

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 11420

Hearing Officer Appointment: September 10, 2019
Hearing Date: October 16, 2019
Decision Issued: October 21, 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 by Management of the Department of Corrections as described in the Grievance Form A dated July 10, 2019. The Grievant is seeking the relief requested in her Grievance Form A, including removal of the Written Notice.

The hearing officer issued a Scheduling Order entered on September 17, 2019 (the “Scheduling Order”), which is incorporated herein by this reference.

At the hearing, the Grievant represented herself 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 Agency into evidence at the hearing¹.

¹ References to the Agency’s exhibits will be designated AE followed by the exhibit number. The Grievant did not submit any exhibits.

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
Grievant
Witnesses for Agency
Witnesses for Grievant

FINDINGS OF FACT

1. The Grievant is employed by the Agency as a Corrections Officer ("C/O") in a state prison facility (the "Facility").
2. Accordingly, staffing and timely attendance by staff are critical.
3. Pursuant to Agency Operating Procedure 110.1 XXIII A:
 - A. Abuses of Leave or Time
 1. Absenteeism/Leave-Time Abuse
 - a. The expectation is that all employees will report to work as scheduled.
 - b. Supervisors are responsible for the operations of the unit and must take decisive, prompt steps to correct abuses in use of time or leave.
 - c. Excessive absenteeism, patterned absences, tardiness, or other abuses of leave/time must be discussed with the employee.
 - B. Failure to reach acceptable levels of attendance or ensure proper, prudent use of time, are violations under Operating Procedure 135.1, *Standards of Conduct*, and will be dealt with through appropriate disciplinary action.

AE 4 at 49.

4. For purposes of determining work hours, work begins with muster and time utilized to enter the facility does not count as work time. AE 4 at 36.
5. By policy, employees are expected to allow sufficient time for traffic conditions, inclement weather, entrance to the facility (including passing through the body scanner), etc. to attend the muster on time.
6. On June 12, 2019, the Agency issued a Group II Written Notice to the Grievant for being tardy for work on 14 different dates from December 3, 2018 through May 2, 2019.
7. In her Tardiness Explanation forms, the Grievant frequently admitted that she had no excuse.

e.g. "No excuse I should have known road conditions." AE 5 at 55.

"just simply running behind not properly prepared for work like always."

AE 5 at 58.

"No excuse I know this." AE 5 at 63.
8. These admissions undermine the Grievant's excuses raised *ex post facto* in the Form A and at the hearing.
9. There were no legitimate excuses for the Grievant's failure to respond to muster on time and the evidence showed that the other officers who testified were also issued tardies if they did not report to work on time.
10. Over the period of her employment with the Agency, the Grievant has a long history of late attendance. AE 6-8. Such failures disrupt Agency operations.
11. The Grievant has a Notice of Verbal Counseling dated January 1, 2019 and a Notice of Improvement/Needed/Substandard Performance dated February 3, 2019.
12. 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. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Operating

Procedure 135.1 ("Policy No. 135.1"). 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.

Pursuant to DHRM Policy No. 1.60 and Agency policy, the Grievant's conduct of failing to timely attend work on 14 different dates between December 3, 2018 through May 2, 2019 could clearly constitute a Group II offense, as asserted by the Agency. Failing to comply with established applicable written policy concerning attendance at a secure facility on so many occasions and after verbal and written counselings was necessary progressive discipline which warranted a Group II Written Notice to get the attention of the Grievant, as asserted by the Agency's attorney. In this instance, the Agency appropriately determined that the Grievant's violations of its attendance policy 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 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.

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.

While the Grievant did not specifically raise mitigation and 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 and all of those listed below in his analysis:

1. the Grievant’s years of service to the Agency;
2. the often difficult and stressful circumstances of the Grievant’s work environment; and
3. the good work of the Grievant apart from the attendance infractions.

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 attendance policy is important to the proper functioning of the Agency and the Agency issued to the Grievant significant prior progressive counseling and discipline concerning attendance infractions, including a Notice of Verbal Counseling and a Notice of Improvement Needed/Substandard Performance. AE 6-7. 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.

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.

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.

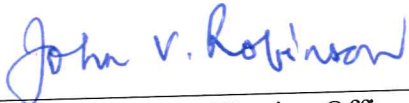
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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: 10/21/2019



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.