

Issue: Group II Written Notice with termination (due to accumulation) (failure to comply with applicable established written policy); Hearing Date: 03/17/04; Decision Issued: 04/05/04; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 578



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 578

Hearing Date: March 17, 2004
Decision Issued: April 5, 2004

PROCEDURAL HISTORY

On November 19, 2003, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

Group II offense for failure to comply with applicable established written policy of requesting a leave of absence for extended absences and supplying necessary documentation to the job to support such an absence. This Group II is the second active Group II and in accordance with DHRM Policy 1.60, Standards of Conduct, employment is terminated.

On December 15, 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 February 12, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 17, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative

Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failure to comply with established written policy.

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 employee Grievant as a Human Service Care Worker. On March 11, 2003, Grievant received a Group II Written Notice for failure to report to work without proper notice.¹

On May 17, 2003, Grievant suffered an injury compensable under worker's compensation. She was released to return to work on May 21, 2003 and returned to full duty on that day. Grievant was put on light duty from July 28, 2003 to September 8, 2003. The Agency was able to accommodate her light duty.

Grievant stopped reporting to work sometime in the middle of August 2003. She presented documentation showing that she had medical appointments on August 31, 2003 to September 2, 2003 with a return to work on September 4, 2003. She submitted documentation of her child's illness from September 5 to 15, 2003.² Grievant was scheduled to work on September 17 and 21, 2003 but did not appear and did not provide any documentation for her absence. Grievant presented documentation showing that she was out of work from September 22, 2003 to September 25, 2003 with

¹ Grievant Exhibit 4.

² Grievant Exhibit 6.

a return to light duty work on September 26, 2003 for six weeks.³ Grievant did not report to work on September 26 or 27, 2003 as scheduled and did not provide documentation of the reason for her absence from work. Grievant provided documentation for being absent on October 3, 2003.⁴ She did not report to work on October 5, 8, 10, 11, 13, 18, 19, 22, 24, 27, and 28 and did not provide documentation of the reason for her absence. Grievant did not report to work on November 3 or 13 and did not provide documentation for her absence.

On November 5, 2003, the Program Director sent Grievant a letter indicating her intent to recommend issuance of a Group II Written Notice for failure to comply with established written policy of requesting a leave of absence for extended absences and supplying necessary documentation to support absences. Grievant received the letter, but did not reply and did not supply necessary documentation of her absence.

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).⁵ 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.” 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).

Employees are expected to report to work as scheduled.⁶ DHRM Policy 4.30(III)(A) provides, “Before taking a leave of absence from work, whether with or without pay, employees should request and receive their agencies’ approval of the desired leave.” DHRM Policy 1.60(III)(A)(2) states that, “If employees cannot report as scheduled, [e]mployees should arrange planned absences, including reporting to work late or leaving work early, in advance with supervisors.”

An agency’s ability to properly staff its facilities depends in part on whether it can rely on staff to report to work as scheduled. For a period from sometime in August 2003 until the middle of November 2003, Grievant did not report to work as scheduled. She contends that various personal problems or family illnesses required her to refrain from working at the last minute. Grievant’s pattern of behavior, however, shows she did not

³ Grievant Exhibit 3.

⁴ Grievant Exhibit 3.

⁵ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁶ DHRM Policy 1.60(III)(A)(1).

intend to report to work and that her intention existed over a several month period. Grievant knew or should have known that she would not be able to work for an extended period of time. Grievant was knowledgeable about the existence of the Family and Medical Leave Act policy because she had utilized that policy earlier in 2003. She should have contacted the Agency and asked for an extended period of leave in accordance with State policy. Her failure to do so prohibited the Agency from effectively planning its staffing levels and was contrary to State policy.

Grievant was instructed and understood the Agency's policy that she needed written documentation to justify her absences. She submitted additional documentation at the hearing. Even with that documentation, Grievant has not justified the reasons for her absence on several days. Her failure to document her numerous absences from work is contrary to policy. The Agency has presented sufficient evidence to justify its issuance of a Group II Written Notice.

Accumulation of a second active Group II Written Notice "normally should result in discharge."⁷ The Agency has presented sufficient evidence to supports its decision to remove Grievant from employment.

Grievant contends that her absences should be excused because she typically called her supervisor on the day she was scheduled to work and notified her supervisor that she would not be appearing as scheduled. Although Grievant often notified her supervisor before her shift on the days she was scheduled to work, Grievant's pervasive pattern of absences shows she did not have a present intent to appear at work as scheduled. Even if this is ignored, Grievant has not provided sufficient written documentation for her absence from work on numerous days.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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.

⁷ DHRM § 1.60(VII)(D)(2)(b).

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

