

Issues: Group III Written Notice (continued unsatisfactory attendance), and Termination (due to accumulation); Hearing Date: 04/11/17; Decision Issued: 04/12/17; Agency: James Madison University; AHO: Carl Wilson Schmidt, Esq.; Case No. 10971; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10971

Hearing Date: April 11, 2017

Decision Issued: April 12, 2017

PROCEDURAL HISTORY

On January 20, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for unsatisfactory attendance/tardiness and failure to report without notice.

On February 10, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 27, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 11, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
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:

James Madison University employed Grievant as a Housekeeper. Grievant had prior active disciplinary action. On August 1, 2016, Grievant received a Group I Written Notice for unsatisfactory attendance/tardiness. Grievant received a Group II Written Notice on October 27, 2016 for unsatisfactory attendance/tardiness and failure to report to work without notice.

The Agency required its employees to notify their supervisors before the start of their shifts on those days the employees are unable to report to work as scheduled.

Grievant's Supervisor issued a memorandum dated October 21, 2016 informing Grievant that, "[g]oing forward any tardiness or unscheduled absences will result in a Group II. This will continue until it's decided that your attendance has improved."¹

Grievant was scheduled to work on January 10, 2017 and January 11, 2017. Her shift was scheduled to begin at 7:30 a.m. Grievant notified her Supervisor on January 10, 2017 at 9:10 a.m. that she would not be reporting to work that day. Grievant notified her Supervisor on January 11, 2017 at 9:50 a.m. that she would not be reporting to work that day.

¹ Agency Exhibit 4.

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.”² 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.”

“[P]oor attendance” is a Group I offense.³ On January 10, 2017 and January 11, 2017, Grievant did not report to work as scheduled. She was expected to call her supervisor prior to the beginning of her shift to notify the Agency she would not be reporting to work.⁴ The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant has prior disciplinary action for unsatisfactory attendance. Accordingly, the Group I Written Notice is elevated to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency’s decision to remove Grievant must be upheld.

The Agency argued that Grievant should receive a Group III Written Notice. The Agency has not met this burden of proof for several reasons. First, unsatisfactory attendance is a Group I offense. A repeated Group I offense can be elevated to a Group II Written Notice, but it may not be elevated to a Group III Written Notice. Second, failure to follow policy is a Group II offense. The Agency asserted that Grievant violated its policy requiring her to notify her supervisor between 7:15 a.m. and 7:30 a.m. that she would not be reporting to work. The Agency did not present this policy to the Hearing Officer and, thus, there is no basis for the Hearing Officer to verify the Agency’s interpretation of its policy.⁵ The Hearing Officer cannot conclude that Grievant violated the Agency’s policy. Even if the Hearing Officer were to find that Grievant violated the Agency’s written policy, a Group II offense can only be elevated to

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ Attachment A, DHRM Policy 1.60.

⁴ This is consistent with DHRM Policy 1.25, Hours of Work.

⁵ In addition, the Hearing Officer cannot conclude what constitutes “proper notice” in order to determine whether Grievant failed to report to work without proper notice.

a Group III Written Notice under extreme circumstances. Such circumstances do not exist in this case.

Grievant asserted that her absences were protected under her claim for family medical leave. Grievant did not testify and did not present sufficient evidence to explain why she was absent and failed to properly notify the Agency on January 10, 2017 and January 11, 2017.

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”⁶ 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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. 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 14th St., 12th Floor

⁶ Va. Code § 2.2-3005.

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 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 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.⁷

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.