

Issue: Group I Written Notice with termination (unsatisfactory attendance); Hearing Date: 10/03/02; Decision Date: 10/09/02; Agency: Radford University; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5532; **Administrative Review: EDR Ruling Request received 10/17/02; EDR Ruling date: 12/20/02; Outcome: HO neither abused discretion nor exceeded authority**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5532

Hearing Date: October 3, 2002
Decision Issued: October 9, 2002

PROCEDURAL HISTORY

On August 13, 2002, Grievant was issued a Group I Written Notice of disciplinary action with removal for:

Unsatisfactory attendance: Employee continues to maintain an unacceptable attendance record. Over the 23 workdays – [Grievant] missed 16 complete shifts and part of four other shifts.

On August 14, 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 September 10, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 3, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Legal Assistant Advocate

Grievant's Aunt

ISSUE

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

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:

Radford University employed Grievant as a Housekeeping Lead Worker until her removal on August 14, 2002. Her shift was from 11 p.m. until 7:30 a.m. When Grievant was working, her performance was good. For example, she provided "excellent floor care maintenance for assigned areas"¹

On April 24, 2001, Grievant received a letter of counseling regarding excessive tardiness. The letter states, in relevant part, "Since January 2, through April 18, 2001, you have reported to work late twenty-nine (29) times. This is a rate of 46.8% of the time. *** If you continue to report later than scheduled for the start of your work shift, further disciplinary action will be administered under the Standards of Conduct."

On March 13, 2002, Grievant was issued a Group I Written Notice for "Unsatisfactory attendance: employee on extended leave without pay (LWOP) status (DOCKED TIME)."² On May 28, 2002, Grievant received a Group I Written Notice for "Unsatisfactory attendance: employee on extended leave without pay (LWOP) status (DOCKED TIME)."³ On July 9, 2002, Grievant received a Group I Written Notice for

¹ Agency Exhibit 3.

² Agency Exhibit 6.

³ Agency Exhibit 7.

“Unsatisfactory attendance: employee charged with leave without pay (LWOP – Docked) for 14 days; 12 work days and 2 holidays.”⁴

For the 23 workdays prior to her removal, Grievant missed 16 complete shifts and part of four shifts. On each occasion, she properly notified her supervisor that she would be absent. Because she lacked sufficient leave balances, Grievant went on to leave without pay status. She began the year with zero annual and sick leave balances.⁵

Grievant receives psychiatric care with “Most of her stress appears to be job-related.”⁶ She was unable to work because of the numerous personal burdens placed on her. Her nephew had emergency surgery requiring her to stay with him in the hospital. She also began caring for her 15 year-old niece.

CONCLUSIONS OF LAW AND POLICY

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).⁷ 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).

“Unsatisfactory attendance” is a Group I offense.⁸ Missing 16 complete shifts and part of four shifts during a 23 workday period is unsatisfactory attendance. An agency’s operations are materially affected when an employee misses all or part of 23 workdays. In essence, the agency has had its maximum employment level reduced by one position. The University’s issuance of a Group I Written Notice to Grievant must be upheld.

“A fourth active Written Notice for a Group I offense normally should result in discharge, except that mitigating circumstances may justify a transfer or demotion along

⁴ Agency Exhibit 8.

⁵ Agency Exhibit 4.

⁶ Agency Exhibit 9.

⁷ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ DHRM § 1.60(V)(B)(1)(a).

with a disciplinary salary action ...”⁹ Grievant’s fourth active Group I Written Notice was issued on August 13, 2002 thereby justifying her removal effective August 14, 2002.

Grievant contends the University retaliated against her because she filed a grievance. She points out that she was terminated the day before she was to appear in court. No credible evidence was presented to support her allegation of retaliation. Grievant’s attendance has been a long-standing concern of the University. Its actions were not motivated by retaliation.

Grievant contends some of her co-workers made racial remarks that offended her and made it difficult for her to work at the University. The evidence showed that after Grievant informed the Manager of the remarks, the University investigated the matter and took action to have the remarks stopped and have employees reprimanded.

Grievant contends the University’s human resource staff should have informed her of the possibility of taking advantage of the Family and Medical Leave Act. In hindsight, it may be the case that the human resource staff would have done a better job of assisting Grievant by advising her of the FMLA. No evidence or argument was presented suggesting the University has an affirmative duty to recommend employees take advantage of the FMLA. The University is obligated to post notices regarding FMLA, but no evidence was presented suggesting the University failed to do so.

Grievant was unable to work because of the numerous personal burdens she was enduring. Given the longstanding pattern of absences, these burdens are not sufficient to mitigate the disciplinary action against her. Her inability to continue working is understandable. The University’s desire to have a dependable employee contributing to its workforce is also understandable. There is no basis to reverse the University’s discipline.

DECISION

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

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

⁹ DHRM § 1.60(VII)(D)(1)(b)(2).

2. 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.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.¹⁰

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.