

Issues: Group I Written Notice (unsatisfactory attendance), Group II Written Notice (unsatisfactory attendance), Group II Written Notice (unsatisfactory attendance), and Suspension; Hearing Date: 09/11/15; Decision Issued: 09/14/15; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10658; Outcome: No Relief – Agency Upheld.

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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 10658

Hearing Date: September 11, 2015  
Decision Issued: September 14, 2015

**PROCEDURAL HISTORY**

Grievant was a direct care services associate the Department of Behavioral Health and Developmental Services (“the Agency”). On May 18, 2015, the Grievant was issued a Group I Written Notice and two Group II Written Notices, for violations of the Agency’s attendance policy. The offense dates were May 6, 8, and 9, 2015.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On August 17, 2015, the Office of Employment Dispute Resolution, Department of Human Resource Management (“EDR”), appointed the Hearing Officer. Through pre-hearing conferences, the grievance hearing was scheduled for September 11, 2015, the first date available for the parties, on which date the grievance hearing was held, at the Agency’s facility.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s exhibits. The Grievant did not appear for the grievance hearing. The hearing officer has carefully considered all evidence presented.

**APPEARANCES**

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 challenged the merit of the discipline.

### 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. However, § 5.8 states “[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.” 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 its facility’s Attendance Policy. Agency Exh. G. The policy provides a point system for levels of discipline for accumulated unapproved absences. The Agency also relied on the Commonwealth’s Standards of Conduct. Agency Exh F.

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 Offenses

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

At the time of the offenses, the Agency employed the Grievant as a direct care services associate. The Group I Written Notice charged the Grievant with an unscheduled absence on May 6, 2015, resulting in a total of 12 points accrued within six months. Under the Attendance Policy, the discipline level is a Group I Written Notice. Agency Exh. C. On May 8, 2015, the Grievant had another unscheduled absence, resulting in a total of 14 points. For the May 8 offense, the Agency issued the Grievant a Group II Written Notice, pursuant to the Attendance Policy. Agency Exh. B. On May 9, 2015, the Grievant had another unscheduled absence, resulting in a total of 16 points and another Group II Written Notice. For the accumulated discipline, the Agency opted to issue five days suspension. Agency Exh. A.

For circumstances considered, the Agency stated on the last written notice:

Because of the short time frame during which these occurrences were accumulated and the lack of time for improvement in her attendance, termination will be mitigated with a 5 day suspension of the employee. Additional unscheduled absences and accumulation of occurrence points within the 6 month period could result in termination of employment.<sup>1</sup>

Agency Exh. A.

The Agency's witnesses, including the nurse manager (Grievant's supervisor) testified consistently with the facts alleged in the Written Notices. The Grievant did not appear,<sup>2</sup> and no witnesses testified on the Grievant's behalf.

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<sup>1</sup> The Agency's human resources analyst testified that the Grievant was issued a subsequent Written Notice for an attendance violation and the Grievant's employment was terminated as a result.

<sup>2</sup> The Grievant, just prior to the scheduled hearing, notified the Agency's advocate of her plan to appear by telephone. The hearing officer called the Grievant's telephone number multiple times and left messages providing the phone number for the hearing conference room telephone. The Grievant did not call.

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. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Based on the manner, tone, and demeanor of the witnesses, I find all the witnesses credible. The witnesses' testimony and the documentation prove by a preponderance of the evidence that the Grievant committed the offenses and the discipline was issued according to the Agency's policy, consistent with the Commonwealth's Standards of Conduct and discipline levels.

#### Mitigation

Mitigating circumstances may serve to reduce or negate discipline. As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.,* EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at \*18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee). The Agency asserts it exercised mitigation to discipline below termination, which was permitted under the accumulated Written Notices. No additional mitigating factors were presented for consideration.

#### DECISION

For the reasons stated herein, I uphold the Agency's discipline of the Group I and two Group II Written Notices, with five days suspension.

#### 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 14<sup>th</sup> St., 12<sup>th</sup> 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 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 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.<sup>3</sup>

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

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<sup>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.