

Issue: Group II Written Notice with Suspension (unsatisfactory performance and failure to follow instructions); Hearing Date: 07/24/19; Decision Issued: 07/31/19; Agency: UVA; AHO: John V. Robinson, Esq.; Case No. 11357; Outcome: No Relief - Agency Upheld.

**COMMONWEALTH OF VIRGINIA  
Department of Human Resource Management  
Office of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case No. 11357

Hearing Officer Appointment: May 14, 2019  
Hearing Date: July 24, 2019  
Decision Issued: July 31, 2019

PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group II Written Notice, issued on February 22, 2019, by the University of Virginia ("UVA" or the "Agency"), as described in the Grievance Form A dated March 5, 2019.

The Grievant is seeking the relief requested in his Grievance Form A, including rescission of the Written Notice.

The hearing officer issued a Scheduling Order entered on May 23, 2019 (the "Scheduling Order"), which is incorporated herein by this reference.

The hearing was held on July 24, 2019. The Grievant represented himself and the Agency was represented by its advocate and attorney.

At the hearing on July 24, 2019, the 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 hearing officer also received various documentary exhibits of the Agency into evidence at the hearing<sup>1</sup>.

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.

### APPEARANCES

Representative for Agency  
Witnesses for Agency  
Grievant  
Witnesses for Grievant

### FINDINGS OF FACT

1. The Grievant is employed by the University of Virginia as a Housekeeper (Custodial Services Worker 4) at Facilities Management, and is responsible for performing daily housekeeping services in assigned areas, using safe work practices and proper housekeeping techniques.
2. At the stage 4 level of the Housekeeper career path, housekeepers are expected to have increased efficiency and thoroughness in maintaining their assigned areas in clean and orderly condition.
3. A housekeeper at the stage 4 level is expected to be especially diligent in areas visited by University patrons and customers.
4. The Grievant repeatedly failed to follow verbal instructions and written policy and to adequately perform his duties despite Management providing many verbal and written warnings.
5. Management has provided multiple written warnings to the Grievant regarding his poor performance and his failure to follow industry cleaning standards

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<sup>1</sup> References to the Agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits will be designated GE followed by the exhibit number.

(Association for Higher Education Facilities Officers [APPA] Level 2 Cleaning Standards.)

6. On February 17, 2017, the Grievant received a written letter of counseling to address unsatisfactory performance including failure to properly clean garage booths in the Central Grounds Garage.
7. On July 3, 2018, the Grievant received a Group 1 Written Notice for Unsatisfactory Performance, Failure to Follow Instructions and Disruptive Behavior. The Group 1 Written Notice focused on customer complaints regarding a dirty and dusty lobby area and unclean locker rooms in the Memorial Gym.
8. Management has provided the Grievant a cleaning schedule which states each cleaning task and its frequency.
9. The Grievant has been cleaning the Central Grounds Garage, using the same schedule, since at least December 2016.
10. The Grievant failed to follow specific instructions from his supervisor, and failed to follow the cleaning schedule which required him to clean the back stairwell of the garage daily and the ticket booth/gates weekly.
11. On January 9, 2019, at 5:30 a.m., following a customer complaint, Management directed the Grievant to clean the back stairwell immediately. The Grievant responded that he only cleans the back stairwell, "once in a blue moon". Later that morning, at 12:30 p.m., Management inspected the garage. The Grievant did not clean the back stairwell as directed. Management noted several areas of the garage failing to meet cleaning standards. Specifically, the back stairwell was filled with trash and debris (i.e., not cleaned daily), and ticket machines/gates were covered in a thick layer of dirt and dust (i.e., not cleaned weekly).
12. On January 10, 11, 14 and 15, 2019, Management inspected the garage, and saw that the Grievant had not cleaned the back stairwell and ticket machines/gates. Management reminded him of these deficiencies on January 10, 11 and 15, 2019. He responded on January 15, 2019, that he had cleaned the garage.
13. On January 16, 2019, Management inspected the garage. While the back stairwell was clean, the ticket machines/gates still had a thick layer of dirt and dust.
14. The Grievant, as a housekeeper at the state 4 level, has the training and experience to properly follow the cleaning schedule and clean according to industry standards.
15. The Grievant's willful failure to clean the back stairwell daily, as written in his cleaning schedule and directed by Management of January 9, 2019, reflects negatively on Facilities Management and the University as a whole.

16. Furthermore, trash and debris in the stairwell may create a safety hazard to University customers, visitors, students and staff.
17. The Grievant's infractions reflected poorly on the University, adversely affecting the Agency's reputation and appearance to customers.
18. 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. AE 5. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serves 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 of failing to follow instructions and/or policy could clearly constitute a Group II offense, as asserted by the Agency. AE 7. In this instance, the Agency appropriately determined that the Grievant's violations constituted a Group II 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 and attorney that the Grievant's disciplinary infractions justified the Group II 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 II offense.

In this case, the Grievant was clearly given by the Agency both pre-discipline and post-discipline constitutional and policy due process rights. AE 3.

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 has asserted that the discipline was unwarranted. 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 in the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in his analysis:

1. the Grievant’s many years of service to the Agency; and
2. the demands of the Grievant’s work environment.

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. *Id.*

Here the policy is important to the proper functioning and appearance and reputation of the Agency and the Agency issued to the Grievant significant prior progressive counseling and discipline concerning infractions in the recent past. AE 10, 11, 12, 13 and 14. 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, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> 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. *Id.*



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 the offenses 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**

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment and Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

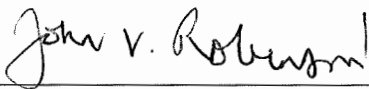
or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>[1]</sup>

ENTER: 7/31/2019



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John V. Robinson, Hearing Officer

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

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.