

Issue: Group II Written Notice (failure to follow instructions/policy and unsatisfactory attendance); Hearing Date: 06/18/12; Decision Issued: 06/20/12; Agency: ODU; AHO: Ternon Galloway Lee, Esq.; Case No. 9832; Outcome: No Relief – Agency Upheld.

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 9832**

**Hearing Date: June 18, 2012**

**Decision Issued: June 20, 2012**

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### **SUMMARY OF DECISION**

The Agency had found Grievant violated the Standards of Conduct by failing to follow instructions, policy, and attendance problems. It therefore issued Grievant a Group II Written Notice. I found Grievant engaged in the conduct alleged and the Agency's discipline was warranted and appropriate.

### **PROCEDURAL HISTORY**

On February 9, 2012, the Agency issued Grievant a Group II Written Notice for failing to follow instructions, policy, and attendance problems.

On March 9, 2011, Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the Third Resolution Step's outcome and requested a hearing. On May 16, 2011, the Department of Employment Dispute Resolution ("EDR") assigned me as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on May 31, 2012, and subsequently a scheduling order was issued.

I scheduled the hearing for June 18, 2012, the first date available between the parties. The hearing took place as scheduled. During the hearing, I admitted the Hearing Officer's Exhibits 1-5 and the Agency's Exhibits 1 - 4. The grievant submitted no exhibits to be admitted.

At the hearing 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. Also during, the proceeding, the Grievant represented herself and the Agency was represented by its attorney advocate.

### **APPEARANCES**

Attorney Advocate for Agency

Witnesses for the Agency (2 witnesses, including the Agency's Representative)

Grievant

Witnesses for the Grievant (4 witnesses) (Grievant was given the opportunity to

testify, but declined to do so.)

### **ISSUE**

Was the Group II Written Notice warranted and appropriate under the circumstances?

### **BURDEN OF PROOF**

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing all the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

1. The University (“Agency”) has employed Grievant in the housekeeping department of the Agency to provide custodial or cleaning services. Grievant has been employed with the Agency since May 5, 1997. When Grievant reports to work, she does a good job cleaning. (Testimony of Agency Witness B; A Exh. 1, p. 9.)
2. Agency Witness B is a Supervisor C for the Agency. She is Grievant’s Supervisor C. Agency Witness B approves or disapproves leave for Grievant and other subordinates. (Testimony of Agency Witness B).
3. The process for obtaining approval in advance for an anticipated leave of absence from work requires an employee to submit an office form requesting time off from work (“leave slip”) to his/her supervisor or supervisor C. An employee desiring a leave of absence can obtain a leave slip from the Supervisor C, complete it requesting certain time off, and submit it to his/her supervisor/Supervisor C for approval at least several days before the time the employee desires to be absent from work. Depending on the Agency’s need for the services of the employee on the date/time the employee desires to be absent from work, the Supervisor C may or may not grant the leave. Approval for leave requested is documented on the leave slip. (Testimonies of Agency Witnesses A and B; Grievant’s Witness C; A Exh. 1, p. 9, 14).
4. An employee is authorized to take leave only if the leave request is granted. (Testimonies of Agency Witnesses A and B).

5. Employees are expected to report to work as scheduled. (Testimony of Agency Witness B).
6. Agency policy requires employees to call their Supervisor C to report unexpected absences from work. (A Exh. 1, pp. 8-9).
7. Employees are responsible for their own transportation to and from work. However, the Agency provides free bus passes for employees to ride the public transportation bus/system (“HRT”) to and from work. Any employee desiring to take advantage of the free bus pass benefit is responsible for taking the initiative to obtain the pass. (Testimony of Agency Witness B; A Exh. 1, p. 13).
8. Grievant’s normal work shift had been 5:00 a.m. to 1:30 p.m. But due to Grievant being placed on light duty, on or about September 22, 2011, Grievant’s work shift was changed to 8:30 a.m. to 5:00 p.m. to accommodate her being restricted to light duty. (Testimony of Agency Witness B; A Exh. 1, p. 13).
9. On September 29, 2011, Grievant was scheduled for a medical appointment. Grievant was excused from work to attend this appointment. Although Grievant was scheduled to work after the appointment, she did not report to work. She called her employer and stated she did not have a ride to return to work. (Testimony of Agency Witness B).
10. On September 30, 2012, prior to reporting to work, Grievant placed a telephone call to the Supervisor C on duty and informed this supervisor that she would be late for work. No explanation was provided for the reported tardiness. Grievant arrived 30 minutes after her scheduled time to work. The Supervisor C to which Grievant provided the message was not the Supervisor C (Agency Witness B) for Grievant’s work shift. Agency policy requires an employee to inform his/her respective supervisor if he/she will be reporting late to work. (Testimony of Agency Witness B; A Exh. 1).
11. On Saturday, October 1, 2011, Grievant was scheduled to work. Unrelated to Grievant’s employment with the Agency, Grievant had made plans to attend her sister’s birthday celebration on a cruise on October 1, 2011. Funds had been paid for the cruise that were not refundable. (Testimony of Agency Witness B; A Exh. 1, p. 14).
12. About a week before October 1, 2011, Grievant confirmed with the director of housekeeping that she was scheduled to work on October 1, 2011. (Testimony of Agency Witness A).
13. Several days before October 1, 2011, Grievant discussed with her shift’s Supervisor C – Agency Witness B – Grievant being scheduled to work on October 1, 2011. Grievant expressed she had plans for a birthday celebration on that day and

