

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case No. 10594

Hearing Date: June 15, 2015
Decision Issued: June 17, 2015

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective April 15, 2015, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on Wednesday, April 15, 2015 at 1:00 p.m. The telephone pre-hearing conference was conducted with the Grievant and Agency representative. At that time, the grievance hearing was scheduled to be conducted on Monday, May 4, 2015 beginning at 9:30 a.m.

The Hearing Officer, the Agency representative and the witnesses for the Agency appeared for the hearing on May 4, 2015. However, the Grievant did not appear but contacted the Agency prior to 9:30 a.m. on May 4, 2015 and advised that she had been hospitalized and was released Sunday night and was not well enough to attend the hearing on Monday morning. As a result, the hearing was rescheduled for Monday, June 15, 2015 beginning at 9:30 a.m.

APPEARANCES

Grievant
Representative for Agency
Three witnesses for the Agency

ISSUES

1. Was the Grievant excessively tardy when reporting for work? If so, was the Grievant's behavior a violation of the Agency Standards of Conduct?
2. If so, did the Grievant's conduct constitute a Group III offense?
3. If Grievant's conduct was a Group III offense, was termination from employment an appropriate discipline?
4. Were mitigating factors considered? If not, why were mitigating factors not considered?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in a single file with the following contents:

- Exhibit A - Grievance Form A-Dismissal Grievance
- Exhibit B - Performance Counseling memo dated June 10, 2014
- Exhibit C - Performance Counseling memo dated January 12, 2015
- Exhibit D - Due Process Notification memorandum dated February 2, 2015
- Exhibit E - Group I Written Notice issued February 3, 2015
- Exhibit F - Due Process Notification memorandum dated February 12, 2015
- Exhibit G - Group II Written Notice issued February 13, 2015
- Exhibit H - Administrative Notification dated March 25, 2015
- Exhibit I - Group III Written Notice issued March 26, 2015

The Grievant did not offer any exhibits.

FINDINGS OF FACT

The Grievant filed a timely appeal from a Group III Written Notice issued on March 26, 2015. The Written Notice describes the offense as attendance, excessive tardiness in violation Group III Code 01.

The disciplinary action taken was the issuance of the Group III Written Notice with termination effective March 26, 2015.

All three of the Agency witnesses, namely, [Team Leader], [Supervisor 1] and [Supervisor 2] all testified that the Grievant had been a good employee for ten years but in early

2014 her attendance became unacceptable. The performance counseling memo dated June 10, 2014 (Exhibit B) written by [Supervisor 1] (formerly [**]) points out that the Grievant came to work for [**] on April 10, 2014 and was then tardy to work on April 11th and 30th, May 8th, 9th and 19th. The memo states that [Supervisor 1] discussed the problem with the Grievant on May 19th but points out that the Grievant was then late on May 29th and 30th and again on June 2nd. The performance counseling memo stressed the importance of being on time and that the Grievant was expected to adhere to Policy 1317-Standards of Conduct.

The performance counseling memo dated January 12, 2015 by [Supervisor 1] (Exhibit C) points out that despite the earlier memo and counseling, the Grievant was tardy to work on August 5th, August 6th, November 6th, December 9th, December 16th, December 17th and December 18th of 2014, as well as on January 6th, 2015 when the Grievant did not call in and did not show up for work (although the Grievant informed her team leader but not her supervisor). The memo again warned the Grievant of the possible consequences if she did not improve her attendance at work.

By Due Process Notification dated February 2, 2015 (Exhibit D) [Supervisor 1] advised the Grievant that [Supervisor 1] intended on issuing a Group I Written Notice because despite the two earlier memos and counseling, Grievant was tardy for work on January 14th, 27th and 29th and February 2nd, 2015. The memorandum stated that before finalizing the decision, [Supervisor 1] would consider any information the Grievant would like to share and set up a meeting for February 3, 2015. [Supervisor 1] testified that the Grievant chose not to meet with [Supervisor 1] at that time. As a result, [Supervisor 1] issued the Group I Written Notice which cited a “pattern of unimproved absences (Exhibit E).” The Group I Written Notice did not impose any disciplinary action beyond issuance of the written notice.

