

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: August 16, 2002; Decision Date: August 20, 2002; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5495



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5495**

Hearing Date: August 16, 2002  
Decision Issued: August 20, 2002

**PROCEDURAL HISTORY**

On May 5, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

*Unsatisfactory Attendance: An excess of eight occurrences within a twelve-month period will result in the issuance of a Group I Written Notice. An employee is eligible for an additional Group I Written Notice for "Unsatisfactory Attendance" for each additional occurrence accumulated within a revolving twelve-month period. You were issued a Group I Written notice on 1/15/02 for occurrences accumulated between April 2001 and December 2001. Since that time, you called in on 12/20/01, 12/28/01, 1/24/02, 1/30/02, 2/5/02, 3/5/02, 3/27/02 and 4/1/02. You dropped 1.5 occurrences included in the Written Notice issued 1/15/02; however, you have accumulated 7.5 additional occurrences to a total of 17.5 occurrences, and are subject to disciplinary action.*

On May 8, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 25, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 16, 2002, a hearing was held at the Agency's regional office.



## **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
RNC/AOD  
HR Director  
Facility Director  
RNCA

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action.

## **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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Registered Nurse. She has been employed for over four years. Grievant has been having problems with depression since 2000. She has had to call in and miss work on several occasions relating to her depression. Because she feared a lack of confidentiality among some of her co-workers, she reported for some of her absences that they were due to reasons other than illness. When an employee unexpectedly calls in to the Agency to inform the Agency that the employee cannot work as scheduled, the Agency refers to this as an occurrence. Under certain circumstances, if an employee is over one hour late or departs early, the occurrence will count only as a half of an occurrence.

On January 15, 2002, Grievant was issued a Group I Written Notice for excessive occurrences accumulating between April 2001 and December 2001. Following the written notice, she called in and was absent on 12/20/01, 12/28/01, 1/24/02, 1/30/02, 2/5/02, 3/5/02, 3/27/02 and 4/1/02. These additional absences meant Grievant had accumulated 19.5 occurrences in the prior twelve month period.

During the step resolution process, Grievant presented letters from her doctor indicating that Grievant was under the doctor's care for treatment of depression for the period August 13-21, 2001 and for stress and headache for the period December 12-16, 2001.<sup>1</sup> The Facility Director reduced Grievant's occurrences from 19.5 to 17.5 based on those letters.

None of Grievant's absences were covered under the Family Medical Leave Act or the Americans with Disabilities Act.

### CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).<sup>2</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

The Facility provides continuous services to its residents. Appropriate staffing is fundamental to the Facility's ability to function within a heavily regulated environment. Under DHRM Policy 1.60, "Unsatisfactory attendance or excessive tardiness" is a Group I offense.<sup>3</sup> The Agency's facility has established a separate policy, HR-05, to more precisely define when an employee's attendance is unsatisfactory. Underlying this policy is a philosophy of distinguishing between planned and unplanned absences. The Agency can control planned absences and adjust its staffing to account for planned absences. Unplanned absences, however, can create an imbalance in staff coverage and strain Facility operations.

Facility Policy HR-05 defines unsatisfactory attendance as, "When a person exceeds 8 occurrences<sup>4</sup> within a twelve (12) consecutive month period<sup>5</sup>, or when a person has established a pattern<sup>6</sup> of absences."<sup>7</sup> An occurrence is defined as:

---

<sup>1</sup> Grievant submitted documentation excusing her from employment for absences from 3/27/02 to 3/28/02 and 4/25/02. Even if these absences were mitigated, Grievant would remain with 15.5 occurrences.

<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>3</sup> DHRM § 1.60(V)(b)(1)(a).

<sup>4</sup> An occurrence can last up to three days. If an employee is permitted eight occurrences, it is conceivable that the employee could have up to 24 days of unplanned absences without receiving any disciplinary action.

An unscheduled absence from work that does not meet the criteria defining a scheduled absence, to include leaving work early (citing reasons that can not reasonably be denied by supervision); or being more than 60 minutes late in reporting to work; or calling-in to request time off without having requested the leave before the end of the last workday preceding the planned day of absence.

A telephone request for annual, compensatory, or personal leave (as explained in IV.B.2 in this policy) will not count as an occurrence unless it is for circumstances about which a supervisor has little or no choice except to approve. Additionally, a telephone request will not be counted as an occurrence when associated with a known medical condition, for which the employee is being treated, *and* when the anticipated illness is directly associated with a previously scheduled doctor's visit and/or treatment for that condition.

Under DHRM 1.60, what constitutes unsatisfactory attendance is largely a matter of judgment. Facility managers have attempted to minimize the subjective nature of when attendance may become unsatisfactory by establishing a "no-fault" system of counting occurrences, and once a threshold is met, disciplinary action is taken subject to mitigation.<sup>8</sup> Once an employee exceeds 8 occurrences within any 12 consecutive month period, he or she "should normally receive disciplinary action in the form of a Group I Written Notice for 'Unsatisfactory Attendance.'"<sup>9</sup>

Grievant had 19.5 occurrences in a 12 consecutive month period. She presented sufficient medical documentation during the step process for Facility managers to mitigate two of the occurrences. Grievant remained with 17.5 occurrences. Since the number of occurrences exceeded eight, the Facility appropriately issued her a Group I Written Notice.

Grievant contends that she suffers from depression and cannot always predict when she will be unable to work. She cannot appropriately plan her sick leave because she cannot predict her depression. She did not offer any additional documentation

---

<sup>5</sup> The 12-month period is a "moving window." Each occurrence remains active for 12 months and lapses at the close of business for the person's assigned shift on the proceeding day of the 12-month period.

<sup>6</sup> A pattern is defined as, "A repeating frequency that is predictable (e.g. on the past 3 absence or 'off' days, employee has called in to take an extra day.)"

<sup>7</sup> HR-05(III)(C).

<sup>8</sup> Mitigating circumstances occur when, "An event or absence that deserves consideration due to the nature of the absence." HR-05(III)(F).

<sup>9</sup> HR-05(IV)(H).

suggesting that some of her occurrences should be mitigated. If the Hearing Officer were to mitigate the disciplinary action, the effect would be to reverse the Facility's policy. No policy is perfect; but HR-05 appears designed to provide some objective basis for measuring what would otherwise be a subjective judgment of when attendance is unsatisfactory. The Hearing Officer will not mitigate the disciplinary action against Grievant.

The Hearing Officer understands the dilemma facing Grievant. She is experiencing difficulties beyond her control and suffering the consequences. When an individual breaks a limb or suffers a physical injury, the illness is obvious and recovery time often predictable. When an individual suffers from depression, however, the illness is not obvious to others and the recovery period can be lengthy and unpredictable. Grievant is doing the best she can in the face of difficult circumstances.

## DECISION

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

## 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 four 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.

4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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.

---

Carl Wilson Schmidt, Esq.  
Hearing Officer