

Issue: Group III Written Notice with Termination (absent in excess of 3 days without authorization); Hearing Date: 10/21/13; Decision Issued: 11/09/13; Agency: VCCS; AHO: Ternon Galloway Lee, Esq.; Case No. 10181; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10181

Hearing Date: October 21, 2013

Decision Issued: November 9, 2013

SUMMARY OF DECISION

The Agency had found Grievant was absent without authorization for five work days. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found Grievant engaged in the conduct alleged, that it was misconduct, and that the Agency's discipline was consistent with law and policy. Thus, the Hearing Officer upheld the discipline.

HISTORY

On July 16, 2013, the Agency issued Grievant a Group III Written Notice with termination for being absent five (5) days without authorization. On or about August 15, 2013, Grievant timely filed his grievance to challenge the Agency's action. On September 17, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on October 4, 2013,¹ and a scheduling order was issued the same date setting the hearing for October 21, 2013.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. At this time, the relevancy of Grievant's exhibits was discussed; however, there was no objection to the admission of them. Hence, the Hearing Officer admitted Grievant's Exhibit 1², as well as Agency Exhibits 1 through 5; Joint Exhibit 1, and the Hearing Officer's Exhibit, to which there were no objections. The parties were granted leave during the hearing to submit additional exhibits by October 28, 2013. Accordingly, the Hearing Officer received subsequent to the hearing and admitted Grievant's Exhibit 2, consisting of 83 pages, and Joint Exhibits 2 through 6.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant represented himself.

APPEARANCES

Advocate for Agency

¹ This was the first date that the parties were available.

² It contains 28 pages.

Witnesses for the Agency (3 witnesses)
Grievant
Witnesses for Grievant (5, including Grievant)

ISSUE

Was the written notice warranted and appropriate under the circumstances?

BURDEN OF PROOF

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(2). 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 who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. Grievant had worked for the Agency since on or about May 2011. Grievant was the lead worker or supervisor of the evening custodial staff in buildings he had been assigned by management to have cleaned. Grievant’s boss (Grievant’s Supervisor) was the overseer of the entire custodial staff at the Agency. During Grievant’s second year of employment with the Agency, management became aware that Grievant was frequently absent from work or reported late for work. By April, 2013, Grievant frequent absences resulted in his being in a leave without pay status when he was absent from work. Thus, the Agency’s payroll department docked some of Grievant’s paychecks because he had been absent without leave. (Testimonies of Grievant’s Supervisor, Recruitment Manager, Custodial Services Manager, and Grievant; A Exh. 3).
2. Grievant’s 8 hour evening work shift began at 6:00 p.m. and he was expected to be present at the beginning of the shift to inform his subordinates of the work expected of them during the shift. Frequently, Grievant did not report to work at 6:00 p.m. and therefore could not give instructions to his staff. Thus, Grievant could not be counted on to report to work as scheduled and be able to direct his subordinates. (A Exh. 2, p. 4; Testimonies of Grievant’s Supervisor and Custodial Services Manager).
3. Some of Grievant’s subordinates lodged complaints about, among other matters, his not reporting to work on time to direct them. (Testimony of Grievant’s Supervisor and Custodial Service Manager).
4. Grievant reported to work at 7:05 p.m. on May 28, 2013. On May 29, 2013, Grievant did not report to work as scheduled. On May 30, 2013, Grievant reported to work at 6:19 p.m., instead of 6:00 p.m. (A Exh. 4).

5. On June 27, 2013, Grievant failed to report to work. Neither did he call in. (A Exh. 2, p. 8; A Exh. 5, p. 3).

6. Grievant failed to report to work as scheduled on July 2, 3, 5, 8, and 9, 2013. And he was not authorized to be absent from work during those days. Grievant did not have any contact with his supervisor until July 10, 2013 when his supervisor called Grievant. Grievant initialed time sheets indicating he did not report to work on the above-referenced five days. (A Exh. 2, pp. 2, 12; Testimony of Recruitment Manager; Testimony of Grievant). Grievant alleged he was sick during the five day absence. Although management requested Grievant provide documentation to substantiate his claim, none was provided. Grievant did however provide a note indicating he was seen at Sentara Emergency Department on July 14, 2013. (A Exh. 1, pp. 3, 6; A Exh. 2, pp. 15-16; Testimony of Recruitment Manager).

