

Issue: Group II Written Notice (failure to work overtime); Hearing Date: 07/27/17;
Decision Issued: 07/28/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 11024; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11024

Hearing Date: July 27, 2017

Decision Issued: July 28, 2017

PROCEDURAL HISTORY

On February 28, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to work overtime.

On March 22, 2017, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On May 30, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 27, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
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:

The Department of Behavioral Health and Developmental Services employs Grievant as a Direct Service Professional at one of its facilities. Grievant had prior active disciplinary action. She received a Group I Written Notice on December 23, 2016 for unsatisfactory attendance.

The Facility operates on a 24 hour basis with three employee shifts. It must have adequate staffing to provide services to individuals residing at the Facility. If a shift is expected to be understaffed, the Agency will compel an employee who is working at the time to continue working beyond his or her regular shift. The Agency refers to this as Emergency Overtime. An employee working Emergency Overtime may work some or all of the subsequent shift up to 16 hours. The Agency selects employees for Emergency Overtime on a rotating basis.

On February 18, 2016, Grievant received approval from the Agency to take Intermittent Leave up to 3 times per month, 1 day per episode. The approval was for the period beginning February 17, 2016 and ending on February 16, 2017. Grievant obtained a Certification of Health Care Provider for Employee's Serious Health stating, in part:

3. *** Identify the job functions the employee is unable to perform: Mandatory overtime challenges patient's coping [mechanisms].

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave

Patient suffers from clinical depression & anxiety. When over-tired or significantly stressed she experiences exacerbation of symptoms which compromises her ability to safely and effectively function. Symptoms include crying, agitation, difficulty focusing, increases heart rate & breathing rate, etc.¹

Grievant worked the first shift on February 2, 2017. She was informed during the shift that she was obligated to work Emergency Overtime and would have to continue working into the second shift. Once she learned she was obligated to work an additional shift, she notified the Supervisor that she was unable to work the second shift because she was taking FMLA leave. She had not claimed intermittent leave on any prior occasion in February 2017. The Agency concluded Grievant had declined to work Emergency Overtime and initiated disciplinary action.

CONCLUSIONS OF POLICY

A State agency may not take disciplinary action against an employee for taking family medical leave.

Under the FMLA, an employee may take leave “on an intermittent basis or work a reduced schedule,” so long as leave taken is “medically necessary”² and does not exceed 480 hours (i.e., 12 work weeks).³ “A reduced leave schedule is a leave schedule that reduces an employee’s usual number of working hours per workweek, or hours per workday,” while intermittent leave is “taken in separate blocks of time due to a single qualifying reason.”⁴

The United States Department of Labor’s Wage and Hour Division, which is tasked with enforcement of the FMLA,⁵ has a “Frequently Asked Questions” page on its website that states:

(Q) My medical condition limits me to a 40 hour workweek but my employer has assigned me to work eight hours of overtime in a week. Can I take FMLA leave for the overtime?

Yes. Employees with proper medical certifications may use FMLA leave in lieu of working required overtime hours. The regulations clarify that the hours that an employee would have been required to work but for the taking of FMLA leave can be counted against the employee’s FMLA

¹ Agency Exhibit 4.

² 29 U.S.C. § 2612(b)(1).

³ DHRM Policy 4.20, *Family and Medical Leave*; 29 U.S.C. § 2612(b)(1).

⁴ 29 C.F.R. § 825.202(a).

⁵ See 29 C.F.R. § 825.401(a).

entitlement. Employers must select employees for required overtime in a manner that does not discriminate against workers who need to use FMLA leave.

On February 2, 2017, Grievant informed the Agency she was taking intermittent family medical leave and would be unable to work Emergency Overtime. The Agency disciplined Grievant for refusing to work Emergency Overtime even though she was authorized to take FMLA leave. The Agency's action was contrary to State policy and federal law and must be reversed.

The Agency alleged that Grievant's use of FMLA leave was not medically necessary on February 2, 2017 and that she simply did not wish to work overtime. The Agency pointed out that Grievant did not complain of any symptoms such as crying, agitation, difficulty focusing and increased heart and breathing rates.

Grievant testified that she did not take intermittent leave as a pretext to avoid working overtime. Her testimony was credible. She was not obligated to experience symptoms before taking leave and she was not obligated to disclose any symptoms to other employees. Grievant believed taking intermittent leave was medically necessary and the Agency has not presented any credible evidence to establish any contrary conclusion.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

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

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.