

Issue: Group I Written Notice with 30-day suspension (unsatisfactory attendance);  
Hearing Date: 08/15/03; Decision Issued: 08/21/03; Agency: DMHMRSAS; AHO:  
Carl Wilson Schmidt, Esq; Case No. 5746



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5746**

Hearing Date: August 15, 2003  
Decision Issued: August 21, 2003

**PROCEDURAL HISTORY**

On February 28, 2003, Grievant was issued a Group I Written Notice of disciplinary action with 30 workday suspension for:

Violation of the Standards of Conduct Policy #1.60 – Unsatisfactory attendance. In accordance with DI No. 501, Attendance Policy and the Standards of Conduct, you were given a Group I written notice on 1/13/03 for unsatisfactory attendance. On 2/13/03 you accumulated 9 more hours of unscheduled leave in the twelve-month cycle and are again in violation of DI # 501 and the Standards of Conduct for unsatisfactory attendance and subject to another Group I written notice. This action will create your fourth active Group I Written Notice and in accordance with the Standards of Conduct this should normally result in discharge.

On March 30, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 21, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 15, 2003, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Supervisor

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action with 30 workday suspension for unsatisfactory attendance.

## **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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as Assistant Timekeeper since 2001. On October 21, 2002, Grievant received a Group I Written Notice for unsatisfactory job performance. On January 8, 2003, Grievant received a Group I Written Notice for unsatisfactory job performance. On January 13, 2003, Grievant received a Group I Written Notice for unsatisfactory attendance.

Grievant suffered serious physical injuries causing her to work fewer than eight hours per day. After consulting with Grievant's physician, the Agency reduced Grievant's work day to 3 hours per day.

As of January 8, 2003, Grievant had accrued 79.1 hours of unscheduled leave.<sup>1</sup> On February 6, 2003, Grievant was sick with the stomach flu and was unable to come to work as scheduled. On February 7, 2003, Grievant did not come to work because of

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<sup>1</sup> On June 13, 2002, Grievant was verbally counseled regarding her unsatisfactory level of unscheduled leave. She had accumulated 43.3 hours of unscheduled leave.

inclement weather. The Facility Director sent all employees two emails dated February 11, 2003 stating:

[Ms. LD], Acting Facility Director, has approved Administrative Leave for those employees who arrived to work late on Friday, February 7, due to inclement weather. Please work with your department timekeeper to complete a Leave Request for the proper amount of Administrative Leave. As a reminder, this Administrative Leave may only be used for the start of the shift, not the end.

If you were absent for the entire day, you need to request personal leave to cover the shift.

I would like to take a moment to answer a couple of questions I received. First, I was asked why the Weather Emergency Plan was not activated. The reason for this is the storm itself and the performance of VDOT. The rate and type of precipitation were such that VDOT was able to do a good job of keeping its priority routes clear. They even came through our campus seven times, which was a big help. When I went out and checked early in the morning, I found slush, not ice, beneath the snow and assumed that most staff would be able to make it in, although it might take longer than normal. Most of you did, as usual, and I thank you personally and on behalf of [Ms. LD] and the rest of the management team. \*\*\* Secondly, I was asked about the relationship between activation of the Weather Emergency Plan and payment of Administrative Leave, and there is none. We decide whether it is appropriate to pay Administrative Leave on a case by case (storm by storm) basis. Although the plan was not activated, we are paying the Administrative Leave. Even though the plan was not activated, we offered to go and pickup key individuals to facilitate our ability to provide treatment services.

I did not realize that a limit must be established on the Administrative Leave: Therefore, up to 4 hours of [leave] may be used to cover late arrival on Friday, February 7.

Grievant did not receive Administrative Leave on February 7, 2003 because she did not come into work that day. On February 12, 2003, Grievant had an earache and did not come to work as scheduled.