therefore she could not work. The Supervisor C informed Grievant that she was scheduled to work on October 1, 2011. Supervisor C did not grant Grievant permission to be absent from work on October 1, 2011, and instructed Grievant to report to work. Grievant did not submit a leave slip to obtain approval to be absent from work on October 1, 2011. Had she submitted one, it would have been denied. (Testimony of Agency Witness B).

14. Grievant failed to report to work as scheduled on Saturday, October 1, 2011. (Testimony of Agency Witness B).

15. On February 9, 2012, agency management issued Grievant a Group II Written Notice (“Notice”). This notice describes the nature of the offense and evidence as follows:

Unsatisfactory attendance-failure to report to work as scheduled and failure to follow supervisor’s instructions. September 29, 2011 you informed me that you had doctor’s appointment on or about 10:00 a.m. However, you called me after the appointment and informed me that you did not have transportation to return to work. September 30, 2011 you were 30 min. late reporting to work. On Saturday, October 1, 2011. You failed to report to work as scheduled and you did not call in to report your absence.

(A Exh. 1, p. 6).

16. The written notice characterized Grievant’s conduct as (i) attendance/excessive tardiness and (ii) failure to follow instructions and policy. (A Exh. 1, p. 7).

17. Grievant’s daughter has reportedly been diagnosed with diabetes. (A Exh. 1).

18. During the period September 29, 2011, to October 1, 2011, Grievant had not exhausted all her FMLA leave for her daughter and Grievant who was suffering from back problems. (Stipulation by Agency).

19. Grievant has an active Group I Written Notice for unscheduled absences without advance notification or documentation. (A Exh. 2).

20. On March 28, 2010, Grievant was counseled about unsatisfactory attendance. (A Exh. 3).

21. On October 8, 2010, Grievant was counseled about disruptive behavior and failure to follow her supervisor’s instruction on October 6, 2010. (A Exh. 4).

### **DETERMINATIONS 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 his/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 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. GPM § 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. A Group I Written Notice is normally issued for less serious misconduct; a Group II Written Notice is normally issued for more serious misconduct; and a Group III Written Notice is normally issued for the most serious misconduct.

On February 9, 2012, Agency management issued Grievant a Group II Written Notice for the reasons previously set forth above in "Findings of Fact" numbers 14 – 15.

I examine the evidence to determine if the Agency has met its burden.

**I. Analysis of Issue before the Hearing Officer**

**A. Did the employee engage in the behavior described in the Group II Written Notice and did that behavior constitute misconduct?**

The written notice asserts Grievant's offenses include (i) attendance problems and (ii) failure to follow instructions and policy.

The evidence shows that on September 29, 2011, Grievant was scheduled to report to work after her medical appointment. She failed to do so. Instead, she called in reporting that she had no transportation to work. I find the employee bears the responsibility to transport herself to and from work. And further note that the Agency had made available to employees free bus passes that could be used by employees to travel to and from work. I note the evidence shows that Grievant did not take advantage of this employee benefit.

The evidence also demonstrates that on September 30, 2011, Grievant reported to work 30 minutes late. While Grievant did call in to state she would be tardy, the lateness was not authorized. Also, when Grievant called in and reported that she would be late to work, the report was not made to Grievant's Supervisor C.

The next day, October 1, 2011, Grievant's attendance was again a problem. About a week before October 1, 2011, Grievant learned she was scheduled to work on that day from 8:30 a.m. to 5:00 p.m. Grievant then met with her Supervisor C and informed the supervisor that she would not be in to work on Saturday, October 1, 2011, because she had plans to attend a celebration for her sister's birthday. Grievant's supervisor instructed her to report for work. Further, earlier the same day the director of housekeeping had informed Grievant that she was scheduled to work on October 1, 2011. Grievant did not show for work on October 1, 2011. Her absence had not been approved by the leave submission policy.

