

Issue: Group I Written Notice (excessive absenteeism); Hearing Date:
04/08/03; Decision Issued: 04/10/03; Agency: Taxation; AHO: David J.
Latham, Esq.; Case No. 5674



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5674

Hearing Date: April 8, 2003
Decision Issued: April 10, 2003

APPEARANCES

Grievant
Executive Assistant
Representative for Agency
Three witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group I Written Notice issued for excessive absenteeism.¹ Following failure to resolve the grievance during the resolution process, the agency head qualified the grievance for a hearing.² The Department of Taxation (hereinafter referred to as “agency”) has employed the grievant in both wage and classified positions since 1995. She was most recently rehired as a classified employee in April 2000 and is a customer service representative.³ When she is at work, grievant is a good worker and one of the highest producers.

The Commonwealth’s Department of Human Resource Management (DHRM) has not promulgated a policy on the topic of attendance. The DHRM Standards of Conduct policy addresses attendance in a general fashion, emphasizing the need to arrange planned absences in advance with supervisors and report unexpected absences as promptly as possible.⁴ It is left to each state agency to formulate an attendance policy that is appropriate to the needs and requirements of that agency. Grievant’s Employee Work Profile includes the core responsibility of being at work on time. Part of the agency’s measure for this responsibility is that the employee should have no more than one unexcused absence per month.⁵ The agency includes in its definition of “unexcused absence” any absence that results in the use of Leave without Pay (LWOP).

Grievant’s attendance was acceptable when she worked as a wage employee from 1995 to 1997. However, after she became a classified employee, her absenteeism began to increase. In that year she was advised in writing that her “attendance needs to improve.”⁶ The following year, grievant was again advised in her performance evaluation that 1) she had multiple unplanned absences, 2) was frequently absent on either a Monday, Friday or after a holiday, and 3) she needed to improve her attendance.⁷ In the first half of 2001, grievant utilized a significant amount of personal leave, and then began requesting leave without pay during the second half of the year. From July through December 2001, she was absent for nearly 20 days on LWOP.⁸ In the first nine months of 2002, she was requested LWOP for 26 days, plus 13 days of LWOP pursuant to FMLA. Grievant also used her available annual leave and sick leave.

Grievant’s absenteeism is significantly worse than any employee in the agency. During the past year, she requested more than 236 hours of Leave

¹ Exhibit 2. Written Notice, issued October 30, 2002.

² Exhibit 1. Grievance Form A, filed November 25, 2002.

³ Exhibit 5. Grievant’s Employee Work Profile (EWP) work title, signed May 6, 2002.

⁴ Exhibit 3. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

⁵ Exhibit 5. *Ibid.*

⁶ Exhibit 5. Performance Evaluation, signed October 7, 1998.

⁷ Exhibit 5. Performance Evaluation, signed October 4, 1999. NOTE: A pattern of frequent absences immediately before or after weekends and holidays usually suggests that the employee is abusing the attendance policy.

⁸ Exhibit 4. Leave History for 2001.

without Pay, in addition to using annual leave, sick leave, personal leave, and 128 hours of leave taken under the Family and Medical Leave Act (FMLA).⁹ There are approximately 70 employees in grievant's department; only 10 had used LWOP and most had used only one or two days of such leave.

Grievant's manager counseled grievant about her excessive absenteeism on September 25, 2002 and informed her that the next unapproved absence requiring leave without pay would result in a Group I Written Notice.¹⁰ After grievant used 32 hours of LWOP from October 15-18, 2002, grievant's manager issued a Group I Written Notice to grievant.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹¹

⁹ Exhibit 7. Leave without pay statistics.

¹⁰ Exhibit 1. Memorandum from manager to grievant, September 25, 2002.

¹¹ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

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 Human Resource Management 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; one example of a Group I offense is unsatisfactory attendance.¹²

The agency has demonstrated, by a preponderance of evidence, that grievant has an abysmal attendance record. Her frequency of absenteeism exceeds that of any other employee by a significant margin. Accordingly, the undisputed evidence establishes that grievant has compiled a longstanding record of unsatisfactory attendance.

Grievant points out that between the date of her counseling and issuance of the Written Notice, the only absence she incurred was due to an unavoidable illness, which was supported by documentation from her physician. She therefore feels that she could not have avoided this absence. However, grievant could have avoided disciplinary action if she had not taken such an excessive amount of leave without pay over an extended period of time.

The Standards of Conduct policy does not require that counseling precede disciplinary action. Further, the policy does not preclude an agency from both counseling an employee, and subsequently issuing a disciplinary action for the same offense. It is true that the general practice of most supervisors is to first counsel an employee and, if improvement is not demonstrated, to discipline for a subsequent repetition of the same offense. However, when an offense is deemed sufficiently serious, the agency may elect to initially counsel an employee in order to end the behavior and then, after deliberation, issue discipline in order to emphasize the seriousness of the offense.

Grievant asserts that her attendance was "never addressed by anyone."¹³ However, the evidence reflects that grievant had been advised on her 1998 and 1999 performance evaluations that her attendance needed improvement. Nonetheless, it is true that no one addressed attendance with grievant during 2002 until the counseling memorandum of September 25, 2002.

Grievant used an extensive amount of leave without pay in September 2002 when her mother was hospitalized. While grievant's concern about her

¹² Exhibit 3. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹³ Exhibit 1. Attachment to grievance form.

mother's health is understandable, the reality is that grievant could do very little, if anything, for her mother at that time. Grievant's mother was under the care of hospital staff during her confinement. Grievant has not presented any evidence to show that she could not have worked during the majority of that time and visited her mother in the hospital outside of working hours.

It is apparent that the agency has allowed grievant extra latitude because she outperforms most of her coworkers on days when she is at work. However, if an employee is absent too often, the aggregate total of the employee's production might only be the same as, or less than, that of coworkers. Another important factor in the agency's assessment is scheduling. Managers who schedule workflow must know about absences in advance whenever possible. If an employee has frequent, unplanned absences, the scheduling of work is disrupted and prevents the department from fulfilling its mission. In this case, it is undisputed that 80-90 percent of grievant's absences have been unscheduled.

Grievant alleged that the agency failed to disclose the attendance policy but in fact, the grievant signed the EWP containing the policy in May 2002. She also alleged unfair and inconsistent application of the policy but has not provided any evidence of misapplication. To the contrary, the agency has allowed grievant to be absent far more frequently than any other employee. Most other state agencies would have taken disciplinary action much earlier than this agency did. Grievant also contended that the agency failed to consider mitigating circumstances but offered no evidence to support her contention. The agency acknowledged that it should have addressed grievant's absenteeism problem earlier. However, this in no way alters grievant's obligation and duty to be at work on a daily basis and to schedule absences in advance whenever possible.

The Commonwealth's policy on taking leave without pay states that an agency **may** grant unconditional leave without pay for personal purposes when the employee does not have or wish to use accrued leave to cover such absences.¹⁴ Thus, it is within the discretion of the agency either to grant or to deny leave without pay. To this point, grievant's agency has been generous in granting LWOP to grievant. However, the agency's largesse is not boundless. If the agency concludes that grievant's use of LWOP is becoming sufficiently frequent and extensive, it may deny grievant's requests. Then, if grievant has exhausted her other leave balances and fails to report to work, the agency may elect to remove her from employment.

The objective of taking disciplinary action under the Standards of Conduct is to identify employee behavior that is unacceptable and take appropriate corrective action in order to prevent a recurrence of the offensive behavior. In this case, grievant's absenteeism is unacceptable; a Group I Written Notice is the appropriate level of corrective action to address her behavior. If grievant

¹⁴ DHRM Policy 4.45, *Leave Without Pay – Conditional and Unconditional*, September 16, 1993.

responds by reducing her absenteeism to an acceptable level, the disciplinary action will be removed from her personnel file in due course.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued to the grievant on October 30, 2002 for unsatisfactory attendance is 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.
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.¹⁵ You must file a notice of appeal with the clerk of the circuit court in the

¹⁵ An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁶

[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]

David J. Latham, Esq.
Hearing Officer

that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.