

Issues: Group III Written Notice (absence in excess of 3 days without authorization) and Termination; Hearing Date: 07/25/08; Decision Issued: 08/11/08; Agency: DMHMRSAS; AHO: John V. Robinson, Esq.; Case No. 8909; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8909

Hearing Officer Appointment: July 7, 2008

Hearing Date: July 25, 2008

Decision Issued: August 11, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment effective April 15, 2008, pursuant to a Group III Written Notice providing: "Absence in excess of three days without proper authorization or satisfactory reason. Employee has failed to provide documentation for absence from 2-6-2008 through 2-24-2008. Documentation expected prior/during an absence of this length – 18 days and minimally upon first day back at work. Employee's attendance has been addressed previously as unsatisfactory through the standards of conduct with no improvement noted."

The Group III Written Notice was issued on April 15, 2008 by Management of the Department of Mental Health, Mental Retardation and Substance Abuse Services (the "Department" or "Agency"), as described in the Grievance Form A dated April 21, 2008. The Grievant is seeking the relief requested in her Grievance Form A and supplemented during the first pre-hearing conference call specified below, including reinstatement, removal of the Group III Written Notice and restoration of any and all lost wages and benefits.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances.

The agency was represented by an independent advocate. The Grievant represented herself. Following a pre-hearing conference held by telephone on July 11, 2008 at 10:00 a.m., the hearing officer issued a Scheduling Order entered on July 11, 2008, which is incorporated herein by this reference.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely

Agency Exhibits 1 through 5 and Grievant Exhibits consisting of fax page numbers 1-8.¹ At the request of the Grievant, the hearing officer issued one order for witness.

APPEARANCES

Representative for Agency

One Additional Witness from the Human Resources Department of the Agency

Grievant

FINDINGS OF FACT

1. The Grievant was a Direct Support Care Worker, previously employed by the agency at Southside Virginia Training Center (“SVTC” or the “Facility”).
2. The Grievant has an active Group I Written Notice dated and issued December 21, 2007, for unsatisfactory attendance-accumulation of in excess of 64 unscheduled hours without verifiable documentation in justification. AE 4.
3. In this Written Notice, the Program Director of the Agency described with specificity the adverse impact of the Grievant’s unauthorized and unwarranted absences upon the Facility’s operations:

Unsatisfactory attendance performance impacts upon efficient unit operations in that it can affect the planned schedule when last minute adjustments have to be made due to unplanned absences of scheduled staff. A frequent result of absences and lateness is overtime for coworkers which affects staff morale and team work. Clients can be exposed to unfamiliar staff when overtime conditions occur and to staff who are tired due to working a double shift. These conditions are undesirable and can be avoided when staff report to work as scheduled.

AE 4.

4. Grievant was absent from work at SVTC from February 6, 2008 through February 24, 2008 (the “Period”).
5. Grievant did not submit to the Agency by the time of her termination, April 15, 2008, any documentation to justify her absence and Grievant neither had any

¹ References to the Grievant’s exhibits will be designated GE followed by the fax page number. References to the agency’s exhibits will be designated AE followed by the exhibit number.

leave available to cover any period of the absence nor timely requested any leave of absence.

6. Throughout the Period and even afterwards, Grievant failed numerous times after repeated requests and opportunities from Management to justify her absences despite many empty assurances from Grievant. AE 2.
7. The Assistant Human Resources Director for the facility conducted a thorough and fair investigation.
8. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
9. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
10. The testimony of the Agency representative was both credible and consistent on the material issues before the hearing officer. The demeanor of the Agency representative at the hearing was candid and forthright.

APPLICABLE LAW AND OPINION

The General Assembly enacted the *Virginia Personnel Act, Va. Code § 2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.

GROUP III

These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. . .

- Absence in excess of three days without proper authorization or a satisfactory reason. . .

AE 5.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the Grievant's employment was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Some time after her termination, the Grievant did finally supply to the Agency a short, two-sentence Doctor's note (GE 4) which at least attempted to explain in vague and general terms, the Grievant's absence during the Period. Obviously and justifiably, this was too little, too late from the Agency's viewpoint.

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

As the agency argued in this proceeding, the policy requires dismissal. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the Grievant's employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The gravity of the violation in the context of the workforce demands of the Facility and the Grievant's active Group I Written Notice for essentially the same disciplinary infraction preclude a lesser sanction. The hearing officer agrees.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the Grievant from her employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the Grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

- 1. A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
- 2. A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's

authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

- 3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).