

Issue: Group I Written Notice with termination (excessive absenteeism);  
Hearing Date: 12/16/02; Decision Date: 12/17/02; Agency: DMHMRSAS;  
AHO: David J. Latham, Esq.; Case No. 5593



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5593

Hearing Date: December 16, 2002  
Decision Issued: December 17, 2002

PROCEDURAL ISSUE

During a pre-hearing telephonic conference on December 3, 2002, the hearing officer advised grievant of the date, time and location of the hearing. Grievant was also advised to submit in advance documentation and a list of witnesses (if any) to be called at the hearing. A notice of hearing containing the relevant dates and instructions was mailed to grievant on November 22, 2002. Grievant did not submit either documents or a witness list prior to the hearing. Grievant failed to appear for the hearing on December 16, 2002.

APPEARANCES

Clinical Nurse Specialist  
Representative for Agency  
One witness for Agency

## ISSUES

Was the grievant's absenteeism 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 for excessive absenteeism due to unplanned leave.<sup>1</sup> The grievant's employment was terminated on the effective date of the Written Notice because this was the fifth active Group I Written Notice. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup>

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as "agency") has employed grievant as a direct service associate for over two years.

The agency's attendance policy addresses unscheduled absences and states, in pertinent part:

**Unscheduled absence.** A period of time away from work or job location when, as required under the definition for scheduled absence, **written approval has not been received.** An unscheduled absence, if approved after its occurrence is charged to the appropriate leave balances. Unscheduled absences, regardless of cause, are used to determine unsatisfactory attendance performance.<sup>3</sup>

The facility has supplemented the above policy with its own attendance policy that defines unacceptable attendance as an "accumulation of more than 64 hours of unplanned leave."<sup>4</sup> The policy further provides that a Group I Written Notice may be issued when the employee accumulates 65 hours of unplanned leave, and that additional Written Notices may be issued for additional accumulations of unplanned leave.

Grievant first incurred unsatisfactory attendance by January 2001 when she had accumulated 88 hours of unplanned leave; she was given a Group I Written Notice.<sup>5</sup> By December 2001, she had accumulated 168 hours of

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<sup>1</sup> Exhibit 8. Written Notice, issued September 16, 2002.

<sup>2</sup> Exhibit 9. Grievance Form A, filed October 15, 2002.

<sup>3</sup> Exhibit 1. Departmental Instruction No. 501(HRM)86, *Attendance Policy*, effective April 1, 1986.

<sup>4</sup> Exhibit 2. Facility Policy Statement HR 053-19, March 1, 2001.

<sup>5</sup> Exhibit 4. Written Notice, issued March 9, 2001.

unplanned leave and was given a second Group I Written Notice.<sup>6</sup> She continued to have unplanned absences and received a third Group I Written Notice in March 2002.<sup>7</sup> A fourth Group I Written Notice was issued to grievant when she accumulated 208 hours of unplanned leave.<sup>8</sup> The grievant has not filed grievances with regard to any of these four Written Notices; the 30-day time limit within which to appeal has expired. All four Written Notices remain active.

By August 31, 2002, the grievant had accumulated 232 hours of unplanned leave. The agency issued the fifth Group I Written Notice and terminated grievant's employment on September 16, 2002 pursuant to the Standards of Conduct.

The agency and facility apply the attendance policy equally to all employees. Some employees have been disciplined and at least one other employee at this facility has been dismissed for unsatisfactory attendance.

#### 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 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.

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<sup>6</sup> Exhibit 5. Written Notice, issued February 4, 2002.

<sup>7</sup> Exhibit 6. Written Notice, issued March 19, 2002.

<sup>8</sup> Exhibit 7. Written Notice, issued May 23, 2002.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>9</sup>

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<sup>10</sup> 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 types of offense.<sup>11</sup> One example of a Group I offense is unsatisfactory attendance. An accumulation of four Group I Written Notices normally results in discharge of the employee.

The agency has borne the burden of proof, by a preponderance of evidence, to demonstrate that grievant's attendance was unsatisfactory pursuant to agency and facility policy. Unsatisfactory attendance is a Group I offense.

Because a timekeeping records problem occurred in another building, grievant argues that she should not have been disciplined. Each building has a timekeeper who maintains attendance records for all employees working in that building. The timekeeper in grievant's building is experienced and has kept very accurate records for several years without any problem. A problem that occurred in another building did not affect grievant's attendance records. All employees in grievant's building have been treated consistently and equitably based on the accurate records maintained by her timekeeper.

Because grievant failed to appear at the hearing or otherwise present evidence on her own behalf, there are no circumstances in the record that would warrant mitigation. This Written Notice is the fifth active Group I Written Notice. Accordingly, termination of employment is an appropriate disciplinary action.

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<sup>9</sup> § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

<sup>10</sup> Now known as the Department of Human Resource Management (DHRM).

<sup>11</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

## DECISION

The decision of the agency is affirmed.

The Group I Written Notice and removal from employment issued on September 16, 2002 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

## 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.
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.

[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]

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David J. Latham, Esq.  
Hearing Officer