Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 03/06/14; Decision Issued: 04/22/14; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No.10299; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10299

Hearing Officer Appointment: February 27, 2014
Hearing Date: March 26, 2014
Decision Issued: April 22, 2014

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I Written Notice issued by Management of the Department of Behavioral Health and Developmental Services as described in the Grievance Form A dated December 6, 2013. The Grievant is seeking the relief requested in her Grievance Form A, namely removal of the Written Notice, if she prevails.

The hearing officer issued a Scheduling Order entered on March 13, 2014 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant was represented by her advocate and the Agency was represented by its advocate. 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 hearinf officer also received various documentary exhibits of the Agency into evidence at the hearing .

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

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

References to the Agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits are to the page numbers of the facsimile transmission.

APPEARANCES

Representative for Agency
Grievant
Witnesses for Agency

FINDINGS OF FACT

1. The Grievant is employed by the Agency as a Security Officer in the Forensic Security Department at a secure facility (the "Facility").

2. The Forensic Security Department has three major components. First Forensic Security provides for maintaining the integrity of the perimeters of the secure forensic programs and for monitoring the ingress and egress of all staff, patients, visitors and materials. Secondly, Forensic Security coordinates movement outside of the secure perimeters to receive medically necessary services. Finally, Forensic Security works collaboratively with all clinical and administrative staff to ensure the safety of staff, patients and visitors through remote electronic surveillance of staff on the most acute wards, by providing education and training on safety and security and assisting clinical staff in critical events. AE 6 at 1.

3. The Grievant maintains security, custody, and control over a patient population ranging from ages 18-64 at the Forensic Unit. The Grievant is responsible for maintaining controlled access both inside and outside in the Forensic Unit. AE 6 at L

4. Accordingly, staffing and timely attendance by staff are criticaL

5. The Grievant had an unscheduled absence from work on each of December 15, 2012, January 14, 2013, March 21, 2013, April 11, 2013, March 11, 2013, July 1, 2013, August 16, 2013, September 14, 2013, October 11, 2013, October 20, 2013, and November 6, 2013. AE 2.

6. Accordingly, the Grievant's shift supervisors on each applicable above date issued the Grievant an occurrence. AE 2; Digital Tape.

7. The Grievant signed for Occurrence Reports provided by her supervisor on each of January 11, 2013, (5 occurrences), February 1, 2013 (7 occurrences), April 15, 2013, (6 occurrences), September 3, 2013, (8 occurrences), and October 10, 2013 (8 occurrences). AE 3 at 4.

8. On November 26,2013, the Grievant signed the due process memorandum provided to her by her supervisor. This informed the Grievant of management's intent to issue the Grievant a correction action in the form of a Group 1 Written Notice for the Grievant's accumulation of 11 occurrences within less than a 12 month period and offered the Grievant an opportunity to respond to her supervisor by November 28,2013. AE 3 at 4.

9. The Grievant timely submitted a written response to her supervisor with supporting medical documentation from her physicians.

10. On December 6, 2013, the supervisor issued the Grievant a Group 1 Written Notice for unsatisfactory attendance. AE 1.

11. The testimony of the Agency witnesses was credible. The demeanor of the Agency witnesses was open, frank and forthright.

ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

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 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 "SOC"). AE 7. The SOC provide a set of rules governing the professional and personal conduct

and acceptable standards for work performance of employees. The SOC 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.

Pursuant to DHRM Policy No. 1.60 and Agency policy, the Grievant's conduct could clearly constitute a Group I offense, as asserted by the Agency. Unsatisfactory attendance is specifically included as an example of a Group 1 Offense in the SOC and in Joint Instruction 8-1, Employee Attendance Policy. AE 7.

The purpose of the employee attendance policy is specified:

> Employees are expected to report for work as scheduled. This policy addresses unplanned or unscheduled absences and patterns of absences. Pre-approved and planned absences for doctor's appointments, medical treatment/recovery periods, court appearances, etc. are not the subject of this policy. These situations do not usually present scheduling problems or inconvenience to other staff. Call-ins, unanticipated absences, and patterns of absences are problematic for supervisors and co-workers; and therefore, are the subject of this policy. Due to public health issues, we encourage staff not to come to work with ill.

An occurrence is defined as follows:

> Occurrence: An unscheduled absence from work that does not meet the criteria defining a scheduled absence, or being more than 60 minutes late in reporting for work; or calling-in to request time off without having requested the leave before the end of the last workday preceding the day of absence. The most common example: when you wake up in the morning and feel sick, and call in that you will not be coming in that day is an occurrence.

