

Issue: Group III Written Notice with termination (excessive absenteeism);
Hearing Date: December 20, 2001; Decision Date: December 21, 2001;
Agency: Department of Mental Health, Mental Retardation and Substance
Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5337



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5337

Hearing Date: December 20, 2001
Decision Issued: December 21, 2001

APPEARANCES

Grievant
Agency Representative
Legal Representative for Agency
One witness for Agency

ISSUES

Was the grievant's absence in September and October 2001 subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on October 18, 2001 for excessive absenteeism. The grievant was discharged

from employment on the same date. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as “agency”) has employed grievant as a food service employee since June 2000. When hired, her supervisor gave her a detailed orientation including the expectations for attendance.¹ In her second month of employment, she attended a more formal orientation training session that further explained the attendance policy.² During her initial six-month probation, grievant performed her job well and had good attendance.

However, beginning in February 2001, grievant incurred unplanned and unexcused absences. She was verbally counseled on February 24, 2001, March 6, 2001, April 23, 2001, August 8, 2001 and August 13, 2001.³ On August 20, 2001, grievant submitted a written request for a 30-day leave of absence to begin on August 21, 2001. The request was approved and grievant took the 30-day leave. She had found another job in the private sector and decided to try it out during her leave of absence. If the job didn't work out, grievant planned to return to work for the agency.

Grievant was scheduled to return to work on September 21, 2001. On that date she called her supervisor at the agency, said that she was resigning and that she would come in on September 27, 2001 to submit a written resignation. The grievant did not report to work or call in on September 27, 28, 29, or October 1, 2001. By October 2, 2001, grievant had decided to quit her job in the private sector and want to return to work with the agency. On October 2, 2001, she called her supervisor and said she wanted to return to work. The supervisor could not grant such permission and referred grievant to the assistant Food Service Director. He advised grievant to come in that afternoon.

When grievant arrived, she was told that she could start working but that the agency was evaluating what disciplinary action should be given for her unexcused absence since September 21, 2001. Grievant signed a statement acknowledging that she might receive disciplinary action up to and including a Group III Written Notice.⁴ Following this, grievant started work in the afternoon of October 2, 2001. The Food Service Director evaluated the matter and concluded that grievant should be discharged because of her unexcused absence and because of the multiple verbal counselings she had received for absenteeism. He forwarded his recommendation in writing to the Facility Director on October

¹ Exhibit 1. *Supervisor Check List*, signed by grievant on June 26, 2000.

² Exhibit 2. *Grievant's Training Record*.

³ Exhibits 3-7. Verbal counseling records.

⁴ Exhibit 9.

10, 2001.⁵ The Director approved the discharge; grievant was given a Group III Written Notice and her employment was terminated on October 17, 2001.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁶

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training⁷ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department*

⁵ Exhibit 10. *Incident Summary*, signed October 10, 2001.

⁶ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

⁷ Now known as the Department of Human Resource Management (DHRM).

of Personnel and Training Manual Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first offense normally should warrant removal [from employment].⁸ One example of a Group III offense is an absence in excess of three days without proper authorization or a satisfactory reason.⁹

The agency has shown that grievant developed a significant absenteeism problem and that she had received repeated counseling. Notwithstanding this problem, the agency allowed her to take a lengthy leave of absence on short notice. Grievant failed to return as scheduled and instead notified the agency that she was resigning. When she failed to come in on the date she had promised, the agency reasonably believed that she had abandoned her position. Then, when grievant asked to return to work, the agency allowed her to do so, primarily for the “due process” purpose of affording grievant time to present any evidence as to why she shouldn’t be disciplined. After due consideration, the agency concluded that grievant should be discharged and did take the necessary disciplinary action. The agency has demonstrated, by a preponderance of the evidence, that the grievant was absent in excess of three days without proper authorization or satisfactory reason. Moreover, grievant candidly acknowledged during the hearing that she knew she had missed too much work and agreed that she deserved to be discharged from employment.

During the hearing, grievant maintained that she does not disagree with the agency’s decision to discharge her. She wanted a hearing solely to find out why, if she deserved to be fired, the agency allowed her to return to work from October 2 through 17, 2001. The agency’s response was that it wanted to allow grievant an opportunity for due process. Although no formal due process meeting was actually conducted, grievant had ample opportunity to present her views to the agency. In this case, this aspect of due process was moot because grievant readily acknowledged her absenteeism problem and agreed with the agency’s decision to discharge her.

What actually dismayed grievant was the fact that she quit her job in the private sector after being told by the agency on October 2, 2001 that she could return to work. If she had known that she might be fired, she might not have quit her other job. However, the grievant had not disclosed her other employment to the agency and the agency was not aware that grievant was using her leave of absence to “try on another job.” In effect, grievant was attempting to have the best of two situations.

In conclusion, the agency has shown that grievant’s prolonged unauthorized absence constituted a Group III offense and warranted discharge. Grievant has not demonstrated sufficiently mitigating circumstances to warrant any change in the agency’s disciplinary action.

⁸ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁹ Exhibit 15. DMHMRSAS Employee Handbook, *Standards of Conduct and Client Abuse*.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on October 18, 2001 and the discharge from employment are AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer