

Issues: Group I Written Notice (excessive tardiness) and Group II Written Notice with termination (due to accumulation) (failure to follow supervisor's instructions); Hearing Date: 07/08/05; Decision Issued: 07/13/05; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8097; **Administrative Review: DHRM Ruling Request received 07/28/05; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8097

Hearing Date: July 8, 2005
Decision Issued: July 13, 2005

PROCEDURAL HISTORY

On April 3, 2005, Grievant was issued a Group I Written Notice of disciplinary action for:

Tardiness: Employee received a Group I for excessive tardiness on November 23, 2004. On that date, he was given a direct order to report for duty on time in the future and to immediately notify his supervisor if he believes he will be late. On March 10, 2005 employee called in late for work one hour and twenty-five minutes past his scheduled time of arrival. This tardy was determined to be unexcused.

On April 19, 2005, Grievant was issued a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for:

Violation of State Policy 1.60, "Standards of Conduct," specifically, you are charged with "failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy." Employee failed to notify his supervisor two hours in advance to calling out sick on April 2, 2005, per written policy. Employee notified his supervisor approximately thirty-five minutes past the required two-hour time limit.

On April 22, 2005, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 8, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 8, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant should receive a Group I Written Notice of disciplinary action for tardiness.
2. Whether Grievant should receive a Group II Written Notice with removal for failure to follow a supervisor's instruction.

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 Commonwealth University employed Grievant as a Police Officer I until his removal effective April 22, 2005. Grievant's removal was based on prior active disciplinary action. Grievant began working for the Agency in 1993.

Grievant received a Group II Written Notice with suspension on June 14, 2003 for driving at excessive speed.

On November 23, 2004, Grievant received a Group I Written Notice for excessive tardiness.¹ On this date, Lt. O ordered Grievant to report to work on time. Lt. O also ordered Grievant to notify a supervisor if Grievant was running late for any reason and that each incident would be judged individually according to their circumstances.²

On February 15, 2004, Grievant was transferred from the day shift to the evening shift "after being habitually tardy for duty." On May 11, 2004, and October 7, 2004, Grievant was formally counseled in writing for unexcused tardiness.

On March 9, 2005, Grievant encountered a family problem and left his home to stay with at a friend's house. Grievant was scheduled to work on March 10, 2005 at 2:50 p.m. Upon leaving the friend's house on March 10, 2005, Grievant discovered his vehicle had a flat tire. Grievant's cell phone was uncharged. He had no money and did not have a key to re-enter his friend's house. Grievant began walking to another friend's house but that friend was not at home.³ Grievant ultimately obtained a ride from an elderly gentleman who drove Grievant to his own house. At 4:15 p.m., Grievant called his on-duty supervisor to inform the supervisor of his unexpected delay. Grievant requested and was granted leave for the day in order to make repairs to his vehicle.

On April 2, 2005, Grievant was scheduled to report to work at 4:00 p.m. At 2:35 p.m., Grievant called the Sergeant and stated that his face was swollen because of recent dental work. Grievant said he was not sure if he should come into work, but if he came into work he would need to be assigned to an indoor beat because he did not wish to work in the outdoor air due to his medical condition. As Grievant continued the conversation expressing uncertainty regarding what he intended to do, the Sergeant asked Grievant if he was calling out sick. Grievant replied "yes." The Sergeant mentioned to Grievant that Grievant had numerous sick days previously used. Grievant responded that he would bring in a doctor's excuse. Grievant asked for sick leave for the day and his request was granted.

On April 4, 2005, Grievant provided the Sergeant with an explanation of April 2, 2005:

I would like to offer an explanation, per your request, about my absence. On April 1, 2005, I had some dental work done it was my intention to report for duty on April 2, 2005, therefore; I did not request time off in advance. Upon waking on April 2, 2005, I discovered my face to be painfully swollen but believed that once the swelling subsided I could perform my duties. I called in to explain my condition and at that point

¹ Agency Exhibit 6.

² Agency Exhibit 2.

³ When Grievant failed to report to work, a Sergeant and Officer In Charge attempted to locate Grievant by calling the telephone numbers Grievant had provided as contact information.

requested to be put on sick leave. I would like to offer an apology for any inconvenience this may have caused.⁴

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).

Group I

“Unsatisfactory attendance or excessive tardiness” is a Group I offense.⁶ Grievant had been repeatedly counseled and instructed to report to work on time. He contacted a supervisor approximately one hour and twenty-five minutes after his shift started. Grievant’s work attendance was unsatisfactory to the Agency and was excessive because of the pattern of tardiness Grievant had established. He added to that pattern on March 10, 2005. The Agency has presented sufficient evidence to support its issuance of this Group I Written Notice.

Grievant contends he was unable to timely notify his supervisor through no fault of his own. In order to justify issuance of a Group I Written Notice, it is not necessary for an Agency to prove that an employee intended to be tardy or absent from work. Rarely do employees intend to be tardy to work. Thus, Grievant’s lack of intent to be tardy or absent from work or his inability to contact his supervisor are not factors excusing his failure to report to work on time as scheduled.

Group II

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.⁷

VCU Police Policy 0565(c) states:

⁴ Agency Exhibit 1.

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(V)(B)(1)(a).

⁷ DHRM § 1.60(V)(B)(2)(a).

When the need for sick leave is **not foreseeable**, the employee shall report the fact immediately to their supervisor and no later [than] two (2) hours prior to duty.⁸ (Emphasis original).

A Group II Written Notice is not supported by Grievant's behavior on April 2, 2005. Grievant did not refuse to follow his supervisor's instruction to notify the supervisor that Grievant would be late. Grievant complied with the supervisor's instruction to notify the Agency of his need for sick leave, but rather failed to comply with that instruction on a timely basis, namely Grievant failed to notify the supervisor at least two hours prior to the beginning of his shift. Grievant's behavior justifies issuance of a Group I Written Notice because of his unsatisfactory work performance. The Group II Written Notice must be reduced to a Group I Written Notice. As stated above, it is not necessary for the Agency to show Grievant intended to untimely notify his supervisor on April 2, 2005.

Accumulation of Disciplinary Action

Accumulation of four Group I Written Notices normally should result in discharge.⁹ Along with the two Group I Written Notices which are the subject of this grievance, Grievant has an active Group II Written Notice¹⁰ issued on June 14, 2003 and an active Group I Written Notice issued on November 23, 2004. Based on the accumulation of disciplinary action, the Agency has presented sufficient evidence to support its removal of Grievant from employment.¹¹

Grievant contends the Agency failed to discipline him in a progressive manner because the Agency did not suspend him as he accumulated disciplinary action for tardiness and unsatisfactory attendance. Grievant also argues the Agency should have offered to send him to the Employee Assistance Program to help him address some of the stressful events occurring to him outside of work. These arguments fail because the Agency is encouraged, but is not obligated to progressively discipline employees and the Agency is not obligated to send employees to the Employee Assistance Program. DHRM Policy 1.60(VI)(C)(1) states, "Referral to the *employee assistance program* shall

⁸ Agency Exhibit 5.

⁹ DHRM Policy 1.60(VII)(D)(b)(2).

¹⁰ A Group II Written Notice may substitute for a Group I Written Notice for purpose of the accumulation of disciplinary action because a Group II offense is more serious than a Group I offense.

¹¹ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

Although the Agency granted Grievant leave on March 10, 2005 and April 2, 2005, it did so after Grievant had already acted contrary to the Standards of Conduct and did so as a convenience to Grievant. By permitting Grievant to take leave on those days, the Agency did not excuse Grievant's behavior.

not be considered a substitute for any disciplinary action imposed for the commission of an offense.” (Emphasis original).

DECISION

For the reasons stated herein, the Agency’s issuance on April 3, 2005 to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency’s issuance on April 19, 2005 of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency’s removal of Grievant from employment is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.¹²

[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

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.