

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

DIVISION OF HEARINGS

In the matter of: Case No. 12272

Hearing Officer Appointment: April 21, 2025

Hearing Date: June 13, 2025

Decision Issued: June 16, 2025

ISSUES:

The Grievant requested an administrative due process hearing to challenge the issuance of a Group II Written Notice which was issued on October 29, 2024, by a facility (the “Facility”) of the Virginia Department of Corrections (the “DOC” or the “Department” or the “Agency”). The Group II Written Notice was for violation of Written Notice Offence Codes 3 – Failure to report without notice; 4 – Three days absent without authorization; 13 – Failure to follow instructions and/or policy; and 99 – Other (Violations of DOC Operating Procedure 110.1; DOC Operating Procedure 135.1; and DHRM Policy 1.60). AE 1.

The Grievant has raised the issues specified in her Grievance Form A and is seeking the relief requested in her Form A, including reversal of the discipline.

PROCEDURAL HISTORY & BACKGROUND:

The Grievant, the Agency’s advocate and the hearing officer participated in the first prehearing conference call at 5:00 pm on April 28, 2025. The hearing was scheduled for and held

June 13, 2025, as reflected in the Scheduling Order of May 2, 2025, incorporated herein by this reference.

The parties all agreed that email is acceptable as a sole means of written communication.

At the hearing, the hearing officer received various documentary exhibits into evidence.¹

The hearing officer recorded the hearing.

At the hearing, the Grievant represented herself and the Agency was represented by its advocate. 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.

APPEARANCES

Representative for Agency
Grievant
Advocate for Agency
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency at the Facility as a Corrections Officer. AE 1.
2. On May 2, 2023, the Grievant was issued a "Notice of Improvement Needed/Substandard Performance." The Grievant had been tardy on the following dates: March 27, March 29, March 30, April 3, April 5, April 6, April 7, April 8, April 9, April 17, April 18, April 20, April 21, April 22, April 23, April 24, and

¹ References to the agency's exhibits will be designated AE followed by the exhibit tab and/or page number. References to the Grievant's exhibits will be designated GE followed by the exhibit tab and/or page number.

May 2, 2023. The Grievant commented that she had car trouble and that she was approved to come in late because of previous appointments. Accordingly, she was placed on a performance improvement plan. AE 25.

3. On September 27, 2023, the Grievant turned in her signed Family and Medical Leave Act (“FMLA”) form. AE 20.
4. On May 31, 2024, the Grievant was issued another “Notice of Improvement Needed/Substandard Performance.” The Grievant failed to report to work as scheduled on the following days: May 17, May 18, May 19, and May 22, 2024. The Grievant commented that she called in on May 17, 2024, to report that she was attending her daughter’s graduation and “needed more time.” Additionally, she stated that for May 18 and 19, 2024, she had used FMLA leave. Moreover, she stated that for May 22, 2024, she was “asked to go home and could[not] return.” Accordingly, she was placed on another performance improvement plan. AE 23-24.
5. On July 26, 2024, the Grievant received a form titled “Important Notice Regarding Family and Medical Leave (FML) for Family Member.” It stated that Human Resources had received her completed Certification of Health Care Provider from her family member’s physician. The Grievant was thus approved for intermittent FML to assist her child, 1 time per month per episode for 8 hours. Additionally, FML was available for a maximum of 12 weeks for the 12-month measurement period. The Grievant was eligible to use 33% of her available sick leave balance and any other paid personal leave to run concurrently with FML for the 12-month period. AE 27.

6. Based on the form's express language, late arrivals would not be covered, only one absence per month for 8 hours for the family member who was approved under FMLA until January 26, 2025. AE 18.
7. On September 11, 2024, the Grievant was served a memo titled "Administration of Employee Discipline: Due Process Notification." The Grievant had failed to improve her attendance during her performance improvement plan from May 20, 2024 to May 19, 2025 (dated May 31, 2024). Specifically, the Grievant failed to report to work on time on the following dates: June 5, 6, 16, 20, 24, 25, 27, 29, 30, 2024; July 3, 4, 9, 13, 18, 22, 23, 26, 27, 2024; August 5, 9, 10, 14, 20, 23, 28, 29, 2024; and September 3, 6, 7, 11, 2024. Additionally, the Grievant did not report to work on the following dates: June 11, 2024; July 14, 2024; August 11, 2024; and September 2, 7, 8, 2024. Moreover, she failed to report to work or contact her supervisor regarding her absence on the following dates: August 15, 19, 2024. AE 5-6.
8. On that same day, the Grievant attended a due process meeting where she stated that she wanted to transfer to another facility, which was closer to home and her children. She explained that she was tardy due to the long distances she needed to travel from her home to the current Facility. AE 7.
9. During the hearing, the Warden explained that the warden to whom the transfer is sought must approve the move. Tape.
10. Additionally, the Grievant argued that she had informed the relevant personnel that she had appointments on August 15 and August 19, 2024. *Id.*

