

Issue: Termination due to excessive absences; Hearing Date: 07/14/05; Decision Issued: 07/28/05; Agency: DMHMRSAS; AHO: Sondra K. Alan, Esq.; Case No. 8107

DECISION OF HEARING OFFICER

In re:

Case No: 8107

Hearing Date: July 14, 2005
Decision Issued: July 28, 2005

PROCEDURAL ISSUES

The Grievant filed a timely grievance from a termination notice¹ of April 12, 2005. Grievant had proceeded through resolution steps and upon Grievant's request for hearing, the Agency qualified the grievance for a hearing. The matter was scheduled for hearing during a pre-hearing telephone conference on June 30 for hearing date of July 14, 2005 at 11:00am at Southwest Virginia Training Center. Agency personnel were prepared at 11:00am on said date, but Grievant was not present. The Hearing Officer commenced the hearing at 11:20am. Grievant arrived at 11:55am.

APPEARANCES

Agency representative
Two witnesses for Agency
Grievant
One witness for Grievant
One Agency witness recalled by Grievant

ISSUES

Was the Grievant's pattern of conduct related to absences from work sufficient to warrant his termination from employment? Was Grievant given sufficient notice of

¹ Agency Exhibit A, Notice of Termination, April 12, 2005

unsatisfactory attendance and impending termination? Should the circumstances of Grievant's last absence mitigate his discipline? Should Grievant receive reinstatement and back pay?

FACTS

The Agency proceeded first as actions of discipline require the Agency bear the burden of proof.²

The Agency's first witness testified that all employees received employee handbooks and also had verbal training when they were first hired with the agency. The Agency's witness testified the Agency relied on rules contained in its handbook³ to guide its decision on Grievant's performance regarding attendance violations. The Agency relied on Instruction 22⁴ which dealt with attendance; Instruction 106⁵ which dealt with standards of conduct and description of disciplinary actions; Instruction 113⁶ which described leave, unanticipated absences, and absences without leave. This exhibit also described how a request for leave with medical certification required submission of documentation on the first day of work following the absence.

Through Agency's second witness, there were several letters, reports and notices given to Grievant which were put into evidence. The first letter⁷ dated November 27th,

² Department of EDR Guidelines manual §5.8

³ SWVTC Employee handbook, 2004 revisions

⁴ Agency Exhibit B

⁵ Agency Exhibit C

⁶ Agency Exhibit D

⁷ Agency Exhibit E

2002 referred to unsatisfactory attendance. A progress report⁸ of December 5, 2002 described an attendance problem. Agency report⁹ of March 13, 2003 described an attendance problem. Agency memorandum¹⁰ of March 13, 2003 described unsatisfactory attendance and for the first time cautioned about termination. Agency progress review¹¹ of May 1, 2003 noted good attendance from March 7, 2003 until May 1, 2003. Agency progress review¹² of June 3, 2003 noted good attendance from May 1, 2003 until June 3, 2003. Agency progress review¹³ of August 15, 2003 noted good attendance from June 4, 2003 until August 15, 2003. Agency notes¹⁴ of May 28, 2004 record conversations with Grievant regarding absences and leave slips. Agency letter¹⁵ of June 2, 2004 described unsatisfactory attendance and failure to turn in leave slips on time and mentioned possible termination. Agency submitted four Written Notices¹⁶ (one Group II and three Group I notices) which described unsatisfactory conduct resulting in suspension from June 6, 2004 to June 19, 2004. Agency letter¹⁷ of November 17, 2004 described unsatisfactory attendance and failure to submit leave slips in a timely fashion, and notice regarding possible termination. Agency letter¹⁸ of January 26, 2005 regarded a prolonged absence

⁸ Agency Exhibit F

⁹ Agency Exhibit G

¹⁰ Agency Exhibit H

¹¹ Agency Exhibit I

¹² Agency Exhibit J

¹³ Agency Exhibit K

¹⁴ Agency Exhibits M and N

¹⁵ Agency Exhibit O

¹⁶ Collective Agency Exhibit P

¹⁷ Agency Exhibit R

¹⁸ Agency Exhibit S

issue. Agency memorandum to Grievant¹⁹ of February 4, 2005 regarded unapproved absence, and notice of possible termination. Agency notice²⁰ of April 12, 2005 notified Grievant that he had been terminated for unsatisfactory attendance.

The Agency witness stated Grievant had been a good employee in regards to his ability to work with patients at the facility.

The Agency witness concluded his testimony stating that in the two and a half years of employment, Grievant had an accumulation of 400 hours of unanticipated absences of which only 104 were "no fault."

Grievant produced one witness who was an employee of the Agency for three years. She stated she had 80 hours of "no fault" absences in her first year and received no Agency notices.²¹ By contrast, she stated Grievant had only 40 hours of absences in his first year.²² This evidence was disputed by Grievant's adverse witness who testified those 40 hours were between August 25, 2002 and November 27, 2002, a matter of only three months.

Grievant testified on his own behalf that his last illness before termination was due to an illness caused by infected patients where he worked. He testified he did not see a doctor until the second day of his illness and did bring in a doctor's excuse.²³

¹⁹ Agency Exhibit T

²⁰ Agency Exhibit A

²¹ Grievant Exhibit 1

²² Grievant Exhibit 2

²³ Grievant Exhibit 5

APPLICABLE LAW AND OPINION

The Department of Employee Dispute Resolution Guidelines procedural manual section 5.8 provides that in disciplinary actions, such as the herein termination, the Agency must show by a preponderance of evidence that the disciplinary action was warranted.

Pursuant to §2.2-1201 of the Code of Virginia, 1950, as amended, the Agency is to promote written Standards of Conduct in keeping with Standards set by the Department of Human Resource Management and advise employees of their policy.²⁴ 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 conduct, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action. The Agency relied on Instruction 22²⁵ which dealt with attendance; Instruction 106²⁶ which dealt with standards of conduct and description of disciplinary actions; Instruction 113²⁷ which described leave, unanticipated absences, and absences without leave. This exhibit also described how a request for leave with medical certification required submission of documentation on the first day of work following the absence. The Agency averred that Grievant had ample opportunity when first hired to familiarize himself with all policies

²⁴ SWVTC Employee handbook, 2004 revisions

²⁵ Agency Exhibit B

²⁶ Agency Exhibit C

²⁷ Agency Exhibit D

both by a written handbook and with oral instruction. Grievant did not offer any objection to Agency's statement regarding this fact. The Agency produced prolific evidence of letters, memos, and notices to Grievant of his many infractions of standards of acceptable behavior. Grievant's rebuttal to these advisements was that he was treated more harshly than at least one other employee, that it was acceptable to be out after his final warning because the people he was charged with caring for infected him with his illness, thereby causing the absence. He stated that he did have a doctor's excuse for the absence.²⁸

While the circumstances of his final absence may have been sufficient reason for mitigating his disciplinary action at an earlier date, his history of absences and his clear notice²⁹ of November 17, 2004 regarding any further absences overrides granting the leniency to Grievant that he had come to expect.

It is reasonable that an employer would only hire an employee if they were needed. An employee who cannot meet that need by being present is of no benefit to the employer. Due to Grievant's excessive absences, the termination was justified. Reinstatement and back pay requested by Grievant are not granted.

DECISION

The termination of Grievant by the Agency on April 12, 2005 is affirmed.

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:

²⁸ Grievant Exhibit 5

²⁹ Agency Exhibit R

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision was 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 Street, 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 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.³⁰ 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.³¹

[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.

Judicial Review of Final Hearing Decision

Within thirty (30) 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.

Sondra K. Alan, Hearing Officer

³⁰ 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).

³¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.