7. Grievant was issued a Group III Written Notice and terminated for being absent without authorization for the above-referenced five days. The Group III Written Notice describes the offense as follows:

[Grievant] was absent without authorization for five days and failed to report to work without giving notice to his supervisor. [Grievant] states that he contacted his supervisor on Tuesday, July 2, 2013 to inform him that he was sick and will not be coming to work. [Grievant] does not report to work beginning July 2, 2013 - July 9, 2013. [Grievant] did not have any contact with his supervisor until July 10, 2013 when his supervisor calls him. Upon request for documentation to support his being out of work sick. [Grievant] provides a work note dated July 14, 2013, however the note does not cover the dates that he failed to contact his supervisor and report/give notice of his absence. In addition, [Grievant] has been absent on numerous prior occasions and in a leave without pay status for the last five pay periods.

(A Exh. 1, p. 3).

8. The Commonwealth of Virginia 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. Under the Standards of Conduct, Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence. Absent for three or more days without authorization is noted as a Group III offense. See Standards of Conduct Policy 1.60.

9. Prior to July 2, 2013, Grievant had received counseling for his unsatisfactory attendance and at least one written memorandum. Grievant was also warned in a memorandum dated June 11, 2013, that any further absences may result in a written notice. (A Exh. 4; Testimonies of Custodial Services Manager and Grievant's Supervisor).

10. During Grievant's first year of work with the Agency and while he was on probation

status, complaints were made that Grievant was disrespectful to his staff. For example, Grievant would make fun of some custodians who barely spoke the English language. Grievant was required to attend sensitivity and cultural diversity training. Further, Grievant had difficulty getting along with some staff including security personnel. As a result of Grievant's difficulties on the job, his probationary period was extended. In lieu of this extension, the Agency could have terminated Grievant. (Testimony of Custodial Services Manager; Testimony of Grievant).

11. During Grievant's employment with the Agency, the Agency had employed one other lead custodial supervisor who worked the evening shift. Grievant contends that the other lead supervisor was at one time assigned less work to perform than Grievant. However, the evidence does not support Grievant's allegation. To address this complaint, management reassigned the buildings to be cleaned by each lead night shift supervisor's staff. (Testimonies of Grievant's Supervisor and Custodial services Manager).

12. Custodian I worked the day shift, and was not aware if Grievant reported to work as scheduled. She perceived that Grievant attempted to resolve work related problems she brought to Grievant's attention. (Testimony of Custodian I).

13. Custodian II was a subordinate of Grievant who worked the night shift. She found Grievant fair and non-hostile. Custodian II perceived some custodians supervised by Grievant did not like Grievant because he wanted them to do their job. (Testimony of Custodian II).

14. Custodian III was a subordinate of Grievant and he worked the night shift. He did not have any problems working with Grievant. Sometimes when Grievant clocked in to work he saw Grievant. Other times he did not. (Testimony of Custodian III).

15. Custodian IV was a subordinate of Grievant and he worked the night shift. In an email, Custodian IV indicated that Grievant and the other night supervisor caused stress and "drama" on the job due to the two of them constantly arguing with each other. (Testimony of Grievant; Joint Exh. 1).

16. Custodian IV was an unavailable witness. Grievant stated that this witness could testify that Grievant's superiors treated Grievant unfairly and would not support Grievant. (Testimony of Grievant).

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.³

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.

Under the Standards of Conduct, Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence. When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so. Group III offenses are the most severe and normally warrant termination. *See* Standards of Conduct Policy 1.60(B)(2)(c).

On July 16, 2013, management issued Grievant a Group III Written Notice with termination for the reason previously noted here. Accordingly, the Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

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

The Agency contends that Grievant was absent without authority for five days in violation of the Standards of Conduct.

