

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE
MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
IN RE CASE NUMBER: 12091**

DECISION OF HEARING OFFICER

I. SUMMARY

The grievant was working for the Department of Motor Vehicles in a rural area in January 2024. The agency determined that he had exhibited performance and attendance issues to an extent that could not be ignored or excused. The agency issued him a Group III Written Notice on February 9, 2024, terminating him from employment with the Commonwealth. The grievant has filed this challenge to the actions of the agency. For the reasons stated here within I hereby uphold the disciplinary action taken by the agency.

II. PROCEDURAL MATTERS

The grievant commenced this proceeding by filing his Form A on February 14. The Department of Human Resource Management (DHRM) appointed me as hearing officer effective March 4. I conducted a prehearing conference call with the grievant and the attorney acting as advocate for the agency. By agreement, I scheduled the matter for hearing on May 7. Upon the request of the grievant that the hearing not be held at the district office for the area of his employment, I set the hearing at an agency facility approximately one hour away from that primary site.

Prior to the hearing, the grievant requested orders for the appearance of nine witnesses. The agency agreed that three of the named individuals were relevant witnesses. Upon the proffer by the grievant as to the expected testimony of the other individuals, I determined that five of them had no relevant evidence to present and declined to issue orders for them. I issued orders for the three individuals agreed to by the agency and one additional person, a former coworker of the grievant.

The hearing took place as scheduled on May 7. The agency was represented by an attorney/advocate. It presented five witnesses. Prior to the hearing in accordance with my prehearing order the agency had proffered twenty-six exhibits. It substituted a flash drive of better quality for the one previously submitted as Exhibit 20. I admitted these into evidence without objection from the grievant.

The grievant represented himself throughout the hearing process. He called two witnesses on his behalf. He chose not to testify. He made opening and closing statements and cross-examined the witnesses for the agency. He requested certain documents from the agency prior to the hearing. I have accepted the Employee Work Profile produced as an exhibit.

III. ISSUE PRESENTED

Whether the agency was justified in issuing the grievant a Group III Written Notice in terminating him from employment on February 9, 2024 for multiple attendance and performance issues?

IV. FINDINGS OF FACTS

In 2023, the grievant worked as a Trades/Utilities Master Technician for the agency. His base of operations was a district office for the agency. At this office he had available to him a computer and space for administrative work. His work required him to travel to multiple other local offices for the agency on an almost daily basis. His duties included repairing certain types of equipment, building maintenance, and similar assignments. He was expected to “check-in” to the district office at the beginning of each workday, pick up his assigned work van, and travel to the outlying offices.

Over the last half of 2023, the district manager for the area covered by the grievant began noticing an unusual number of incomplete work assignments given to the grievant. In December 2023, the supervisor to whom the grievant directly reported spoke with the grievant. The grievant expressed unhappiness with his personal and work situation. The supervisor granted him permission to take off a few days from work at the end of the year to assess whether he wished to continue working for the agency, and, if so, whether he wanted to pursue other roles within the agency.

The first day in 2024 that the grievant was expected to work was January 5. His assigned work hours were from eight o'clock a.m. to five o'clock p.m. The regional manager and at least one other employee at the regional office began noticing substantial attendance issues with the grievant in January. A security camera at the district office showed the area of the parking lot where the work vehicle assigned to the grievant was typically parked when not in use. The grievant typically parked his personal vehicle next to the work van. The video footage for the first three weeks of

January was reviewed. The video revealed that the grievant arrived for work at least one hour late on January 5, 8, 10, 11, and 19. On those same dates, he also left the district office in his personal vehicle without permission from his supervisor at least one hour before the end of his scheduled shift. Additionally, the grievant failed to appear for work at all at the district office on January 9, 12, 16, 17, and 18. He failed to obtain prior approval for any of these absences or late arrivals.

The grievant submitted time sheets reflecting that he had worked for eight hours on each of these January dates, except for January 16; that day was a shortened workday due to inclement weather. He claimed the full six hours of scheduled work for that day. When the supervisor of the grievant discovered the discrepancies between the time records and the times of work as shown on the video, he asked the grievant to correct his time sheets. The grievant failed to do so. The supervisor had allowed him approximately 24 hours to cure the discrepancies in the time sheets.

After a review of the situation, the supervisor consulted with the agency human resource department and others. He issued the grievant a Group III Written Notice and terminated him from employment on February 9, 2024. The offenses cited by the supervisor were.

- Attendance/excessive tardiness
- Leaving work without permission
- Failure to report without notice
- Unsatisfactory performance
- Failure to follow policy or supervisor's instructions
- Falsifying records

At the time of his termination from employment, the grievant had worked for the agency for multiple years. He had received no prior formal discipline or unsatisfactory performance ratings.

