

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 10/28/15;
Decision Issued: 11/19/15; Agency: UVA; AHO: John V. Robinson, Esq.; Case No.
10674; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10674

Hearing Officer Appointment: September 8, 2015

Hearing Date: October 28, 2015

Decision Issued: November 19, 2015

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I Written Notice issued April 9, 2015 by the University of Virginia, Facilities Management ("UVA", the "Department" or the "Agency"), as described in the Grievance Form A dated April 27, 2015.

The Grievant is seeking the relief requested in his Grievance Form A, namely removal of the Group I. The hearing officer issued a Scheduling Order entered on October 6, 2015, which is incorporated herein by this reference.

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 1-9 in the Agency's exhibit binder.¹

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

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 housekeeper for a particular hall. The Grievant has been with the Agency for approximately 9 years and has received significant specialized training concerning how to spot debris and perform his duties.
2. On March 25, 2015, the Acting Supervisor for Housekeeping ("W") told the Grievant that because an employee was going out for medical reasons, the Grievant would have to cover her area in the gym for 2 hours. The Grievant became confrontational and aggressive to W and objected to this assignment to the Custodial Services Superintendent (the "Superintendent"). AE 5. To accommodate the Grievant, the Superintendent arranged for another worker to cover the gym and for the Grievant to cover this worker's areas in the hall.
3. On March 26, 2015, the Grievant failed to thoroughly complete his assigned duties in the work areas assigned to him. Debris, etc., which should have been removed was left clearly visible.
4. Near the beginning of the Grievant's shift on March 27, 2015, management met with the Grievant to go over the Grievant's performance deficiencies, the Grievant's assigned duties and areas, and to outline management's reasonable expectations concerning the Grievant's performance of his job duties. The Grievant understood his assigned duties and management's communicated expectations.
5. When management re-inspected the Grievant's assigned areas later on Friday, March 27, 2015, certain of the deficiencies brought to the attention of the Grievant clearly received no attention with the same debris, etc. clearly visible.
6. On Monday, March 30, 2015, management again inspected the Grievant's assigned work areas after the Grievant should have completed his work and found many of the items addressed with the Grievant on the previous 2 workdays were still not done or were incomplete.
7. The Grievant's unsatisfactory performance has negatively affected the Department's ability to maintain consistent quality standards.

8. During a predetermination meeting on April 1, 2015, the Grievant offered no meaningful justification for his failure to properly clean his assigned work area.
9. The Grievant has been previously counseled on meeting performance expectations including receiving an "Inconsistent" overall rating on his 2014 annual performance evaluation issued on 3/6/15 (AE 7) and a Written Letter of Counseling (AE 8) which was issued on 4/04/2013.
10. The Grievant was also issued a Group II Written Notice (AE 6) on 9/23/2014 for Leaving Work without Permission and Disruptive Behavior when he became agitated about a new work assignment and left work for the remainder of the day. AE 6.
11. The tasks being performed by the Grievant are routine in nature (vacuuming, wiping tables, etc.) and the expectations for service standards are consistently applied in all areas.
12. Additionally, the Grievant was provided with timely feedback when management observed the performance deficiencies and the Grievant failed to take action to correct the issues.
13. Much of the debris that was observed by management from day to day was the same kind of debris in the same locations previously observed.
14. The Grievant's performance issues did negatively impact the Agency's operations.
15. 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.
16. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
17. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
18. 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 1 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 could appropriately have been classified at the Group II level. 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 at least a Group I offense.

The Grievant has alleged retaliation but has failed to carry his burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the grievant's evidence shows by a preponderance of the evidence that the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn there from may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561 and 1587, page 5* (June 25, 2007). This is addressed in greater detail below.

The Grievant has shown that he engaged in a protected activity, namely filing a previous grievance. The Grievant has also shown that he suffered a materially adverse employment action, namely the issuance of the Group I Written Notice to the Grievant. However, the hearing officer finds and decides that the Grievant has not borne his burden of proving that a causal link exists between the discipline and the protected activity.

The Grievant also raised the affirmative defenses of Agency corruption and that he was "set up." However, neither these nor any other affirmative defenses were supported by any meaningful probative evidence at the hearing and, in any event, the hearing officer finds there is insufficient evidence in the record to even begin to decide that the Grievant has met his evidentiary burden of proof in this regard.

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.

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 specifically raised mitigation as an issue in the hearing. 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 herein, in the Form A and all of those listed below in his analysis:

1. the Grievant's past good service to the Agency;
2. the newly assigned work areas;
3. the Grievant's 9 years of service; and
4. the many demands of the Grievant's job.

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 offense was serious, and of course, there were also aggravating factors in play including the warnings to the Grievant by the supervisors concerning performance infractions, the fact that the Grievant was combative to W and the Grievant's refusal to take responsibility and trying to shift the blame to others. AE 5. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

Pursuant to 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.

In this proceeding, the Agency's actions were consistent with law and policy. The Agency appropriately determined that the Grievant's violations of Agency policies concerning performance warranted a Group I Written Notice under the circumstances. Accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

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

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

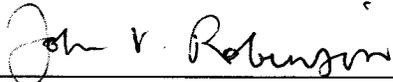
A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal

with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 11 / 19 / 2015



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).