

Issue: Group III Written Notice with Termination (unsatisfactory performance); Hearing Date: 03/15/13; Decision Issued: 03/20/13; Agency: DOC; AHO: Loren A. Costanzo, Esq.; Case No. 9982; Outcome: No Relief – Agency Upheld.

Commonwealth of Virginia
DEPARTMENT OF CORRECTIONS

DECISION OF HEARING OFFICER
In the matter of: Case No: 9982

Hearing Date: March 15, 2013
Decision Issued: March 20, 2013

PROCEDURAL HISTORY

On March 9, 2012, Grievant was issued a Group III Written Notice for *Written Notice Offense Code 11, "Unsatisfactory Performance"* and terminated. The *Nature of Offense and Evidence* indicated:

Based on [Grievant's] annual evaluation rating of Below Contributor, [Grievant] was given a 90-day period from November 9, 2011 until February 9, 2012 to improve his work performance. In his employee development plan, [Grievant] was instructed to complete training by January 9, 2012 and to arrive to work on-time. [Grievant] failed to follow the instructions given to him by his supervisors and has again received a rating of Below Contributor. NOTE: [Grievant] did complete the training on February 2, 2012 which is before the conclusion of his 90-day review period; however, it is nearly a month later than when he was instructed to complete his training. Per DHRM policy 1.40, [Grievant] is subject to termination based on this poor work performance. Per OP 135.1 and the active discipline issues he has received, his behavior warrants a Group III Written Notice and Termination.

On April 4, 2012 Grievant grieved the issuance of a Group III Written Notice, requested his position be reinstated, and requested that the group offense be permanently removed from his employment record.¹ Matters proceeded through the grievance process and, on October 31, 2012, when matters were not resolved to Grievant's satisfaction, the matter was qualified for a hearing by Agency Head who indicated under "Reasons", "Disciplinary actions are grievable".²

Undersigned was appointed hearing officer effective November 26, 2012 and a pre-hearing telephone conference was held on December 7, 2012 with Grievant's Attorney, Agency Advocate, and Hearing Officer. At the pre-hearing conference Grievant's Attorney indicated she would not be available during December of 2012 for hearing.

The parties agreed to extend the 35 calendar day period for the hearing to be held. There being no objection, and by agreement of the parties, the hearing officer extended such period and, by agreement, the hearing in this cause was set for January 11, 2013.

Upon Hearing Officer arriving at the set time and location for the hearing on January 11, 2013, neither Grievant nor Grievant's Attorney were present. Hearing Officer was informed that Grievant's attorney was sick and not able to attend. At the hearing site a telephone conference was held with staff of Attorney for Grievant in presence of Agency Advocate. There being no objection, the grievance hearing was re-scheduled, on Grievant's motion, to February 12, 2013.

¹ Agency Exhibits Tab 1.

² Agency Exhibits Tab 1.

Prior to the February 12, 2013 hearing date Hearing Officer was informed Grievant's Attorney had been admitted to the hospital and had been transferred from her original hospital to another hospital for treatment. Grievant's Attorney's staff indicated Grievant's Attorney would not be able to be present for the February 12, 2013 hearing due to her medical condition. Grievant's Attorney's staff, Grievant, and Agency Advocate were contacted by telephone as to matters and scheduling. By agreement, there being no objection, the hearing was continued to 3/15/13. Hearing Officer indicated he would attempt to accommodate an earlier hearing date for Grievant, if he so desired. No earlier date was requested.

Grievant (by certified mailing) and Grievant's Attorney's office and Agency Advocate (by e-mail) were given notice of the continuance to March 15, 2013 at 10:00 A.M. at Facility. The parties were further notified that the Hearing Officer anticipated that there would be no further continuances in this cause. Grievant was notified that this matter will have to proceed forward to hearing and the grievance hearing would be held on March 15, 2013 at 10:00 A.M. at Facility.

Neither Grievant nor his attorney appeared for the grievance hearing as scheduled on March 15, 2013 at 10:00 A.M. at Facility. The Hearing was convened after 15 minutes had elapsed past the scheduled start time. The grievance hearing was held without Grievant or his attorney appearing. Exhibits were admitted *en masse* at hearing.

APPEARANCES

Agency Advocate
Agency Party Designee
Warden
(*Grievant did not appear*)

ISSUES

Whether the issuance of a Group III Written Notice with termination was warranted and appropriate under the circumstances?

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. The grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.³ A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.⁴

FINDINGS OF FACT

After reviewing the evidence admitted at hearing and observing the demeanor of the witness, the Hearing Officer makes the following findings of fact:

³ DHRM, Office of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8.

⁴ DHRM, Office of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 9.