The attendance policy defines Unsatisfactory Attendance as follows:

> Unsatisfactory Attendance: When a person exceeds 8 occurrences within a 12-month consecutive period, or when a person has established a pattern of absences.
>
> 8 satisfactory 9 or more unsatisfactory

The policy provides:

> Documentation from a Health Care Provider. Documentation from a health care provider does not negate the occurrence. Documentation is only used to show that the employee is fit for

duty or to support a non-occurrence. Exceptions are listed under Section IV, B, Nonoccurrence.

Monitoring and Counseling:

1. Employees are responsible for knowing how many occurrences they have accrued. Employees may request a summary of their occurrences from their supervisor or timekeeper.
2. Supervisors are responsible for knowing how many occurrences have been accrued and for reviewing employees' leave record for call-in patterns and partial workdays. Supervisors must meet with any employee who has accumulated six (6) occurrences. The meeting may be a verbal or written counseling; however, the employee must receive a copy of their own **Occurrence Report.** The supervisor should keep a copy for the supervisory file. If a discrepancy is discovered, the supervisor may initiate a **Leave and Occurrence Correction Form** to correct an occurrence that was erroneously charged.

Disciplinary Action. Once an employee exceeds 8 occurrences within any 12-month consecutive period, a disciplinary action in the form of a Group **1** Written Notice for *Unsatisfactory Attendance* is normally issued. The supervisor should contact the Human Resource Department and bring all leave slips, call-in books, occurrence reports, physician/health care provider documentation (if maintained in supervisory file) and any evidence of mitigating circumstances to be considered. **Only the Regional Director of Human Resource and/or designee can make a determination of mitigation.** Before disciplinary action is taken, the supervisor will meet with the employee to begin due process. At that time, the employee may present documentation for any mitigating circumstances they feel should be considered prior to the issuance of disciplinary action.

AE7.

In this instance, the Agency appropriately determined that the Grievant's violations of its attendance policy constituted a Group I Offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the Group I Written Notice by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group I offense.

In this case, the Grievant was clearly given by the Agency both pre-discipline and post-discipline constitutional and policy due process rights. The Grievant responded to the proposed discipline. However, the medical documentation provided by the Grievant did not excuse the occurrence because the Grievant had not filed for authorization under the Family Medical Leave Act ("FMLA"), as the Department had recommended. Subsequent to the infractions, the Grievant has received FMLA authorization from the Agency. *See,* Section IV(B) of the Employee Attendance Policy; and GE at **1-11.**

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or ... an employee's long service, or otherwise satisfactory work performance." 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. *Rules §* VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The Grievant specifically raised mitigation in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein and all of those listed below in his analysis:

1. the Grievant's good service to the Agency;

2. the often difficult and stressful circumstances of the Grievant's work environment;

3. the fact that the Grievant received an overall rating of "Contributor" in the 2013 evaluation cycle; (AE 6 at 8)

4. the fact that the Grievant received an overall rating of "Contributor" in the 2012 evaluation cycle; (AE 6 at 24)

5. the Grievant's medical issues; and

6. the Grievant's honesty and forthrightness at the hearing.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. */d*

Here the attendance policy is important to the proper functioning of the Agency and the Agency issued to the Grievant significant prior discipline concerning attendance infractions, including a Notice of Improvement Needed/Substandard Performance in January 2012 and a Group 1 Written Notice in August 2011. AE 5 at 1 and AE 6 at 25. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

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, eiff" Rules for Conducting Grievance Hearings,§* VI; *DeJarnette v. Corning,* 133 F.3d 293,299 (4 Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, 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. */d.*

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

The hearing officer decides for each offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice 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 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 two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. 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 refer 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 ore-mailed.

2. A challenge that the hearing decision does not comply with grievance procedure as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR'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 Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed ore-mailed to EDR.

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.

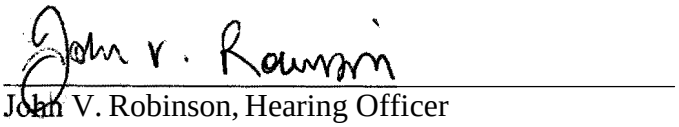
A hearing officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

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 EDR before filing a notice of appeal.

ENTER: 4/22/14



John V. Robinson, Hearing Officer

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