

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

DIVISION OF HEARINGS

In the matter of: Case No. 11551

Hearing Officer Appointment: June 22, 2020

Hearing Date: July 27, 2020

Decision Issued: August 5, 2020

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance of a Group II Written Notice, issued on February 14, 2020, by the University of Virginia ("UVA" or the "Agency"), as described in the Grievance Form A dated March 9, 2020.

The hearing officer's appointment is effective June 22, 2020.

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

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. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

At the hearing, the Grievant represented himself and the Agency was represented by its attorney. 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 hearing officer also

received various documentary exhibits of the parties into evidence at the hearing, namely exhibits 1-10 in the Agency's exhibit binder.¹

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a custodial services worker. The Grievant has been with the Agency for approximately 10 years and has received significant specialized training concerning the need to inform his supervisor of any unscheduled absences from work so that his supervisor can arrange coverage for his custodial work duties.
2. The Grievant is responsible for maintaining offices, classrooms and public areas, or other assigned areas in a clean and orderly condition.
3. This position follows an established routine.
4. On Thursday, January 9, 2020, the Grievant left work at 7:00 a.m. after one hour of work due to feeling sick.
5. The Grievant did not return to work on Friday, January 10, or Monday, January 13, 2020.
6. On both days, the Grievant did not call to notify his supervisor of his absence.
7. On Monday, January 13, 2020, the Zone Manager called and left a message for the Grievant asking if he intended to return to work.
8. The Grievant called his supervisor later that afternoon and stated, "I had a touch of the flu so I didn't bother to get on the phone because I was tired."

¹ References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not offer any exhibits.

9. The Grievant did return to work on January 14, 2020 with a note from his physician.
10. The note had a return to work date of January 13, 2020.
11. The Standards of Conduct Attendance policy is posted for all employees in the supervisor's office.
12. Grievant goes to this office regularly.
13. The operational needs of this unit depend on the availability of staff showing up to follow the established routine.
14. The protocol of advanced notice has been communicated many times to the Grievant.
15. When the Grievant does not follow the policy by notifying his supervisor of an absence, the needs of customers cannot be met, and other employees need to be shifted to cover his assigned areas.
16. This behavior also affects the morale of other employees.
17. The Grievant's unsatisfactory performance has negatively affected the Department's ability to maintain coverage for its routine custodial operations.
18. The Agency maintains a 24 hour call-out line which the Grievant can utilize at any time to provide the required notice to his supervisor of any unscheduled absence. The Grievant failed to utilize this accommodation during the Period.
19. During his predetermination meeting, the Grievant acknowledged that he had the information with the call-out number and that he failed to utilize this mechanism. AE 3.
20. The Grievant has been previously counsel verbaled on two (2) other occasions for failure to report without notice (December 2018 and June 2019).
21. The Grievant admitted during the hearing that he should have called management when he was sick during the Period.
22. Appropriately exercising progressive discipline on February 14, 2020, Management issued to the Grievant a Group II Written Notice (AE 3) for failure to report without notice and for failure to follow instructions and/or policy. AE 3.
23. The Grievant's disciplinary infractions did negatively impact the Agency's operations.

24. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
25. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
26. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
27. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

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 9. 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.

The Grievant's disciplinary infractions were reasonably classified by management as a Group II offense. The Grievant argues that the Agency has misapplied policy and acted unjustly. However, the hearing officer agrees with the Agency's attorney that the offenses are appropriately classified at the Group II level with the Agency appropriately exercising progressive discipline. While the Grievant argues that the Agency's performance expectations were unclear, the hearing officer finds, to the contrary, that Management's expectations were clearly communicated to the Grievant on multiple occasions.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 1.60 and that the violations rose to the level of a Group II offense. AE 9 at 22.

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 Grievant asserts that the discipline is too harsh. The Agency did consider mitigating factors, including the Grievant's past good service to the Agency.

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

DHRM's *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." *Rules* § VI(B).

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;
2. the demands of the Grievant's work environment;
3. the Grievant's overall good job performance and awards; and
4. the Grievant's illness.

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 training, notice and progressive verbal counseling concerning infractions in the recent past. 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 (4th 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 14th St., 12th Floor
Richmond, VA 23219

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

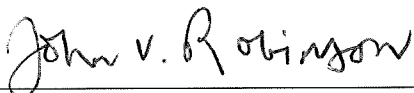
You must also provide a copy of your appeal to the other party and the hearing officer.

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.^[1]

ENTER: 8/05/2020



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).

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