01. Grievant was employed at Facility as a Security Officer III, work title: Correctional Officer. Grievant was employed by Agency on 5-25-09.⁵

02. For the November 1, 2010 to October 31, 2011 Employee Work Plan (“EWP”) Grievant received an overall rating of “Below Contributor” with “Below Contributor” ratings in the areas of A1.) Performance Management and L.) Time, Attendance and Leave (TAL).⁶

03. On November 9, 2011 management met with Grievant and issued an employee developmental plan/performance re-evaluation plan setting forth performance measures for the following three months. The plan identified two performance areas for improvement/substandard: A1.) Performance Management and L.) Time, Attendance and Leave (TAL). Employee Developmental Plans provided:

Employee Developmental Plan for A1. Performance Management
[Grievant] needs to complete online classes through Learning Management System (LMS) on Communication Skills: Module I) Frankly Speaking, Module II) The Art of Listening. A certificate of completion needs to be provided to your immediate supervisor by January 09, 2012.

Employee Developmental Plan for L. Time, Attendance and Leave (TAL)
During this three month Employee Development Plan [Grievant] is not to arrive late for work, or miss scheduled days, or go on Leave without Pay, unless some type of prior approval has been given by supervision. If his occurs the behavior is unacceptable and further disciplinary action may result.⁷

04. On December 8, 2011 Grievant arrived at work approximately five minutes late.⁸

05. Grievant failed to complete the two online Communication Skill modules by January 9, 2012, as required in the Employee Development Plan given him and reviewed by him 11/9/11.⁹

06. On February 2, 2012 Grievant’s Re-Evaluation was reviewed with him. Grievant received an overall “Below Contributor” rating on his Re-Evaluation (signed by reviewer and supervisor 2/2/12 with notation employee refused to sign). Grievant received ratings of “Below Contributor” in four areas. The RE-EVALUATION indicated, in pertinent part, as follows:

.... [Grievant] was rated below contributor for the lack of responsibility to complete required training, in which he had two months, and failure to follow supervisors’ instructions in doing so.”

[Grievant] failed to complete the additional training assigned in his developmental plan that was reviewed with him on November 09, 2011. These classes were to be completed by January 09, 2012.”

[Grievant] is disrespectful toward his fellow staff and offenders. He has failed to follow supervisors instructions that were set forth in the Employee Developmental Plan that was given and reviewed with him on November 09, 2011.

⁵ Agency Exhibits Tab 3 and Tab 4.

⁶ Agency Exhibits Tab 2, Tab 3, and Tab 4.

⁷ Agency Exhibits Tab 3 and Tab 4.

⁸ Agency Exhibits Tab 3 and Tab 4.

⁹ Agency Exhibits Tab 3 and Tab 4.

On December 08, 2011, [Grievant] arrived to work approximately five minutes late. The developmental plan that was reviewed with him on November 09, 2011, stated he was not to arrive late for work during the ninety days review period due to the disciplinary action that he had received during the November 2010 – October 31, 2011 evaluation period.¹⁰

07. Grievant received and signed a written memorandum on February 15, 2012 from Agency concerning notice and scheduling of a Due Process Meeting to be held the following day. The memorandum provided an explanation of the evidence and indicated:

The Due Process Meeting is the employee's reasonable opportunity to respond and present evidence. Please bring any witness or documentation that you would like to provide during the Due Process meeting. **As a result of the Due Process meeting, disciplinary action may be recommended, and you may be facing disciplinary action up to, and including, a Group III Written Notice and termination.**¹¹

08. Grievant and management met on February 16, 2012 concerning the possible disciplinary action. Grievant presented his response and evidence to management concerning matters.¹²

09. Grievant has two active Written Notices. One active Group I Written Notice was issued Grievant on September 6, 2011 for *Written Notice Offense Code 01 "Attendance/excessive tardiness"*.¹³ One active Group III Written Notice was issued Grievant on December 8, 2011 for *Written Notice Offense Code 99, "Other"*.¹⁴ The "Nature of Offense and Evidence" of the Group III Written Notice indicated:

Violation of Policy 135.1 Section V.D.2.b. A Group I Written Notice was issued to [Grievant] on September 6, 2011 the dealt with his absence from work on August 13 and 14, 2011. During this meeting [Grievant] expressed to administrative staff how sick he had been on the days in question. While addressing this issue, information was received that [Grievant] had posted pictures on Facebook during the days in question that clearly showed him at the beach. Based on this information, an investigation was conducted and [Grievant] was asked about his whereabouts on the weekend in question and he denied being at the beach. The investigation found that [Grievant] was not truthful to administrative staff and in fact was in Virginia Beach on August 13 and 14th. On September 30, 2011, [Grievant] e-mailed the Chief of Security and confessed that he was not truthful about his whereabouts. During a due process meeting on October 13, 2011, [Grievant] verbally acknowledge that he had not told the truth about being sick in an attempt not to get in trouble. [Grievant] was not truthful about his whereabouts which led to an attempt to falsify leave usage. A Group III Notice is being issued as result of these actions.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This legislation includes provisions for a grievance procedure and balances the need

¹⁰ Agency Exhibits Tab 3.