Considering the above, I find the Grievant violated agency policies by not reporting to work as scheduled on September 29 and 30, 2011, and October 1, 2011; by failing to follow her supervisor's instruction and report to work on October 1, 2011; and by failing to submit a leave request form and obtain approval for leave on October 1, 2011.

I do note that Grievant written statements of record that were presented to management in grieving this matter and the testimony of all Grievant's witnesses have been considered. I had the opportunity to observe the demeanor of all the witnesses. I observed the witnesses of the Agency were forthright and decisive. I find them credible. Also, they had firsthand knowledge of the facts surrounding the alleged offenses and I give great weight to their testimony. To the contrary, Grievant's witnesses did not have firsthand knowledge of the alleged misconduct. Their testimony to cast doubt on the

conduct occurring on the respective dates was therefore not persuasive. Moreover, Grievant's own witness, Grievant Witness C, corroborated the Agency's policy regarding requiring the submission of leave slips to request an absence from work.

Accordingly, I find the Agency has met its burden and shown by a preponderance of the evidence that Grievant engaged in the conduct alleged and the conduct was misconduct.

**B. Was the Agency's Discipline consistent with law and policy?**

The evidence shows that Grievant failed to report to work as scheduled as noted above and that she failed to follow her supervisor's instructions and policy regarding requesting leave. Such under the Standards of Conduct constitutes a Group II offense. Thus, the Agency's discipline was consistent with law and policy.

**II. Mitigation**

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."<sup>1</sup> EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>2</sup> More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

- (i) the employee engaged in the behavior described in the Written Notice,
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and Policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>3</sup>

Thus the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

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<sup>1</sup> Va. Code Section 2.2-3005 (c )(6)

<sup>2</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>3</sup> *Rules for Conducting Grievance Hearing* VI(B)



I have found the Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy. A focus on whether the discipline was reasonable is now undertaken.

Grievant contends that she does not deserve a Group II. She claims retaliation and/or discrimination against her. She also asserted that at times leave slips when requested were not provided and/or to obtain authorized leave, the submission of leave slips was not required. Further, Grievant infers that FMLA leave may apply due to family illness or her back problems. I have considered all the evidence and find the claims of retaliation or discrimination are unsubstantiated. So too was Grievant's claim that leave slips were not provided or required to obtain authorized leave

With respect to the inference that FMLA applies to Grievant's absences/tardiness, the evidence does not corroborate this assertion. First, on September 29, 2011, the evidence shows Grievant did not report to work after her medical appointment because she contended she had no transportation. Second, on September 30, 2011, Grievant reported to work 30 minutes late. While Grievant did telephone a Supervisor C and report that she would be late, she provided no explanation for reporting late to work.<sup>4</sup> Third, on October 1, 2011, Grievant did not report to work because she attended a birthday celebration for her sister on a cruise. The event had been prepaid and the cost was not refundable. Grievant had informed her supervisor she would not report to work on October 1, 2011, due to the planned birthday celebration. As noted earlier, the absence had not been approved.

Considering Grievant's arguments and all the evidence, I am guided by the Rules for Conducting Grievance Hearings. They require a Hearing Officer to give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Under these rules, only if under the record evidence, the Agency's discipline exceeds the limits of reasonableness is a Hearing Officer permitted to mitigate the discipline.<sup>5</sup>

The evidence shows that in issuing the Group II Written Notice, the Agency considered mitigating circumstances. The Agency noted and the evidence shows that the Agency could have terminated Grievant because she already had an active Group I Written Notice of record. Further, that active notice was for unexcused absences. Moreover, the Agency noted that Grievant had been counseled for several work place misconducts in the past. However, the Agency considered that Grievant had been an employee with the Agency for almost 15 years and that when she reported to work she provided good cleaning services. Grievant, therefore, was not terminated.

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<sup>4</sup> I am aware of Grievant's contention to the Agency after the Group Notice was issued and during the grievance process that on September 30, 2011, she was late because she had to tend to her daughter.

<sup>5</sup> *Id.*

I have considered Grievant's arguments and any evidence presented to support them as well as all other evidence. Having done so, I find no reason to disregard the Agency's assessment regarding mitigating the discipline and find the Agency's discipline did not exceed reasonableness. The Agency should be able to rely on its housekeeping employees reporting to work as scheduled so that cleaning services can be adequately provided.

### **DECISION**

Hence, for the reasons noted here, the Agency's discipline is upheld.

### **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 review 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 decisions 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. Request should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12th floor Richmond, VA 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 that the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, VA 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 the 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 final decisions, a party may appeal on the ground 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 Directory before filing a notice of appeal.

ENTERED this 20<sup>th</sup> day of June, 2012.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Representative and Attorney Advocate  
Grievant  
EDR's Hearings Program Director