V. ANALYSIS

The Commonwealth of Virginia provides protections to its employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Human Resource Management (DHRM) Office of Employment Dispute Resolution has developed a Grievance Procedure Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). The GPM sets the applicable standards for this type of proceeding. Section 5.8 provides that in disciplinary grievance matters (such as this case) the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of evidence, that its actions were warranted and appropriate. The Rules state that in a disciplinary grievance a hearing officer shall review the facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice?
- II. Whether the behavior constituted misconduct?

III. Whether the discipline was consistent with policy? and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Upon the commencement of the hearing, as part of his opening statement, the grievant conceded the facts as alleged by the agency. The agency presented sufficient corroboration of the allegations and met its burden of proof that the acts and omissions occurred. They constitute misconduct.

Policy 1.25 of the DHRM ("Hours of Work") specifies that an employee of the Commonwealth is required to work "their assigned work schedules." Also, an employee has the responsibility to promptly notify management if they are unable to arrive on time or need to leave work early. By arriving late and leaving early, the grievant violated this policy on five out of the ten workdays beginning January 5 through January 19. His failure to report for work at all on five other dates also violated this policy.

The Standards of Conduct promulgated by DHRM (Policy 1.60), assign three levels of seriousness of offenses. The lowest level of offense, Group I, includes tardiness. By any reasonable definition, being more than one hour late to work qualifies as tardy. As stated, during the subject 10 days the grievant was tardy on five separate occasions.

The next level of offense, Group II are those offenses "includes acts of misconduct, violations of policy or performance of a more serious nature that significantly impacts the agency's services and operations." Specifically listed as examples of Group II offenses are "leaving work without permission" and "failure to report to work without proper notice/approval." The grievant left work early without permission on five dates. He failed to report for work, without notice or permission, on five dates.

Group III level offenses are the most serious ones under Policy 1.60. Listed as examples of offenses at this level are absences of at least three consecutive workdays without approval. That is what the grievant did on January 16 through January 18. Also listed as a Group III offense is unethical conduct. The filing by the grievant of time sheets that incorrectly and intentionally stated his hours of work on multiple days clearly qualifies as fraudulent, unethical conduct.

The Written Notice charged the grievant with unsatisfactory performance in his work. The evidence presented relevant to this allegation would be his failure to keep up with the assigned work. Although the evidence did support that he had multiple pending work orders, I do not find the evidence to be sufficient to say that this neglect would be a Group III offense for "significant neglect of duty" that had a substantial impact on agency operations.

The agency has argued that it could have properly given the grievant a separate Written Notice for each of the offenses. The fact that it chose to issue a single written discipline combining the offenses makes the failure to prove a serious neglect of duty

irrelevant. The combination of the multiple offenses is sufficient to support the issuance of the Group III Written Notice and the termination of employment. Under Policy 1.60 discharge may occur, even in the absence of single of a Group III Written Notice, where a combination of other offenses is sufficient. The agency has established a Group III offense for attendance that would be satisfactory standing by itself, to support the action taken by it. The existence of other offenses, especially the filing of false time records, bolsters that action.

The grievant has argued that throughout his employment with the agency it has allowed a period of flexible work hours. The argument, although forcefully made, is not supported by any evidence. In fact, it was disputed by one of his own witnesses, as well as a witness for the agency.

Mitigating evidence considered by the agency included the prior work history of the grievant. The agency was entitled to focus on the events occurring in January 2024, rather than prior years and months. The grievant argued that the agency could have disciplined him earlier, as soon as the attendance issues arose. Although an argument can be made that doing so would be a best practice, such as not required under the Standards of Conduct and the grievance procedure.

When the grievant was issued this discipline, he contacted the human resources office for the agency. He argues that that office failed to provide him with sufficient guidance as to his rights. Regardless of what more may have been appropriate as a response to the inquiry from the grievant (such as referring him to DHRM/EDR), such additional steps are not required in the policies of the Commonwealth.

I find that the actions taken by the agency are consistent with law and policy. The grievant has not argued that he has been the subject of discrimination or is a member of a protected class.

VI. CONCLUSION

The grievant had a history of being a valuable employee to the agency. For unspecified personal and professional reasons, that started changing in 2023. The decline culminated in the attendance issues in January 2024. It is unfortunate for the grievant that those issues arose and were not dealt with in a different manner. The agency acted entirely reasonably in its approach to the problems exhibited in the workplace, or his absence there from, during that month. For the reasons set forth above, I uphold the issuance of the Group III Written Notice and the termination from employment of the grievant.

VII. APPEAL RIGHTS

The parties may file an administrative review request within fifteen calendar days from the date this decision is 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 Resources Management to

review the decision. You must state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

Director, Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or send by facsimile to (804) 371-7401, or by email.

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your requests to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th street, 12th floor
Richmond, VA 23219

or send by email to EDR@dhrm.virginia.gov, or by facsimile 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 fifteen calendar days of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The 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 contrary to law. You must file a notice of appeal with the clerk of circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.

See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or you may call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights help from an EDR Consultant.

DECIDED this May 14, 2024.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer