

Issues: Performance (arbitrary/capricious evaluation), Group II Written Notice (poor attendance/excessive tardiness, unsatisfactory performance, failure to follow instructions), Group II Written Notice (failure to report without notice), and Termination; Hearing Date: 04/13/17; Decision Issued: 06/09/17; Agency: Department of Military Affairs; AHO: Carl Wilson Schmidt, Esq.; Case No. 10966, 10967, 10968; Outcome: Partial Relief.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10966 / 10967 / 10968**

Hearing Date: April 13, 2017  
Decision Issued: June 9, 2017

#### **PROCEDURAL HISTORY**

On November 4, 2016, Grievant was issued a Group II Written Notice of disciplinary action for excessive tardiness/poor attendance, unsatisfactory performance and failure to follow policy or instructions. On December 15, 2016, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to report to work without notice.

Grievant filed grievances to challenge the Agency's disciplinary action. In addition, on November 30, 2016, Grievant filed a grievance to challenge her 2015-2016 performance evaluation. The Agency qualified the grievances for hearing and on February 7, 2017, the Office of Employment Dispute Resolution issued Ruling No. 2017-4497 consolidating the grievances for a single hearing. On February 21, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 13, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency's Counsel  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Military Affairs employed Grievant as a Senior Procurement Officer at one of its locations. Grievant had prior active disciplinary action. On February 5, 2015, Grievant received a Group II Written Notice with a one day suspension for poor attendance and excessive tardiness and failure to report to work without notice. On May 24, 2016, Grievant received a Group II Written Notice for excessive tardiness/poor attendance, unsatisfactory performance and failure to follow policy or instructions.

Grievant was a productive worker when she reported to work. She had been repeatedly counseled for excessive tardiness and absences.

Grievant's work shift began at 8 a.m. On August 1, 2016, Grievant did not report to work because of "tummy issues." On August 3, 2016, Grievant reported to work at 8:23 a.m. On August 15, 2016, Grievant did not report to work because of "tummy issues." On August 16, 2016, Grievant did not report to work because of "tummy/fever." On August 18, 2016, Grievant did not report to work because of "tummy/fever." On August 22, 2016, Grievant reported to work at 9:01 a.m. On August 30, 2016, Grievant reported to work at 8:05 a.m. On September 14, 2016, Grievant reported to

work at 8:56 a.m. On September 16, 2016, Grievant reported to work at 8:35 a.m. On October 4, 2016, Grievant did not report to work because of "blood sugar." On October 5, 2016, Grievant reported to work at 8:18 a.m. On October 17, 2017, Grievant reported to work at 8:28 a.m. On November 3, 2016, Grievant did not report to work. On November 4, 2016, Grievant reported to work at 8:28 a.m. Grievant received a Group II Written Notice with a ten workday suspension for poor attendance and tardiness.

Grievant was suspended from November 7, 2016 through November 18, 2016. She was to report to work on November 21, 2016.

On November 7, 2016, Grievant filed an application for short term disability with the Third Party Administrator. Grievant did not report to work on November 21, 2016. She sent a text message to an HR employee on November 21, 2016 at 10:56 a.m. stating:

Hey, this is to let you know that I'm in the process of filing for med leave as [name] said I could in our last meeting, disability has initiated but doc sent new paperwork last Friday, takes disability 24 hours to process.<sup>1</sup>

On November 23, 2016, Grievant sent a text to an HR employee stating:

I just got notified my STD will not be approved due to the suspension, which I am filing grievance(s) on. On Nov 21 [Third Party Administrator] told me to stay put. My therapist is talking with them about the matter, waiting. \*\*\*\*<sup>2</sup>

Grievant was removed from employment effective December 16, 2016.

Grievant presented during the hearing a note from a Licensed Clinical Social Worker stating that Grievant:

is diagnosed with major depression, recurrent, severe. Due to a recurrence of this condition, she was unable to work on or about November 21, 2016.<sup>3</sup>

Grievant also presented a note from a Medical Provider stating

[Grievant] has been under my care since 2006 for physical stress, spinal pain, and injury related exacerbations or pain associated with a compensated but unstable Levoscoliosis, spinal disc degeneration, and local and peripheral injuries. This patient's spinal condition, scoliosis and

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<sup>1</sup> Agency Exhibit 11.

<sup>2</sup> Agency Exhibit 11.

<sup>3</sup> Grievant Exhibit 4.

disc degeneration is chronic and exacerbatory and has resulted in episodic need for stabilization care and need for physical rest.<sup>4</sup>

Grievant presented a note from a Medical Doctor stating:

[Grievant] has been a patient of mine for over six years. She is actively being treated for depression, PTSD, which is sometimes aggravated by work place stress, chronic arthritic complaints and allergies.<sup>5</sup>

On March 29, 2017, the Third Party Administrator notified Grievant of its decision regarding her request for review of its denial of STD benefits to Grievant. The Third Party Administrator changed its denial to an approval for the period of November 21, 2016 through December 15, 2016.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>6</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

### **Group II Written Notice for Poor Attendance and Tardiness**

Tardiness and poor attendance is a Group I offense.<sup>7</sup> Grievant demonstrated a pattern of tardiness and poor attendance from August 1, 2016 through November 4, 2016. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Because Grievant had a written notice for a similar offense, the Agency was authorized to elevate the Group I to a Group II Written Notice for tardiness and poor attendance.

### **Group II Written Notice – Failure to Report to Work**

In order to discipline an employee for failing to report to work as scheduled, an agency must show that the employee was obligated to report work on the day the

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<sup>4</sup> Grievant Exhibit 5.

<sup>5</sup> Grievant Exhibit 5.

<sup>6</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>7</sup> See, Attachment A, DHRM Policy 1.60.

employee failed to report to work. An employee who is on approved short-term disability is not obligated to report to work.

Grievant did not report to work as scheduled on November 21, 2016. At the time she was disciplined, her request for STD had been denied. Once her request was approved, she was no longer obligated to report to work on November 21, 2016. There is no basis to discipline Grievant for failing to appear on November 21, 2016 because she was not obligated to report to work.

#### Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant had prior active disciplinary action including two Group II Written Notices. With the addition of a Group II Written Notice in this case, the Agency has presented sufficient evidence to support Grievant's removal.

#### Mitigation

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management ...."<sup>8</sup> Under the *Rules for Conducting Grievance Hearings*, "[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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

#### Other Issues

The parties did not present sufficient evidence for the Hearing Officer to resolve any other issues such as challenge to a performance evaluation.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for excessive tardiness is **upheld**. The Group II

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<sup>8</sup> Va. Code § 2.2-3005.

Written Notice for failure to report to work is **rescinded**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was 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 Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

or, send by fax to (804) 371-7401, or e-mail.

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

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax 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 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.<sup>9</sup>

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<sup>9</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer