Issue: Group I Written Notice with 30-day suspension (unsatisfactory attendance); Hearing Date: April 12, 2002; Decision Date: April 15, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: David J. Latham, Esquire; Case Number: 5415

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5415

Hearing Date: April 12, 2002
Decision Issued: April 15, 2002

APPEARANCES

Grievant
Agency Representative
Legal Representative for Agency
Three witnesses for Agency

ISSUES

Were the grievant's absences from March 1, 2001 through January 18, 2002 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

Grievant filed a timely appeal from a Group I Written Notice issued on January 25, 2002 for unsatisfactory attendance.[1] She was also suspended for 30 workdays as part of the disciplinary action. 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 forensic mental health technician for over four years. On three previous occasions, grievant has been disciplined with Group I Written Notices for unsatisfactory attendance; all three Notices are still active.[2]

The agency implemented an attendance policy in 1999 to address, among other things, call-ins, unanticipated absences and problem patterns of absenteeism. Section III of the policy states, in pertinent part:

> C. **Unsatisfactory Attendance:** When a person exceeds 8 occurrences within a twelve (12) consecutive month period, or when a person has established a pattern of absences.
>
> H. **Disciplinary Action:** Once a person exceeds 8 occurrences within any twelve (12) consecutive month period, he/she should normally receive disciplinary action in the form of a Group I Written Notice for "Unsatisfactory Attendance."[3]

Grievant does not dispute the agency's record of her absences during the period at issue herein. She incurred 15 call-ins for unscheduled absences and arrived late on another occasion during the period from March 1, 2001 through January 18, 2002. Grievant has high blood pressure and one of her children has bronchitis. She is a single parent. The agency issued a Group I Written Notice and 30 days suspension on January 25, 2002.[4]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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

[1] Exhibit 2. Grievance Form A, filed February 11, 2002.
[2] Exhibit 3. Group I Written Notices, issued on February 8, 2000, March 2, 2000 & May 19, 2000.
[3] Exhibit 5. Human Resources Policy Number: HR-05b, *Attendance/Call-ins*, Date of Origination September 1, 1999.
[4] Exhibit 1. Written Notice, issued January 25, 2002.

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 § 2.2-3000 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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[5]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[6] 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.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses are the least severe and include behavior such as unsatisfactory attendance.[7]

The grievant's absence record is undisputed. The number of her absences (15) exceeds the policy guideline for issuance of disciplinary action. During the second step of the grievance process, the facility director consolidated certain absences into single occurrences in an effort to give consideration to grievant's situation.[8] Nonetheless, even after this consolidation process, the

[5] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.
[6] Now known as the Department of Human Resource Management (DHRM).
[7] Exhibit 4. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[8] Exhibit 2. Second Step Response, February 19, 2002.

remaining number of occurrences (11.5) still exceeds the policy guideline. Therefore, the agency has demonstrated, by a preponderance of the evidence, that grievant's attendance has been unsatisfactory and warrants issuance of disciplinary action pursuant to Policy HR-05b.

Grievant argued that other wards apply the attendance policy differently and that other employees are not disciplined equally for the same number of absences. However, grievant did not proffer either witnesses or documentation to support her contention. Grievant's mere allegation, without some proof, is insufficient to overcome the agency's assertion that the policy is applied uniformly for all employees.

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

> While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:
>
> a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
> b. an employee's long service or otherwise satisfactory work performance.[9]

Normally, a fourth active Group I Written Notice results in termination of employment. The agency has already applied mitigation by reducing grievant's discipline from termination of employment to a 30-day suspension. Grievant nonetheless argues that this discipline is harsh because she has no control over when she or her children become ill. The hearing officer empathizes with grievant. It is understandable that grievant, as a single working parent, considers a 30-day suspension harsh. However, when one works for an employer, one implicitly agrees to work subject to the conditions and policies of that employer. In this case, the agency has an unambiguous attendance policy that requires specified discipline when a certain number of absences occur. Grievant exceeded the limit and is therefore subject to the discipline required by the policy.

DECISION

The decision of the agency is hereby affirmed.

[9] Exhibit 4. Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

The Group I Written Notice issued on January 25, 2002 and the 30-day suspension 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.

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David J. Latham, Esq.
Hearing Officer