11. Moreover, she stated that there was a lot going on in the Facility and a lot going on at home, causing her to be late. AE 8.
12. On November 28, 2024, the Grievant stated in a letter dated that same day that her tardiness and absences from work were due to her son's medical condition. AE 20.
13. Specifically, she stated that she used FMLA leave on June 11, 2024 for her son, and that she had provided the necessary documentation. She did not know why the other dates of absence were related to FMLA. *Id.*
14. On March 6, 2025, a letter titled "Third Resolution Step Employee Grievance Response" was sent to the Grievant. It was found that her FMLA approval for her family member began on July 26, 2024, Additionally, medical documentation provided for August 15 and August 19, 2024 was not FMLA related. AE 18.
15. The investigation conducted was thorough and impartial. The conclusions reached were reasonable.
16. The Grievant performed a vital function for the Facility as an Officer with significant and substantial training invested in the Grievant by the Agency in all aspects of her employment. The Facility reasonably and of necessity relied on the Grievant to fulfill all her duties.
17. The orderly and efficacious performance of the Grievant's work is critical for the orderly and efficient functioning of the Agency.
18. Despite this critical need, the Grievant committed serious violations of the Agency's security policies and protocols by failing to turn up to work without reason and by consistently arriving late.

19. As the detailed, unrefuted argument of the Agency's advocate revealed, over the approximate 3-month period at issue in this proceeding, the Grievant only arrived for duty on time on 2 occasions. Tape. This, in turn, put considerable operational stress on the Facility and caused material additional overtime expense. Tape.
20. On cross-examination, the Grievant admitted that she did come in late and that the clock-in times produced by the Agency were accurate. Tape and AE 8.
21. 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.
22. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
23. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
24. 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 POLICY, 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.

The Grievant did not follow the applicable state and agency policies.

Specifically, the Grievant committed the following disciplinary infractions which were reasonably classified by management as a Group II offense.

Operating Procedure 110.1, *Hours of Work and Leaves of Absence*, Section XXIII provides:

“A. Absenteeism/Leave-Time Abuse

1. The expectation is that all employees will report to work as scheduled.
2. Supervisors are responsible for the operations of the unit and must take decisive, prompt steps to correct abuses in use of time or leave.
3. 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 48.

Moreover, Operating Procedure 135.1, *Standards of Conduct*, Section XIV provides:

“A. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, include but are not limited to, endangering others in the workplace, constituting illegal or unethical conduct, indicating significant neglect of duty; resulting in disruption of the workplace; or other serious violations of policies, procedures, or laws.

B. Group III offenses include, but are not limited to:

1. Absence of three or more consecutive days without proper authorization or a satisfactory reason.” AE 68.

Here, the Grievant has consistently failed to follow policy. She arrived late to work on at least thirty occasions and was absent without proper reason on at least eight separate days.

With respect to her tardiness, late arrivals were not covered under her current FMLA scheme.

As for her absenteeism, only one absence per month for 8 hours to care for her family member was approved under FMLA. Medical documentation provided for the absences on August 15 and August 19, 2024 was not FMLA related.

Furthermore, the considerable distance she travels to work, as well as her personal stresses at home and at work, do not constitute valid excuses for repeated tardiness or absenteeism.

The Grievant was previously placed on two performance improvement plans (one in May 2023 and another in May 2024) specifically addressing these attendance issues. Despite the Agency's considerable efforts to support her improvement, and the Agency's commendable efforts to exercise progressive discipline, the Grievant's pattern of misconduct has continued.

It is regrettable that the Grievant's son has suffered from a serious medical condition, and it is acknowledged that this has caused her substantial stress and hardship. The Agency has appropriately granted her FMLA leave to care for her son. However, FMLA leave cannot be misused to justify unrelated instances of tardiness or absenteeism. Proper documentation and justification must be submitted when invoking FMLA protections, and it has been demonstrated that the Grievant has not complied with these requirements.

The Grievant argues that the Agency has not carried its burden of proof, has misapplied policy and acted unjustly in issuing the discipline. However, the hearing officer agrees with the

Agency's advocate that the various offenses are appropriately classified at the Group II level, as designated.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated numerous policies, including Policy No. 1.60 and that the violations rose to the level of a Group II.

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. *See*, AE 1, 4.

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. *See*, AE 1, 4.

Indeed, the memo titled "Administration of Employee Discipline: Due Process Notification" had provided that the Grievant's misconduct could warrant a Group III Written Notice, which, on a first occurrence, may warrant termination. AE 6.

However, despite the numerous infractions made by the Grievant, the discipline had been mitigated to a single Group II Written Notice.

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 AE 1, the Written Notice, the Form A, the hearing, those referenced herein and all of those listed below in this analysis:

1. the demands of the Grievant's work environment;
2. the Grievant's tenure at the Agency;
3. the Grievant's past favorable performance evaluation history;
4. no active prior discipline;
5. her very hard work for the Facility;
6. the long hours worked by the Grievant;
7. the shortage of staff at the Facility; and
8. her son's medical condition.

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 policies are important to the proper functioning, appearance and reputation of the Agency, and the Grievant held an important position where management of necessity relied on her to attend work and to perform her duties in strict conformity with Agency policies, as she

had undertaken to do. 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 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, 200

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 6/16/2025

John Robinson

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.