## **CONCLUSIONS OF 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).<sup>2</sup> Group II offenses “include acts and behavior which are

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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 or excessive tardiness” is a Group I offense.<sup>3</sup> The Agency has several policies regarding unsatisfactory attendance. Facility Instruction No. 1510.1 sets forth the Facility's policy governing employee attendance. This policy states:

Counseling and progressive discipline will be administered when an employee does not meet attendance expectations. Counseling will be conducted when the employee reaches 40 hours of unscheduled absence in any 12-month period or if a demonstrated pattern exists. An employee with unscheduled leave in excess of 65 hours within any twelve month consecutive period is subject to a Group I Written Notice. For each accumulation of 8 or more hours, an employee is subject to another Group I Written Notice, provided that the employee continues to have 65+ hours of unscheduled leave in the 12 month cycle.

The policy defines unscheduled leave as:

Time an employee is scheduled to work but is absent without a signed leave slip approved in advance (no later than the end of the employee's last work shift preceding the day of absence).

When consecutive work days are missed, only the hours missed on the first day<sup>4</sup> are counted as unscheduled leave when the following conditions are met:

- The employee sought and received medical attention for the condition, and/or,
- The employee was unable to work on the advice of a physician and provides specific documentation from the physician.

Institutional Policy 139-87 states:

All employees are essential to the effective and efficient operation of this facility. They are expected to report for duty as scheduled at all times including periods of inclement weather. Employees should not call the Institution to inquire if the hospital will be open. In circumstances when it

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<sup>3</sup> DHRM § 1.60(V)(B)(1)(a).

<sup>4</sup> This policy provision means that an employee who cannot come to work due to illness is charged with unscheduled leave even though the illness was legitimate and the employee submitted a doctor's excuse to agency managers.

is not possible to arrive for work as scheduled because of difficult weather, employees must notify their supervisor as soon as practical and request emergency leave. Such absence, if approved, will be charged to annual leave, compensatory leave, or leave without pay. Requests for sick leave during inclement weather will receive close scrutiny. \*\*\*

Grievant was scheduled to work on February 6<sup>th</sup>, 7<sup>th</sup>, and 12<sup>th</sup>, but did not come to work. She accumulated nine hours of unscheduled leave which exceeded the eight-hour threshold for a Group I Written Notice. The Agency has presented sufficient evidence to support issuance of a Group I Written Notice on February 28, 2003 for unsatisfactory attendance.

Group I Written Notices are cumulative. "A fourth active Written Notice for a Group I offense normally should result in discharge, except that mitigating circumstances may justify ... suspension for up to 30 workdays as an alternative to discharge."<sup>5</sup> Grievant has a cumulative four active Written Notices thereby justifying a 30 workday a suspension.

Grievant contends that the Agency may have incorrectly calculated the number of hours of unscheduled leave. The evidence is insufficient for the Hearing Officer to conclude that the Agency miscalculated the number of hours of Grievant's unscheduled leave.

Grievant asserts that she should have received three hours of Administrative Leave on February 7, 2003 due to inclement weather. The evidence showed, however, that Administrative Leave was available only to employees who came to work on February 7, 2003. Because Grievant did not come to work, she was not entitled to Administrative Leave. Grievant suggests that she was instructed it was unnecessary for her to come to work on February 7, 2003. There is insufficient evidence to support this assertion because Grievant did not present a witness stating that he or she informed Grievant that it was unnecessary to come to work.

Grievant asks the Hearing Officer to speak with other employees at the Facility to determine who is telling the truth. The Hearing Officer must base his decision on the evidence presented at the hearing and lacks the authority to conduct an independent investigation. Consequently, Grievant's request must be denied.

Grievant's seeks to contest the prior Group I Written Notices issued to her. Grievant failed to appeal those Written Notices and may not contest them as part of this appeal.

Grievant contends that the Agency retaliated against her, failed to account for her disability, and permitted others to verbally abuse her. No credible evidence was presented to support Grievant's allegations.

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<sup>5</sup> DHRM § 1.60(VII)(D)(1)(b)(2).

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action with thirty workday suspension 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.<sup>6</sup>

[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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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer