

Issues: Group I Written Notice (unsatisfactory performance and tardiness), and Group II Written Notice (unsatisfactory performance and tardiness); Hearing Date: 07/12/17; Decision Issued: 07/13/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11006, 11007; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11006 / 11007

Hearing Date: July 12, 2017

Decision Issued: July 13, 2017

PROCEDURAL HISTORY

On December 20, 2016, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance/tardiness. On February 14, 2017, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory attendance/tardiness.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On May 1, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 12, 2017, a hearing was held at the Agency's office. Grievant was notified of the hearing date but did not appear at the hearing.

APPEARANCES

Agency Representative
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 Behavioral Health and Developmental Services employs Grievant as a Direct Support Professional at one of its facilities. She has been employed by the Agency for approximately five years. No evidence of prior active disciplinary action was introduced during the hearing.

If Grievant was absent from or late to work, the Agency would not count these events as unplanned absences if Grievant presented the Agency with notes from medical providers excusing her absences or tardiness.

Grievant was absent from work without excuse on:

January 21, 2016
February 26, 2016
April 14, 2016
July 13, 2016
August 26, 2016
November 10, 2016
December 20, 2016

Grievant was tardy without excuse on:

January 7, 2016
January 10, 2016

April 18, 2016
May 16, 2016
June 6, 2016
August 12, 2016
November 9, 2016

Grievant was also absent from work without excuse on December 19, 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.”¹ 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.”

Policy 4040 governs Employee Attendance and Punctuality. The Agency’s Policy 4040 describes Unplanned Absences as:

Each time an employee is absent from work without a signed/approved leave slip will be documented as one (1) unplanned absence. Each tardy or unapproved early departure will be recorded as one-half (1/2) an unplanned absence.

Corrective Action under Policy 4040 is:

Written warning upon eight (8) unplanned absences within the 12 month rolling period. Will result in a Group I Written Notice.

Written warning upon nine (9) unplanned absences within the 12 month rolling period. Will result in a Group II Written Notice.

Group I Written Notice

As of December 10, 2016, Grievant accumulated 10.5 unplanned absences thereby justifying the issuance of a Group I Written Notice.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Group II Written Notice

Grievant accumulated an additional unplanned absence for a total of 11.5 unplanned absences during the 12 month rolling period. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant did not attend the hearing and did not present any defenses to the Agency's evidence.

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"² 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 I Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

² Va. Code § 2.2-3005.

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]

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.