

Issues: Group II Written Notice (unsatisfactory attendance and excessive tardiness), and Termination (due to accumulation); Hearing Date: 06/22/17; Decision Issued: 07/13/17; Agency: DSS; AHO: James M. Mansfield, Esq.; Case No. 11027; Outcome: No Relief - Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 11027

Hearing Date: June 22, 2017
Decision Issued: July 13, 2017

PROCEDURAL HISTORY

Grievant was a Support Enforcement Specialist for the Virginia Department of Social Services. Grievant began state employment in March 2002. It was alleged by the Agency that Grievant had an ongoing pattern of unsatisfactory attendance with habitual tardiness. Grievant's performance while at work was not an issue. Grievant received a Group I Written Notice on October 1, 2015; a Group II Written Notice on February 2, 2016; and a Group II Written Notice on August 12, 2016 regarding unsatisfactory attendance/excessive tardiness. She was also given a notice of Improvement Needed Plan on August 12, 2016. Despite these actions, Grievant continued to be tardy. On April 20, 2017 Grievant was charged with a third Group II Written Notice for excessive tardiness on April 6, 2017. The Written Notice terminated Grievant's employment with the Agency effective April 20, 2017.

In response to the Notice of Intent, Grievant stated that traffic and road construction was a reason for her late arrivals. She also stated she did not agree with the arrival times listed. Grievant admits she has been late, but when she is at work she gives her eight (8) hours of work; her work does not suffer when she is absent or late; and she completes her worklist, mail and reports. Grievant also stated she feels this notice came from retaliation based on her contact reports with her supervisor's District Manager. A pre-hearing conference was held on May 24, 2017, and a hearing in the matter was scheduled and conducted on June 22, 2017.

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constitutes misconduct?
3. Whether the Agency's discipline was consistent with law and policy, and was properly characterized as a Group II offense subject of termination?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; and evidence that is more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to any disciplinary action by the Agency.

HEARING

The following appeared at hearing held at the Agency's Facility on June 22, 2017:

Grievant
Agency Party Designee, Grievant's Field Supervisor
Agency, District Manager
Agency Attorney
Hearing Officer

The Agency's exhibits were admitted by agreement of the Parties. Grievant offered no exhibits and, other than herself, presented no witness on her behalf.

FINDINGS OF FACT

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

1. The evidence introduced by the Agency, without objection, was that on October 1, 2015, Grievant was issued a Group I Written Notice for not adhering to her work schedule; being excessively tardy to work; and taking unscheduled leave. (Agency Exhibit No. 7). On February 2, 2016, Grievant was issued a Group II Written Notice for "unsatisfactory attendance/excessive tardiness" as well as taking unscheduled leave which "negatively affects the work within the division." (Agency Exhibit No. 8). Again, on August 12, 2016, after verbal counseling and "Notice of Improvement Needed" Grievant was issued another Group II Written Notice for the same infractions and the same reasons. (Agency Exhibit No. 9).

On April 20, 2017, Grievant was issued a third Group II Written Notice for unsatisfactory attendance which negatively affects the work within her Unit, and that prior Written Notices did not result in significant improvement of Grievant's attendance/tardiness issues. (Agency Exhibit No. 1). As a result, Grievant was terminated from her employment with the Agency.

Grievant testified on her own behalf, and acknowledged that she received the Group Notices in question; that she had been late to work on a regular basis, but that she made up any time missed by working through lunch and working late; that she was late to work due to traffic, weather and family matters; and that her termination was in retaliation for contacting the Agency's District Manager.

2. The Agency called two witnesses, the Grievant's Field Supervisor and the District Manager. Both testified and corroborated Grievant's record and testified in support of the Agency's actions.
3. Grievant had an opportunity to cross examine the Agency's witnesses.
4. The Agency's witnesses were credible and the Grievant offered no evidence to contradict their testimony.
5. The Agency's actions in finding a Group II offence were justified and supported by the evidence.
6. There was no evidence of mitigating circumstances, medical or otherwise, to excuse Grievant's behavior.

CONCLUSIONS OF POLICY

Pursuant to the Agency's Policy Resolution 1.60: 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." 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."

DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds that the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action and termination is **UPHELD**.

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 Street, 12th 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 14th Street, 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 days 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.

[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/ James M. Mansfield
James M. Mansfield

copies e-mailed to: Grievant
Agency Attorney
EDR