

Issue: Group I Written Notice with termination (due to accumulation) (excessive absences); Hearing Date: 05/04/06; Decision Issued: 05/04/06; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8329; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8329

Hearing Date: May 4, 2006
Decision Issued: May 4, 2006

PROCEDURAL HISTORY

On February 10, 2006, Grievant was issued a Group I Written Notice of disciplinary action for accumulation of unplanned leave. Grievant was removed from employment based upon the accumulation of disciplinary action.

On March 8, 2006, 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 11, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 4, 2006, a hearing was held at the Agency's regional office. Grievant did not appear at the hearing.

APPEARANCES

Agency Representative
Witness

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Direct Care Associate (CNA) at one of its facilities. On August 29, 2005, Grievant received a Group I Written Notice for the accumulation of unplanned leave. On September 28, 2005, Grievant received a Group I Written Notice for the accumulation of unplanned leave. On February 8, 2006, Grievant received a Group I Written Notice with a three work day suspension for the accumulation of unplanned leave. The Written Notice stated, "ANY SUBSEQUENT WRITTEN NOTICE RECEIVED BY EMPLOYEE FOR ANY LEVEL OF OFFENSE DURING ACTIVE LIFE OF THE CURRENT WRITTEN NOTICES MAY RESULT IN TERMINATION."

As of February 9, 2006, Grievant had unplanned leave equaling 212.2 hours.

An Agency employee testified that the Agency had complied with the notification and other requirements of the Family Medical Leave Act.

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).¹ 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).

Agency policy HR 053-19 defines unplanned leave as, “[t]ime an employee is scheduled to work but is absent without a signed leave slip approved in advance (no later than the end of the employee's last work shift the preceding day of absence).” Unacceptable attendance is defined as “accumulation of more than 64 hours of unplanned leave.” “At the accumulation of 65 hours of unplanned leave, the employee may be issued a Group I Written Notice”²

Grievant accumulated more than 64 hours of unplanned leave thereby justifying the issuance of a Group I Written Notice. Grievant has accumulated four active Group I Written Notices and may be removed from employment pursuant to DHRM Policy 1.60.

Grievant asserted at the Agency miscalculated her number of hours of unplanned leave. Grievant claimed she was not permitted to work at the Facility without her CNA license but the days of her absence were counted as unplanned leave. Grievant did not present any evidence regarding how many hours of unplanned leave with which she was charged due to her lack of a license. The Supervisor testified that Grievant is responsible for obtaining and renewing her license. According to the Supervisor, the State Board notified Grievant two months prior to the expiration of her license on January 31, 2006. In addition, the Agency notified Grievant by telephone two weeks prior to the expiration of her license and reminded her to renew the license. Based on the evidence presented, there is no basis for the Hearing Officer to conclude that the Agency miscalculated Grievant's hours of unplanned leave.

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....”³ 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)

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² Grievant received a copy of policy HR 053-19 during her orientation to the Facility. In addition, she received annual in-service training discussing the policy.

³ *Va. Code § 2.2-3005.*

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 I Written Notice of disciplinary action with removal based on the accumulation of active disciplinary action 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 all of your appeals to the other party and to the EDR Director. 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.⁴

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.