¹¹ Agency Exhibits Tab 4.

¹² Agency Exhibits Tab 4.

¹³ Agency Exhibits Tab 6.

¹⁴ Agency Exhibits Tab 6.

for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and pursue legitimate grievances.

Code Section 2.2-3000(A.) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

Operating Procedure 135.1 ... Standards of Conduct:

The Virginia Department of Corrections ("DOC"), pursuant to Va. Code § 53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The *Standards of Conduct* (DOC Operating Procedure Number 135.1, Effective Date: April 1, 2011) divide unacceptable behavior into three groups, according to the severity of the behavior. Group I offenses include types of behavior less severe in nature, but which require correction in the interest of maintaining a productive and well-managed work force.

Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.¹⁵

Section IV. of the *Standards of Conduct (Operating Procedure 135.1)* states, in pertinent part:

- E. The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.
- F. Timely and Regular Attendance/Performance
 - 1. Employees should report to work as scheduled.
- H. Satisfactory Work Performance
 - 2. Employees are expected to meet established performance expectations.
- I. Supervising for Better Work Performance
 - 2. Supervisors should be aware of inadequate or unsatisfactory work performance or behavior of employees and attempt to correct the performance or behavior immediately. Depending on the severity of the situation, corrective action may be accomplished through informal or formal means. Formal disciplinary action is accomplished by the issuance of a *Written Notice*.

Section V. of the *Standards of Conduct* states, in pertinent part:

- G. "Active" Life of *Notices*

¹⁵ Agency Exhibits Tab 7, DOC Operating Procedure 135.1.

1. *Group I Written Notices* shall have a two year "active" period from the date the *Notice was issued to the employee.*

3. *Group III Written Notices* shall have a four year "active" period from the date the *Notice was issued the employee.*

Policy Number 1.40 ... Performance Planning and Evaluation

"Below Contributor Rating" is defined to include results or work that fails to meet performance measures. To receive this rating, an employee must have received at least one documented Notice of Improvement Needed/Substandard Performance form within the performance cycle. However, Policy also provides a Written Notice that is issued to an employee for any reason in the current performance cycle may be used in place of the Notice of Improvement Needed/Substandard Performance to support an overall rating of "Below contributor".

Policy Number 1.40 (Performance Planning and Evaluation) provides in pertinent part:

Identifying Substandard Performance

Supervisor should immediately identify poor, substandard, or unacceptable performance.

An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed.¹⁶

Re-evaluation Plan

Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer.¹⁷

If Performance Does Not Improve

If the employee receives a re-evaluation rating of "Below Contributor" the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period.¹⁸

Terminate

If the agency determines that there are no alternatives to demote, reassign, or reduce employees of duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period.¹⁹

Disciplinary Action

The re-evaluation process does not prevent the agency from taking disciplinary action based on the employee's poor performance or other reasons stipulated in Policy 1.60, Standards of Conduct, or issuing additional Improvement Needed/Substandard Performance forms.²⁰

¹⁶ Agency Exhibits Tab 5.

¹⁷ Agency Exhibits Tab 5.

¹⁸ Agency Exhibits Tab 5.

¹⁹ Agency Exhibits Tab 5.

²⁰ Agency Exhibits Tab 5.

Grievant:

In Grievant's written document of 5/9/12 Grievant acknowledges that his evaluation was "Below Contributor" and appears to contend:

- a. He was being judged unfairly based on his personality when he was given "Below Contributor" for being abrasive and confrontational.
- b. He completed the online courses on February 2, 2012 which was within the 90 day period.
- c. When he was written up for being late he was not late. Captain will say an employee is five minutes late even if only 30 seconds late and no two clocks at Facility have the same time.
- d. All incidents he was written up for did not compromise the safety of the public, employees, or offenders and he considers them to be too trivial to warrant termination.²¹

No evidence was presented in support of these contentions.

Performance:

Supervisors are charged with identifying poor, substandard, or unacceptable performance. Grievant received an overall rating of "Below Contributor" for the November 1, 2010 to October 31, 2011 Employee Work Plan review period. Grievant had received one Written Notice during the 11/1/10 to 10/31/11 performance cycle (i.e. a Group I Written Notice issued on 9/6/11).

Management expressed concern that Grievant was abusing leave policy and he needed to work on improving his attendance, including not being late for work. Management felt Grievant needed to work on communication skills, refrain from arguing with supervisors, and needed to work on communicating in a manner that would not be considered abrasive or offensive.