Absence in excess of three workdays without authorization is a Group III offense under the Standards of Conduct. *See* Standards of Conduct Policy 1.60 Attachment A. The evidence

³ GPM §5.8

shows and Grievant acknowledges that he did not report to work as scheduled on July 2, 3, 5, 8, and 9, 2013. Further, the evidence demonstrates Grievant was not authorized to be on leave during that time period. Although some evidence suggests Grievant did contact his supervisor by telephone on July 2, 2013, and reported he was sick and would not be in to work, nothing shows the Supervisor approved any leave for Grievant on July 2, 2013. Moreover, even if one could somehow consider Grievant's lone telephone contact with his supervisor on July 2, 2013, as an approval to be absent from work on July 2, 2013, no evidence supports authorization of leave on July 3, 5, 8, and 9, 2013. Thus, the Hearing Officer finds Grievant engaged in the alleged conduct. She further finds the behavior was misconduct as the Standards of Conduct demonstrate that absence without authorization for at least three days is a serious act of misconduct.

B. Was the discipline consistent with policy and law?

As previously mentioned, Standards of Conduct governing state employees reveals that Group III Offenses include acts and behavior of such a serious nature that a first occurrence normally warrants removal.

Grievant's unauthorized absences were grave. Grievant supervised others and was supposed to report timely at the beginning of the shift to provide instructions to his staff on tasks to be performed by them during the shift. During his unauthorized absences, he was unable to do so. This resulted in disruption in the workplace as no evidence has been presented that a supervisor reported in his place to perform Grievant's duties. Further, the evidence does show that at some point before Grievant's termination some of Grievant's subordinates had complained to management about Grievant's failure to be present at the beginning of the shift to direct them. Moreover, the evidence demonstrates that Grievant's history of attendance problems had caused Grievant's supervisor to lose confidence in Grievant's ability to report to work. What is more, as a supervisor and leader of his night shift, Grievant's delinquent behavior could very likely be modeled by his subordinates. Such would cause even more interruption in the work to be performed by the custodial staff Grievant supervised. Moreover, as noted above, the Standards of Conduct governing state employees identifies absences of three or more days without authorization as a Group III offense. Considering the above, the Hearing Officer finds the Agency's issuance of a Group III Written Notice with termination was consistent with policy and law.

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 the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁴ 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.”⁵ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing

⁴ Va. Code § 2.2-3005 and (c)(6)

⁵ *Rules for Conducting Grievance Hearings* VI(A)

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.⁶

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.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice, the behavior was misconduct, and the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has carefully deliberated and considered all evidence. This includes, but is not limited to, several assertions of Grievant. Of note, Grievant contends that the Agency was harassing him and just looking for a reason to terminate his employment. The Hearing Officer finds this claim unsubstantiated. Further, it is noted (contrary to Grievant's assertion) that in lieu of firing Grievant during his probationary period when Grievant's work was unsatisfactory, the Agency gave Grievant a second chance and extended his period of probation. Also, the Hearing Officer has considered Grievant's assertions that the other night supervisor was given less work to perform and that some subordinates had attendance problems that had not resulted in their terminations. Here too, the Hearing Officer finds the claims unsubstantiated. Moreover, in her deliberations the Hearing Officer has considered evidence that some of Grievant's subordinates had no problems with Grievant and found him fair.

The Hearing Officer does note several aggravating factors: Grievant held a supervisory role and had a history of missing work, reporting late, or leaving the work site without authorization and then returning. Further, the Agency attempted to work with Grievant even providing him an opportunity to submit a medical note supporting his claim of being out sick during the five days.

Having undergone a thorough consideration of all the evidence, the Hearing Officer cannot find the Agency acted without reason.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

⁶ *Rules for Conducting Grievance Hearings VI(B)*

APPEAL RIGHTS

You may file an **administrative review** request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Departmental of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov. or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15 calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁷

Entered this 9th day of November, 2013.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant
Director of EDR

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.