

Issues: Group I Written Notice (unsatisfactory attendance) and Group II Written Notice with termination due to accumulation (failure to work required overtime);
Hearing Date: 09/29/04; Decision Issued: 09/30/04; Agency: DMHMRSAS;
AHO: David J. Latham, Esq.; Case No. 7877



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7877

Hearing Date: September 29, 2004
Decision Issued: September 30, 2004

PROCEDURAL ISSUE

Grievant expressed concern about why there are two sets of written notices. The copy that grievant first signed contained incorrect dates in the block marked "Date this notice will become inactive." The second copy grievant signed shows the correct dates in this block; the Group I Notice is active for two years (becomes inactive on August 11, 2006) while the Group II Notice remains active for three years (becomes inactive on August 11, 2007).¹ Therefore, it appears that, while grievant may not recall it, she was asked to sign a second set of notices when the agency realized that the dates had been erroneously entered on the first set.

APPEARANCES

Grievant
Two witnesses for Grievant
Program Director
Advocate for Agency

¹ Exhibit 8. Two sets of Written Notices, August 11, 2004.

One witness 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 filed a timely grievance from a Group I Written Notice for unsatisfactory attendance and a Group II Written notice for failure to work required overtime.² Due to an accumulation of prior active disciplinary actions, grievant was removed from state employment effective August 11, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.³

The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant as a human services care worker for almost two years. Grievant has two prior active disciplinary actions; both are Group I Written Notices for unsatisfactory attendance.⁴

The facility's attendance policy provides that regular attendance is a condition of employment. When an employee exceeds eight occurrences of unscheduled time away from work within a 12-consecutive-month period, her attendance is considered unsatisfactory and warrants corrective action in the form of a Group I Written Notice.⁵ A multiple-day absence for the same condition is counted as only one occurrence.⁶

Grievant incurred one or more absences every month (except one) during the last 12 months of her employment.⁷ After being disciplined with Group I Written Notices in March and June 2004, she was absent again on June 5, July 15, and July 16, 2004. At this point, she had an accumulation of 12.5 occurrences during the preceding 12-month period.

² Exhibit 1. Written Notices, issued August 11, 2004.

³ Exhibit 2. *Grievance Form A*, filed August 12, 2004.

⁴ Exhibit 5. Group I Written Notices, issued on March 27, 2004 and June 3, 2004.

⁵ Exhibit 6. *Attendance Policy*, April 1, 2003.

⁶ *Ibid.*

⁷ Exhibit 3. Occurrence Totals log, September 25, 2002 through July 2004.

On June 25, 2004, grievant was counseled in writing because she refused to work overtime on June 14, 2004.⁸ She was warned that a future refusal to work could result in disciplinary action under the Standards of Conduct. On July 30, 2004, grievant was told to work overtime but refused to do so.⁹

Before the agency decided to remove her from employment, her supervisor, the program director, human resources, and the facility director all reviewed the case. Management concluded that her discipline was consistent with the discipline meted out to other employees in the same or similar circumstances.

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

⁸ Exhibit 4. Employee Counseling Report, signed by grievant June 25, 2004.

⁹ Exhibit 4. Memorandum from supervisor to grievant, August 1, 2004. NOTE: The agency cited grievant for refusing to work overtime on both July 22 and July 30, 2004; however, during the hearing, the agency acknowledged that grievant actually did work overtime on July 22, 2004. See Exhibit 9. Timecard for grievant, July 10, 2004 – July 24, 2004.

circumstances. In all other actions the grievant must present her evidence first and prove her claim by a preponderance of the evidence.¹⁰

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) 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 of the Commonwealth of Virginia's Department of Personnel and Training Manual *Standards of Conduct* Policy provides that Group I offenses include acts and behavior that are least severe in nature.¹¹ Unsatisfactory attendance is one example of a Group I offense. Group II offenses are defined as acts and behavior of a more severe nature such that an accumulation of two Group II offenses should normally warrant removal from employment. Refusal to work overtime is one example of a Group II offense.

The agency has borne the burden of proof to show that grievant had unsatisfactory attendance, as defined by its written policy. She had incurred 12.5 occurrences during the preceding year, while the policy provides for discipline after only eight occurrences in a 12-month period. Grievant has not disputed that she was absent on the dates cited by the agency. Accordingly, grievant's unsatisfactory attendance constitutes a Group I offense and the Group I Written Notice was warranted.

The agency has also shown that grievant refused to work overtime on July 30, 2004. During the hearing, grievant admitted that she refused to work overtime on that date. Grievant had been warned less than two months earlier that another refusal to work would warrant disciplinary action. Accordingly, grievant's refusal to work constitutes a Group II offense and the Group II Written Notice was warranted.

Grievant cited the case of another employee who was not fired after refusing to work overtime. In that case, the employee was given a Group I Written Notice because it was her first offense. Grievant's refusal to work was her second such offense and therefore warranted a Group II Written Notice. Grievant also cited the case of a probationary employee who was not discharged when she refused to work. The Standards of Conduct do not apply to employees who are serving probationary periods.¹² However, the probationary employee

¹⁰ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹¹ Exhibit 7. Section V.B.1, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

¹² Exhibit 7. Section I, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

was subsequently discharged for refusing to work overtime and for poor attendance. Finally, grievant cited the case of another employee who was not discharged until he had accumulated more occurrences than she had. Grievant's case involved not only excessive absenteeism but a refusal to work overtime. The combination of grievant's offenses was sufficient to conclude that she would not be a productive state employee and therefore justified dismissal even though she had somewhat fewer occurrences than the other employee.

The agency may mitigate discipline when circumstances warrant. Here, the agency evaluated grievant's record and concluded that there were no mitigating circumstances. Grievant has been employed for less than two years and therefore does not have long service with the agency or state. Her excessive absenteeism creates an undue burden on coworkers who are required to work extra days and/or overtime because of her absences. The agency must fulfill its responsibility to provide client care by having employees whose attendance is reliable and dependable. Grievant does not meet that criterion. Therefore, the agency has reasonably concluded that grievant must be removed from employment.

It must be noted that, prior to these two disciplinary actions, grievant had accumulated two active written notices. Therefore, two additional Written Notices are sufficient to justify grievant's removal from employment pursuant to the Standards of Conduct.¹³ In this case, the Group I and Group II disciplinary actions, in conjunction with the two previous active disciplinary actions, left the agency little alternative but to remove her from employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for unsatisfactory attendance, the Group II Written Notice for refusing to work overtime, and the removal of grievant from state employment on August 11, 2004 are hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in 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:

¹³ Exhibit 7. Section VII.D.2.b.(2), *Ibid.*, states: "A Group II Written Notice following three active Group I Written Notices should result in discharge."

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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.¹⁴ 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.¹⁵

[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]

¹⁴ 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).

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer