

Issue: Group I Written Notice and Termination (unsatisfactory attendance, accumulation of Written Notices); Hearing Date: 04/28/03; Decision Issued: 04/29/03; Agency: DMHMRSAS; AHO: David J. Latham; Case No. 5707



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5707

Hearing Date: April 28, 2003
Decision Issued: April 29, 2003

PROCEDURAL ISSUE

A Notice of Hearing, confirming the date, time and location of the hearing was mailed to grievant on April 15, 2003. Grievant failed to submit either documents or witness list prior to the hearing, and failed to appear for the hearing on April 28, 2003. Grievant also failed to provide any notice prior to the hearing regarding the reason for not appearing at the docketed time. The hearing was conducted with the party and witnesses who did appear.

APPEARANCES

Employee Relations Manager
Advocate for Agency
Two witnesses for Agency

ISSUES

Did the grievant's actions warrant 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

The grievant timely filed a grievance from a Group I Written Notice issued for unsatisfactory attendance.¹ The grievant's employment was terminated as the result of an accumulation of active disciplinary actions. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as "agency") has employed the grievant for three years as a direct care associate. Grievant has had a chronic problem with both tardiness and attendance. He has four active disciplinary actions including two Group I Written Notices for unsatisfactory attendance, one Group I Written Notice for excessive tardiness, and one Group II Written Notice for abuse of state time.³

The facility at which grievant was employed promulgated a written attendance policy that provides, in pertinent part:

Regular attendance is a condition of employment. Therefore, once an employee accrues and exceeds eight (8) occurrences of unscheduled time away from work with a 12-consecutive month period, his/her attendance shall be considered unsatisfactory and will warrant appropriate corrective action.⁴

Beginning in 2001, grievant had been repeatedly warned about his unsatisfactory attendance. He received written notices in September 2001, February 2002, April 2002, and June 2002. Notwithstanding these warnings, grievant continued to abuse the attendance policy. He developed a pattern of being absent immediately before or following weekends and holidays. He would also often leave work early claiming that he did not feel well.

Grievant has an asthma condition and had been qualified to utilize medical leave pursuant to the Family and Medical Leave Act. He often stated that many of his absences were attributable to asthma, however he failed to provide

¹ Exhibit 1. Written Notice, issued February 13, 2003.

² Exhibit 1. Grievance Form A, filed February 21, 2003.

³ Exhibit 2. Active written notices, issued between September 2001 and June 12, 2002.

⁴ Exhibit 4. Facility Policy Number HR-05b, *Attendance/Call-In's* (sic), February 4, 2002.

medical documentation on several occasions when he was absent. His extensive record of absences during the 12 months prior to his discharge includes 18 occurrences, far more than were allowed under the facility's policy.⁵

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.⁶

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

⁵ The agency acknowledged that some absences, which should have been charged as occurrences because grievant failed to submit medical documentation, were not properly charged at the time due to inefficient supervisory follow-up. Thus, according to policy, grievant should have received discipline even earlier than he did.

⁶ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.1 of the Standards of Conduct policy provides that Group I offenses include acts and behavior that are deemed least serious; one example is unsatisfactory attendance.⁷

The agency has demonstrated, by a preponderance of evidence, that grievant's attendance was unsatisfactory according to the facility's written policy. Grievant had ample prior warning since he had received four written notices in the preceding 18 months. Therefore, the evidence reflects that grievant's excessive absenteeism warranted issuance of the Group I Written Notice. Further, the accumulation of active disciplinary actions warrants removal of grievant from state employment pursuant to the Standards of Conduct policy.⁸

Grievant failed to submit either documents for consideration or a witness list.⁹ He also failed to appear for the hearing to present testimony and evidence on his own behalf. Therefore, the grievant has not demonstrated any circumstances that would mitigate his misconduct.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for unsatisfactory attendance issued on February 13, 2003, and grievant's removal from employment are hereby UPHELD. The Written Notice shall remain in grievant's personnel file for the length of time specified in Section VII.B.2.c 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.

⁷ Exhibit 7. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

⁸ Exhibit 7. Section VII.D.1.b.(2), DHRM Policy No. 1.60, *Ibid*.

⁹ As is standard procedure, grievant was advised during the prehearing conference and in the Notice of Hearing, that copies of all documents to be entered as evidence and a witness list must be submitted to the opposing party and the hearing officer not later than four working days prior to the date of the hearing.

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.¹⁰ 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.¹¹

[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

¹⁰ 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 that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.