On November 9, 2011 Agency reviewed matters with Grievant as to his "Below Contributor" overall rating for the November 1, 2010 to October 31, 2011 employee work plan review year. Agency addressed Employee Developmental Plans for the areas in which he received "Below Contributor" ratings. The areas of "Performance Management" and "Time, Attendance and Leave" were identified and an improvement plan was developed for each of these areas. The plan set forth performance measures for a three (3) month period. Grievant was required to complete two online modules by January 9, 2012 and was required not to be late to work, miss scheduled days, and not to go on Leave without Pay unless prior approval was given. Grievant signed documentation setting forth in writing these requirements.

On February 2, 2012 a three month Re-Evaluation was conducted. Grievant received an overall rating earned of "Below Contributor" in the Re-Evaluation. Grievant did not complete the two online training modules by January 9, 2012 as instructed and was late to work on December 8, 2011. Due to these matters disciplinary action was taken under consideration.

The evidence indicates that Grievant knew or should have known that the two required online modules had to be completed by January 9, 2012 and that he was not to miss work or be late to work without prior approval. He was informed that he would be compensated for any time spent completing the online modules and was informed he could come in early or stay on after his shift to ensure the modules were completed.

²¹ Agency Exhibits Tab 1.

Management believed the two online modules (Module I ***Frankly Speaking*** and Module II ***The Art of Listening***) would assist in correcting Grievant's performance at work, assist Grievant to be able to engage in constructive dialogue, and help to eliminate Grievant being argumentative and displaying an outwardly negative behavior at work. Management believed Grievant needed to arrive at work in a timely manner and thus avoid having a negative impact on fellow workers and the work schedule.

For a valid business reason management instructed Grievant to complete two online modules. Grievant was given approximately a 60 day period to do so. This afforded him a reasonable time period for completion. He was told he would be compensated for his time doing the modules. Grievant chose to not complete the modules within the time he was instructed to do so. Additionally, for a valid business reasons management required him to arrive for work on time. The evidence indicates he was not at work on time on 12/8/11.

Policy No. 1.40 does not prevent management from also taking disciplinary action based upon the employee's poor performance or other reason set forth in the *Standards of Conduct*. The evidence indicates that Grievant is subject to termination based on unsatisfactory/poor work performance which was related to his not following instructions.

As more fully discussed above, Agency decided to issue a Group III Written Notice with termination for Unsatisfactory Performance. The *Nature of Offense and Evidence* set forth on the Written Notice indicated a number of matters related to Grievant's unsatisfactory work performance. These matters described Grievant initially receiving an overall rating of "Below Contributor", Agency establishing a performance re-evaluation plan with performance measures, a re-evaluation rating of "Below Contributor", and Grievant's failure to following instructions. Noting these matters and noting the prior active Group III and Group I Written Notices the Agency made the determination to issue the Group III Written Notice with termination.

Due Process:

On February 15, 2012 Grievant received and signed a written memorandum notifying him of a due process meeting scheduled for February 16, 2012. The memorandum provided notification of the offense and that disciplinary action and/or termination was being considered. It provided an explanation of the agency's evidence in support of the charge.

The memorandum was clear and provided a descriptive explanation of the offense in a manner that allowed Grievant to understand the facts presented and afforded Grievant reasonable opportunity to present mitigating factors or denial of the charges.

A due process meeting was held on February 16, 2012 with Grievant and management. Grievant indicated he had completed the required online modules/training programs at home. However, pursuant to the certification he produced, the modules/training programs were completed February 2, 2012 and not by the January 9, 2012 date required.

The evidence indicates that prior to disciplinary actions Grievant was given notification of an offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Mitigation:

Under the *Rules for Conducting Grievance Hearings*, Section VI, B, 1, a hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.

Operating Procedure 135.1 provides that the Normal Disciplinary Action for a first offense of a Group III is issuance of a Written Notice and removal or *Notice* and up to 30 workdays maximum suspension without pay in lieu of removal. Agency took into consideration mitigating and aggravating circumstances. Consideration was given to Grievant's disciplinary record including his having an active Group III. The evidence indicates that Grievant had received the following:

One Group III Written Notice for unsatisfactory work issued on 12/08/11.

One Group I Written Notice for attendance issued on 09/06/11.

A Substandard Form for Attendance issued on 05/16/11.

A Substandard Form for Attendance issued on 10/01/10.²²

The Agency's discipline is not found to exceed the limits of reasonableness.

CONCLUSION

Based upon the evidence presented at hearing and for the reasons presented above, the Agency has proven by a preponderance of the evidence that (i) Grievant 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. Furthermore, the disciplinary action of issuing a Group III Written Notice and termination was warranted and appropriate under the circumstances.

DECISION

For the reasons stated above, the Agency's issuance to Grievant of a Group III Written Notice with termination is **UPHELD**.

APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* 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.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date

²² Agency Exhibits Tab 4 page 3.

of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the DHRM Director. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

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.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

Copies: Agency Representative
Grievant
Grievant's Attorney
Agency
EDR