[Supervisor 2] testified that she issued the Due Process Notification dated February 12, 2015 (Exhibit F) due to the Grievant’s continued pattern of unimproved absences. The Notification pointed out that on February 4, 2015 (the day after the Grievant was issued the Group I Written Notice) the Grievant took her lunch break late without discussing the matter with her supervisor and then did not return from lunch on time. The Due Process Notification also stated that on February 5, 2015 that [Supervisor 2] came to talk to the Grievant but found her in her closet with the door shut instead of working and that on February 11, 2015 the Grievant was three hours late to work.

[Supervisor 2] testified that after issuing the Group II Written Notice on February 13, 2015 (Exhibit G) [Supervisor 2] continued to discuss the problem with the Grievant and offered to change the Grievant’s shift. The Grievant declined changing shifts. Again, no disciplinary action was imposed other than the issuing of the Group II Written Notice.

[Supervisor 2] further testified that she issued the Administrative Notification dated March 25, 2015 (Exhibit H) to inform the Grievant of her intent to issue a Group III Written

Notice for an offense under Agency Policy 1317, Standards of Conduct due to the Grievant's continued attendance and tardiness issues. The Notification pointed out that on March 20, 2015 the Grievant was to report to work at 6:00 a.m. but did not arrive at 6:00 a.m. and did not contact her supervisor, [Supervisor 2], until 9:00 a.m. and that the Grievant didn't actually arrive at work until 10:00 a.m. The Notification advised that this was the third Group Notice in the 2015 calendar year, all relating to attendance, tardiness and/or abuse of state time.

The final Agency Exhibit, the Group III Written Notice (Exhibit I) summarized the history of the written notices issued to the Grievant and terminated her employment effective March 26, 2015.

The Grievant testified that she had been a good employee for ten years prior to personal problems causing her record of bad attendance during 2014 and 2015. She testified that the problems in her personal life resolved themselves shortly after her termination from employment. She testified that she hoped that the fact that she was on time on all of the days except those days outlined in the evidence (which she does not dispute), combined with her ten year good work record would mitigate in her favor to avoid termination of employment.

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 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).

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.

Standards of Conduct, Policy: 1.60 applies to oppositions covered by the Virginia Personnel Act, including non-probationary full-time and part-time classified and restricted employees. Agency's may use this policy as a guide for evaluating the workplace conduct of employees who are not covered by the Virginia Personnel Act, such as wage employees,

probationary employees and employees expressly excluded from the Act's coverage. The Standards of Conduct state as follows:

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include:

- failure to obtain license or certification required for the job;

Agency Exhibit I which includes reference to Agency Policy 1317 Standards of Conduct and Performance for Classified Employees sets out that among the listed Group I offenses is "unsatisfactory attendance or excessive tardiness." Policy 1317 goes on to state that a Group II offense "includes any act of misconduct of a ... repeat nature". Policy 1317 also sets out that "Sanctions will be commensurate with the severity and/or frequency of the offense and may include termination of employment."

DECISION

The disciplinary action of the Agency is upheld.

The Agency proved by a preponderance of the evidence that the Grievant was guilty of the Group III offense as alleged, namely, failing to report to work on time on numerous occasions from April 11, 2014 until March 20, 2015. The Grievant's tardiness continued despite the Performance Counseling Memo issued June 10, 2014, the Performance Counseling Memo issued January 12, 2015, the Group I Written Notice issued February 3, 2015 and the Group II Written Notice issued February 13, 2015.

It is not disputed by the Grievant that her supervisors liked her and attempted to help her avoid losing her job. It is undisputed that her ten years of otherwise satisfactory performance as an employee of the Agency were considered when first giving her two warnings before the Group I Written Notice was issued. Her prior good work record and her personal problems she said she was experiencing also mitigated in her favor when no disciplinary action was taken with either the issuance of the Group I Written Notice or the issuance of the Group II Written Notice.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A 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 administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. "Received by" means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

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 with which the hearing decision is not in compliance. 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 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.
2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, 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 hearing 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 must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both

administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of 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: 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. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

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. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer