

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 04/27/04;  
Decision Issued: 05/17/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 675



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 675**

Hearing Date: April 27, 2004  
Decision Issued: May 17, 2004

**PROCEDURAL HISTORY**

On January 7, 2004, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance. On January 30, 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 April 8, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 27, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Representative  
Witnesses

**ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action 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 Corrections has employed Grievant as a Corrections Officer Senior since 1989. The purpose of her position is to “provide security and supervision of adult offenders.” Grievant’s September 26, 2003 evaluation rated her overall performance as “Contributor.”<sup>1</sup> No evidence of prior disciplinary action was introduced at the hearing.

Corrections officers are essential personnel at the Facility because the Facility operates at all times. When security employees do not come to work, the Agency must draft other employees who would otherwise be off of work in order to ensure that all security posts are filled.

Grievant’s employment days are set using a 28 day schedule. A supervisor sets this schedule well in advance for many security employees.

Beginning November 6, 2003, Grievant took 144 hours of annual leave. When combined with rest days, Grievant’s annual leave usage in November 2003 resulted in her not working for most of the month of November.

For the month of December 2003, Grievant took 64 hours of annual leave and 24 hours of compensatory leave. She also took 24 hours of sick family leave and 56 hours of personal sick leave.

Grievant took 4 hours of personal sick leave and 8 hours of holiday leave on January 1, 2004 and 4 hours of personal sick leave and 8 hours of holiday leave on January 2, 2004.

The Agency does not question the legitimacy of Grievant’s illnesses. She brought in doctor’s excuses when asked to do so.

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<sup>1</sup> Grievant Exhibit 2.

On January 7, 2004, Grievant was placed on leave restriction for one year. Under this restriction, Grievant must comply as follows: "Any time missed from work for any reason must have written documentation to support your entire absence."<sup>2</sup>

### **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." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. 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." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

"[U]nsatisfactory attendance" is a Group I offense.<sup>3</sup> To prove unsatisfactory attendance, the Agency must show that an employee's attendance was less than what would otherwise be expected of an adequately performing employee. It is not necessary for the Agency to show that the Grievant was at fault for having unsatisfactory attendance.<sup>4</sup> In other words, it is not necessary for the Agency to show that an employee who became ill was falsely claiming illness. An unacceptable pattern of absences due to legitimate illness can be unsatisfactory attendance. Key to this analysis is how much effect an employee's absences had on agency operations.

Grievant's use of sick leave caused her attendance to be unsatisfactory thereby justifying issuance of a Group I Written Notice. The effect of taking 80 hours of sick leave over 7 days was that Grievant did not work in the month of December 2003. This comes after using annual leave and some compensatory leave to take off the month of November 2003. Grievant was out on sick leave on January 1 and 2, 2004. Grievant's leave practice also had the effect of extending the length of two major holidays – Thanksgiving and Christmas and avoiding working on New Year's Day. Grievant's use of sick leave adversely affected the Agency's ability to properly staff its Facility.

Grievant contends the Agency has inconsistently disciplined its employees regarding unsatisfactory attendance. She presented evidence of an employee who was out of work for approximately 2.5 months because of a workers' compensation injury. This employee's absence does not show inconsistent discipline. The employee was out

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<sup>2</sup> Agency Exhibit 4.

<sup>3</sup> DOCPM § 5-10.15(B)(1).

<sup>4</sup> For example, if an employee has adequate sick leave balances, but uses a significant number of hours of sick leave so as to potentially interfere with an agency's operations, then the employee's attendance is unsatisfactory.

of work for a continuous period of time for which the Agency could plan in advance. Grievant's sick leave was taken periodically and without much advanced notice.

Grievant objects to being placed on leave restriction. *Institutional Operating Procedure 205-7.6* provides:

Supervisors may require employees to bring in documentation for all sick leave used after taking into consideration current leave balances, patterns of sick leave usage, length of state services, and mitigating circumstances. Restriction letters will inform employees that they must bring in documentation for a period of one year.

Grievant's usage of sick leave forms a pattern because she takes sick leave in a manner that extends her periods of scheduled time off. Leave restriction merely requires Grievant to produce doctor's excuses for time missed due to illness. An Agency is free to require any employee to produce a doctor's excuse to substantiate any sick leave taken on any occasion.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for unsatisfactory attendance 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>5</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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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.