Issue: Group I Written Notice with termination due to accumulation (unsatisfactory attendance); Hearing Date: 09/03/04; Decision Issued: 09/07/04; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 843

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 843

Hearing Date: September 3, 2004
Decision Issued: September 7, 2004

PROCEDURAL ISSUE

The grievance procedure provides that a written grievance must be initiated with 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute.[1] In the instant case, the Written Notice was issued on May 5, 2004; therefore, the time limit for filing the grievance was June 4, 2004. Grievant filed her grievance on July 8, 2004 – more than one month after the time limit had expired. Nevertheless, the agency head qualified the grievance for a hearing, and at the hearing, the agency did not raise the late filing as a defense. Therefore, in this case only, the agency is deemed to have waived the 30-day requirement.

APPEARANCES

Grievant
Attorney for Grievant
Program Director
Advocate for Agency

[1] §2.2 *Grievance Procedure Manual*, effective July 1, 2001.

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 filed a timely grievance from a Group I Written Notice for unsatisfactory attendance.[2] Due to an accumulation of prior active disciplinary actions, grievant was removed from state employment effective June 9, 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 eight years. Grievant has two prior active disciplinary actions; both are Group III Written Notices for sleeping during work hours.[4] Other than the prior disciplinary actions, grievant has a satisfactory performance record, follows instructions, and works well with clients.

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] Employees whose unsatisfactory attendance subjects them to disciplinary action may request mitigation according to guidelines in attendance policy Attachment A. Absences for a serious chronic health condition will only be mitigated if the employee has applied for and been approved for intermittent Family and Medical Leave Act leave for the condition.[7]

As of March 25, 2004, grievant had accumulated 12 occurrences of unscheduled absences from work during the preceding 12-month period.[8] The absences were for illness and for personal reasons. Some of the absences were

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[2] Exhibit 1. Written Notice, issued May 5, 2004.
[3] Exhibit 1. *Grievance Form A*, filed July 8, 2004.
[4] Exhibit 4. Group III Written Notices, issued on August 25, 2000 and July 17, 2004.
[5] Exhibit 3. *Attendance Policy*, April 1, 2003.
[6] *Ibid.*
[7] Exhibit 3. *Guidelines for Mitigation*, September 1, 2002.
[8] Exhibit 2. Incident Summary, March 29, 2004.

for extended durations including a two-week absence in December 2003 for hypertension, and a one-week absence in January 2004 for the same diagnosis.

Grievant has a young son who has epilepsy. His medical condition has been unstable and he has required frequent admission to a hospital epilepsy monitoring unit. He requires close monitoring and grievant is required to take her son to medical appointments. Two years ago, grievant's physician recommended that she consider taking part-time employment because of the ongoing medical care her son receives.[9] Grievant has not qualified for coverage under the Family and Medical Leave Act.

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

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[9] Exhibit 6. Letter from physician, April 1, 2002.

[10] § 5.8, Department of Employment Dispute Resolution (EDR) *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 Va. Code § 2.2-1201, 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 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.

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 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.

When an employee receives a Group III Written Notice but is not discharged due to mitigating circumstances, the agency notifies the employee that any subsequent written notice received by the employee for any level of offense during the active life of the Written Notice may result in discharge.[12] In this case, grievant had previously received two Group III Written Notices. In both instances, the agency mitigated the discipline because of grievant's situation and retained her in state employment. However, due to grievant's continuing attendance problem, it was necessary to issue the Group I Written Notice. Because grievant's situation did not meet the attendance mitigation guidelines, the agency applied the Standards of Conduct and removed her from employment.

The agency may mitigate discipline when circumstances warrant. However, in this case, grievant's situation appears to be ongoing, not temporary. Her continuing unscheduled absences create an undue burden on coworkers who are required to work extra days and/or overtime because of her absences. While the agency could adjust to a short-term situation, the indefinite, long-term nature of grievant's situation creates an untenable problem. The agency must fulfill its responsibility to provide client care by having employees whose attendance is reliable and dependable. Grievant no longer meets that criterion. Therefore, the agency has reasonably concluded that grievant must be removed from employment.

[11] Exhibit 5. Section V.B.1, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[12] Exhibit 5. Section VII.D.3.b.(2), *Ibid*.

Grievant argues that she is entitled to "three strikes" before being "out" of the agency. Such an argument is unpersuasive. First, there is no such rule, written or unwritten; the discipline and removal of employees from state service is governed by the Standards of Conduct. Second, even if there were such a rule, grievant has had her third strike. She was previously disciplined on two occasions for sleeping during work hours; the past year's unsatisfactory attendance constitutes the third "strike."

Grievant suggests that the agency should give her part-time employment, which might accommodate her situation. That is a decision that the agency must make. If the agency has an available part-time position, grievant may file an application for the opening. The agency will then have to decide whether grievant would be the best candidate for the position.[13]

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice and the removal of grievant from state employment on June 9, 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:

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:

[13] Pursuant to §5.9(b)2, 6, & 7, *Grievance Procedure Manual*, effective July 1, 2001, a hearing officer may not direct an agency to place grievant in a part-time position. Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

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]

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David J. Latham, Esq.
Hearing Officer

[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.