

Issues: Group II Written Notice (failure to report without notice) and Termination (due to accumulation); Hearing Date: 08/21/12; Decision Issued: 08/23/12; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9867; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9867

Hearing Date: August 21, 2012
Decision Issued: August 23, 2012

PROCEDURAL HISTORY

Grievant was a direct service associate (“DSA”) in the nursing department for the Department of Behavioral Health and Development Services (“the Agency”), with several years of service with the Agency as of the offense date. On June 8, 2012, the Grievant was charged with a Group II Written Notice for failure to report to work without proper notice, with an offense date of May 23, 2012. The discipline was job termination, based on this and a prior, active Group II Written Notice and a Group I Written Notice.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On July 24, 2012, the Office of Employment Dispute Resolution, Department of Human Resource Management (“EDR”) appointed the Hearing Officer. Following multiple attempts to reach the Grievant for a pre-hearing conference, the grievance hearing ultimately was scheduled for August 21, 2012, on which date the grievance hearing was held, at the Agency’s facility.

The Grievant did not appear for the grievance hearing. The Agency submitted documents for exhibits that were accepted into the grievance record, without objection by the Grievant, and they will be referred to as Agency’s Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Representative for Agency
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Through her grievance filings, the Grievant requested rescission of the Group II Written Notice, reinstatement, and back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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 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.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II Offenses to include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. Failure to report to work without proper notice is an example of a Group II offense. Agency Exh. 5.

The Agency's policy Q-2, Call-Ins, states the policy and procedure for nursing personnel to follow when unable to report on duty as scheduled. The policy requires as much advance notice to supervision as possible, but at least:

- 2 hours before start of Day Shift
- 4 hours before start of Evening/Night Shifts

Agency Exh. 5.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*... as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a DSA, with several years service with the Agency. The Grievant had prior active written notices (one Group II for another instance of failing to call in; one Group I for tardiness), as well as counseling notices concerning attendance.

The current written notice charged:

Per Hospital Policy Q-2; Call-Ins, Nursing staff are expected to provide as much advance notice to supervision as possible, but at least: 2 hours before the start of the day shift. On May 23, 2012 you called in to work at 8:45 AM. You are assigned to the day shift which as a start time of 7:00 AM. You failed to call in two hours before the start of the day shift to notify us that you would be late, which is a violation of Hospital Policy Q-2; Call-Ins.

Agency Exh 2.

The Agency's chief nurse executive testified to the facts alleged in the written notice. The chief nurse executive also testified to the critical nature of providing nursing services and personnel to the population served by. No appearance or evidence was submitted by the Grievant.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. While I apply no negative inference the Grievant's non-appearance, that omission left unrebutted the Agency's evidence of the charged offense. Without the Grievant's further explanation or embellishment through testimony, there is no evidence to rebut the Agency's case and no opportunity for the hearing officer to make a credibility determination of any countervailing testimony from the Grievant. Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offense and level of discipline.

Mitigation

The Agency expressed its inability to mitigate the discipline to less than termination because the Agency has exercised progressive discipline with counseling and cumulative written notices. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness. The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Termination is the normal disciplinary action for a second Group II offense unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive 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.” Va. Code § 2.2-3005(C)(6). Under the *Rules for Conducting Grievance Hearings*, “[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. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Under the *Rules for Conducting Grievance Hearings*, an employee’s length of service and otherwise satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action.

Under the EDR’s Hearing Rules, the hearing officer is not a “super-personnel officer.” Therefore, 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, even if he disagrees with the action. In this case, the Agency’s action of imposing discipline of termination is within the limits of reasonableness. The Hearing Officer finds no evidence that warrants any mitigation to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency’s Group II discipline and termination.

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
Department of Human Resource Management
101 North 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 North 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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.