

Issue: Group II Written Notice (failure to report without notice), and Termination (due to accumulation); Hearing Date: 02/19/16; Decision Issued: 03/10/16; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10746; Outcome: No Relief - Agency Upheld; **Administrative Review: EDR Ruling Request received 03/25/16; EDR Ruling No. 2016-4331 issued 04/29/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 03/25/16; DHRM Ruling issued 05/24/16; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10746

Hearing Officer Appointment: December 28, 2015

Hearing Date: February 19, 2016

Decision Issued: March 10, 2016

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 December 2, 2015. The Grievant is seeking the relief requested in his Grievance Form A, namely removal of the Written Notice, and to be reinstated if he prevails.

The hearing officer issued a Scheduling Order entered on January 12, 2015 (the "Scheduling Order"), which is incorporated herein by this reference.

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 Agency into evidence at the hearing¹.

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.

¹ References to the Agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits are to the page numbers 1-6 of the Grievant's submittal.

APPEARANCES

Representative for Agency
Grievant
Witnesses for Agency

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. The Facility has a security level 4-5.
3. The Grievant is a security employee and maintains security, custody, and control over an inmate population serving long-term, including single, multiple and life + sentences.
4. Accordingly, staffing and timely attendance by staff are critical.
5. Pursuant to Agency Operating Procedure 110.1 IV (T) (1):

T. 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 shall take decisive, prompt steps to correct abuses in use of time and/or leave.
- c. Excessive absenteeism, patterned absences, tardiness, or other abuses of leave/time shall be discussed with the employee. 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.

6. Pursuant to Agency Operating Procedure 110.1 IV (C)(3):

All leave should be requested as far in advance as possible. In the event of illness, injury, or other emergency, an employee shall be required to provide adequate notice to the supervisor and request use of leave...

- b. Security employees and other shift workers are required to notify the officer in charge, or the shift commander, at least two hours prior to the beginning of their shift if they must be absent. Organizational units may develop their own protocol for acceptable notice.

- c. Employees who fail to notify their supervisor, or the supervisor's designee, should be considered "absent without leave". This will result in a loss of pay and be treated as a violation of Operating Procedure 135.1, *Standards of Conduct*.
7. On Wednesday, October 21, 2015, the Grievant failed to follow the proper notice procedure in accordance with policy when he failed to report for work as scheduled and did not notify his supervisor, Captain P, or supervisor's designee, Lieutenant L. GE 3.
 8. On October 24 and October 25, 2015, the Grievant again failed to notify his supervisor that he would be absent from his scheduled work.
 9. However, concerning October 24 and 25, 2015, the Grievant received on October 26, 2015, a letter dated October 21, 2015 from the Warden stating that "effective Saturday, October 24, 2015, [the G was] placed on Pre-Disciplinary Leave with Pay." GE 1.
 10. The first time Grievant became aware he was on pre-disciplinary leave concerning October 24-25, 2015 was on October 26, 2015. GE 3.
 11. Over the period of his employment with the Agency, the Grievant has a long history of failing to notify the Agency concerning absences and late attendance. AE 27-52. Such failure to notify severely disrupts Agency operations.
 12. The Grievant has an active Group II Written Notice issued October 20, 2014 for failure to follow the instructions of 2 Supervisors and refusing to return to duty at a housing unit at the Facility. AE 6-7.
 13. Pursuant to the Written Notice issued November 9, 2015, the Agency terminated the Grievant's employment effective November 9, 2015 because of the Grievant's accumulation of 2 active Group II Written Notices. AE 1.
 14. 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 notify his supervisor of his absence from work on October 21, 2015 could clearly constitute a Group II offense, as asserted by the Agency. Failing to comply with established applicable written policy concerning notification is included as an example of a Group II Offense in the SOC. AE 16. In this instance, the Agency appropriately determined that the Grievant's violations of its notification policy constituted a Group II Offense.

However, the hearing officer decides that the Grievant committed no disciplinary infractions for October 24-25, 2015 because pursuant to the Warden's letter of October 21, 2015, the Agency placed the Grievant on Pre-Disciplinary Leave with Pay for this period even though the Grievant only became aware of this *ex post facto* on October 26, 2015. GE 1 and GE 3.

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 advocate that the Grievant's disciplinary infractions on October 21, 2015 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 not 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 Agency's mix-up at the beginning of the hearing concerning the identity of the Grievant's applicable supervisor at the relevant time.

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 notification 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 and notification infractions, including a Group II Written Notice in October 2014. AE 6-7 and AE 27-52. 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 October 21, 2015 offense 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

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.

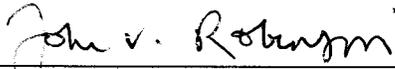
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the 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: 3/10/2016



John V. Robinson, Hearing Officer

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