

Issue: Group I Written Notice (unsatisfactory attendance and excessive tardiness);
Hearing Date: 03/28/03; Decision Issued: 03/31/03; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 5668



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5668

Hearing Date: March 28, 2003
Decision Issued: March 31, 2003

PROCEDURAL HISTORY

On October 28, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

“Unsatisfactory attendance or excessive tardiness” On October 4, 2002, you reported to work late for the seventh time this year. You received a Group I Notice on July 18, 2001, for “Unsatisfactory Attendance or Excessive Tardiness.” This year you have missed 21 unscheduled days for medical/personal reasons and you were late for work on 7 other occasions. You have also been placed on Leave With-Out Pay on several occasions this year for a total of 38.80 hours due to insufficient leave. You are responsible to ensure that you have sufficient leave to cover expected and unexpected leave, as well as maintaining satisfactory attendance. After reviewing your personnel record I find that you have an active Group I and Group II Written Notices. Significant and immediate improvements must be made in your attendance. If immediate improvements are not made, further action may include removal from state service.

On November 12, 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 March 6, 2003, the Department of

Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 28, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Sergeant
Captain
Major
Corrections Officer

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for unsatisfactory attendance or excessive tardiness.

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 Corrections employs Grievant as a Corrections Officer. She received a Group I Written Notice on July 18, 2001 for unsatisfactory attendance or excessive tardiness. She received a Group II Written Notice on April 1, 2002 for failure to follow supervisor's instructions.

Corrections Officers at the Institution are scheduled to work 160 hours in a 28 day cycle. They work twelve shifts of 12 hours and two shifts of 8 hours. From January 1, 2002 to October 28, 2002, Grievant was placed on leave without pay status for 38.8 hours because she lacked sufficient accumulated leave. Due to medical or personal reasons, Grievant did not work on 21 days of the approximately 140 days she was

otherwise expected to work. She was tardy on seven occasions. An employee who is even one minute late for work is considered tardy. If an employee is tardy on five occasions during the year, the employee is given a written warning informing the employee that any further tardiness will result in disciplinary action. After Grievant was tardy for the fifth time, she was not given a written warning informing her of the possibility of disciplinary action.

Grievant's supervisor initially rated Grievant's overall performance as Below Contributor in Grievant's most recent annual evaluation. When the evaluation was brought to the Major's attention, he insisted that Grievant's rating be changed to Contributor because Agency managers could not present sufficient documentation of why Grievant was to be rated as Below Contributor.

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." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. 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." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

Grievant was issued a Group I Written Notice for two reasons – excess tardiness and unsatisfactory attendance. When more than one factual scenario gives rise to disciplinary action, the Hearing Officer must examine each scenario individually and together to determine if disciplinary action is warranted.

"[E]xcessive tardiness" is a Group I offense.¹ The evidence showed that before issuing a written notice for excessive tardiness, the Institution's practice and employee expectation was that after the fifth tardiness in a twelve month period, a supervisor would give an employee a written warning indicating that any additional tardiness would result in disciplinary action. Grievant was not given written warning prior to being issued a Group I Written Notice that an additional tardiness would result in disciplinary action. Thus, Grievant's tardiness does not form a basis for disciplinary action against her.

The Agency argues that Grievant knew or should have known that she had been tardy for seven times in the calendar year. This argument fails because when the Captain began supervising employees in July 2002, she indicated that she was "wiping the slate clean" regarding concerns of prior supervisors. Grievant interpreted this comment to mean that the Captain did not intend to give close scrutiny to tardiness determinations made by supervisors prior to the Captain. Grievant's interpretation of

¹ DOCPM § 5-10.15(B)(1).

the Captain's comments was incorrect but reasonable given the Captain's lack of specificity regarding what decisions of prior supervisors she would disregard. If Grievant had been given a written warning following her fifth tardiness, any ambiguity resulting from the Captain's statement could have been corrected. The absence of a written warning makes it inappropriate to discipline Grievant base on tardiness.

"[U]nsatisfactory attendance" is a Group I offense.² Over approximately nine months, Grievant missed 21 days of work due to medical or personal reasons. This represents approximately 15 percent of the total number of days she would have otherwise worked. She was placed on leave without pay status on several occasions for a total of 38.80 hours due to insufficient leave balances. Security positions in correctional institutions typically require continuous staffing.³ A corrections officer who is absent from work approximately 15 percent of the time is not adequately attending to the Agency's work schedule. Thus, a sufficient basis exists to support issuance of a Group I Written Notice to Grievant for unsatisfactory attendance.

Grievant contends she was absent due to illness or for personal reasons. The Agency has not challenged Grievant's reasons for being absent. Grievant argues she cannot control when she is ill and thus should not be disciplined for being unable to come to work. Although the Hearing Officer is sympathetic to Grievant's real and legitimate medical concerns, a showing of unsatisfactory attendance does not depend on whether or not the reasons for the absence were justified. In other words, an employee is not required to be "at fault" for being absent before the Agency may discipline an employee for having unsatisfactory attendance.

Grievant contends the Agency has retaliated against her for having previously filed a grievance.⁴ The evidence is insufficient to support this allegation. Grievant has not established any connection between engaging in the protected activity of filing a grievance and the disciplinary action or other adverse employment action against her. Grievant's evaluation could not serve as evidence of retaliation because it was changed to reflect the rating with which Grievant agreed.⁵ Grievant received a Notice of Improvement Needed/ Substandard Performance dated October 28, 2002. This Notice is appropriate and does not constitute retaliation.

² DOCPM § 5-10.15(B)(1).

³ DOCPM § 5-10.8(A) states, "Employees should report to work as scheduled."

⁴ During the step process, the Warden told Grievant "There's always the grievance procedure. I know you know how to use that." Grievant contends the Warden's statement reflected his retaliatory attitude toward her. Agencies should be careful not to demean or discourage exercise of an employee's right to file a grievance. The evidence presented, however, is not sufficient to support a claim of retaliation.

⁵ Grievant also objects to the Captain's statement of opinion that Grievant displays a negative attitude. Grievant has not presented any policy provision prohibiting such comments.

Grievant contends the Agency misapplied its compensatory leave, standards of conduct, leave reporting and overtime policies. No evidence was presented showing that the Agency failed to comply with these policies.

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

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.
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.⁶

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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