

Issue: Group II Written Notice with termination (due to accumulation) (failure to report to work as scheduled), and Group II Written Notice with termination (due to accumulation) (leaving the worksite without permission); Hearing Date: 10/06/04; Decision Issued: 10/19/04; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 868; **HO Reconsideration Request received 10/29/04; Reconsideration Decision issued 11/15/04; Outcome: No newly discovered evidence or incorrect legal conclusions. Request to reconsider denied.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 868

Hearing Date: October 6, 2004
Decision Issued: October 19, 2004

PROCEDURAL HISTORY

On July 2, 2004, Grievant was issued a Group II Written Notice of disciplinary action for "Failure to report to work as scheduled without proper notice to supervisor." She also received a Group II Written Notice for "Leaving the work site without permission during working hours." Although not expressly stated on the written notices, Grievant was removed from her employment based on the accumulation of disciplinary action.

On July 13, 2004, 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 September 9, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 6, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative

Witnesses

ISSUES

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failure to report to work as scheduled and a Group II Written Notice with removal for leaving the work site without permission during working hours.

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 Virginia Department of Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Psychiatric Aide at one of its facilities. The purpose of her position was:

Under the direction of a RN, perform direct care of patients in a respectful manner according to each patient’s treatment plan, while providing a safe environment.¹

Grievant received a Group II Written Notice on February 26, 2002 for “Failure to report to work as scheduled without proper notice to supervisor.” On July 2, 2004, Grievant received a Group I Written Notice for disruptive behavior.² She chose not to appeal the Group I Written Notice.

Grievant’s usual work shift is from 11 p.m. until 7:30 a.m. During the night of June 17, 2004, Grievant knew she would be late for her shift. She called the Shift Administrator’s Office at approximately 10:45 p.m., but no one answered. She then called to F Unit, her assigned unit, and spoke with Ms. AM. Grievant told Ms. AM that

¹ Agency Exhibit 7.

² Agency Exhibit 9.

she would be just a few minutes late. Ms. AM responded that she would let Grievant's

At about 1:30 a.m., Grievant called the Director of Nursing at his home and discussed the events in detail. The Director of Nursing wrote a memorandum to the file stating, in part:

According to [Grievant], the altercation ended up in her telling the supervisors that she was going home and they had better find someone else to work, and being asked to turn in her keys and badge, which she threw at [the Relief Shift Administrator.]³

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).⁴ 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).

Group II Written Notice for Failure to Report

“Failure to report to work as scheduled without proper notice to supervisor(s)” is a Group II offense.⁵ Grievant reported to work on the day she was scheduled to work; she simply reported late to work. There is no basis to issue Grievant a Group II Written Notice for failure to report to work as scheduled without proper notice to supervisor(s). Accordingly, the Written Notice must be reversed.

Grievant was late to work. The DMHMRSAS Employee Handbook lists as a Group I offense, “[u]nsatisfactory attendance or excessive tardiness (i.e. accumulating more than 64 hours of unplanned leave or excessive tardiness with more than three tardies of more than 10 minutes over a three-month period.)”⁶ No evidence was presented showing that Grievant had accumulated more than three tardies of more than 10 minutes over a three-month period. Accordingly, there is no basis to reduce the Written Notice to a Group I offense – the Written Notice must be rescinded.

Group II Written Notice for Leaving Work Site

³ Agency Exhibit 5.

⁴ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ DHRM Policy § 1.60(V)(B)(2)(d).

⁶ Grievant Exhibit 4.

“Leaving the work site during work hours without permission” is a Group II offense.⁷ Grievant left her work site with several hours remaining in her shift and without permission to do so from her supervisor. The Agency has established sufficient facts to support its issuance of a Group II Written Notice.

Accumulation of a second active Group II Written Notice “should normally result in removal.”⁸ Grievant had an active Group II Written Notice issued February 26, 2002 and an active Group I Written Notice issued on July 2, 2004. Based on the accumulation of disciplinary action, the Agency has presented sufficient evidence to support Grievant’s removal from employment.

Grievant contends she did not intend to leave the work site, but rather she intended to step outside the Facility to take a short break. She argues she only left the work site once instructed to do so by the Relief Shift Administrator. The greater weight of the evidence, however, shows that Grievant intended to leave the Facility. When she spoke with the Director of Nursing approximately an hour after leaving the Facility, Grievant told the Director of Nursing that she had said “she was going home and they had better find someone else to work.” This statement shows Grievant had formed the intent to leave the work site.

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”⁹ Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for “Failure to report to work as scheduled without

⁷ DHRM Policy § 1.60(V)(B)(2)(c).

⁸ DOCPM § 5-10.16(C)(2).

⁹ *Va. Code § 2.2-3005.*

proper notice to supervisor is **rescinded**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal for "Leaving the work site without permission during working hours" 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. 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.¹⁰

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 868-R

Reconsideration Decision Issued: November 15, 2004

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

The Agency submitted sufficient facts to support its conclusion that Grievant should receive a Group II Written Notice for “[l]eaving the work site during work hours without permission.”¹¹ It is not necessary for the Agency to prove beyond any doubt that Grievant intended to leave the work site, it is only necessary to prove this by a preponderance of the evidence. The Agency presented credible testimony of witnesses who indicated Grievant expressed her intent to leave the work site. Grievant’s confirms this in her request for reconsideration by admitting she told a co-worker “I need to go home, and that I could not work upset like this.”

Grievant seeks copies of witness statements. Grievant was provided with copies of all exhibits presented at the hearing. She may obtain copies of hearing tapes by requesting them in writing from the Division of Hearings and reimbursing the cost to copy the tapes.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant’s request for reconsideration is **denied**.

¹¹ DHRM Policy § 1.60(V)(B)(2)(c).

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer