

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 12/04/06;
Decision Issued: 12/22/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8461; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8461

Hearing Date: December 4, 2006
Decision Issued: December 22, 2006

PROCEDURAL HISTORY

On August 18, 2006, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance. On September 14, 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 he requested a hearing. On November 3, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 4, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

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 employs Grievant at one of its Facilities. He was hired by the Agency on May 10, 1999.

On March 31, 2003, Grievant received a copy of the Agency's Operating Procedure #3 governing attendance. He signed a document acknowledging his receipt of the policy.¹

On November 8, 2005, Grievant received a written counseling because he had accumulated 12 unscheduled absences. He was advised:

to report to work as scheduled and plan time off when needed. Failure to do so could result in a Group I written notice.²

¹ Agency Exhibit 1, p. 24.

² Agency Exhibit 1, p. 15.

Grievant received a Notice of Improvement Needed/Substandard Performance on November 8, 2005 regarding his unsatisfactory attendance.

On February 10, 2006, Grievant received a written counseling regarding having accumulated nine unscheduled absences. He was advised he:

needs to report to work as scheduled and plan time off when needed. Failure to do so could result in a Group I for unsatisfactory attendance according to the Standards of conduct.³

On February 11, 2006, Grievant was given a Notice of Improvement Needed/Substandard Performance advising him to improve his attendance by reporting to work as scheduled and request time off in advance.

As of August 6, 2006, Grievant had accumulated 12 unscheduled absences.

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).

The Agency has a "no fault" attendance policy. "Once an employee exceeds eight (8) whole occurrences within any twelve (12) consecutive month period or eight (8) half occurrences within a six (6) consecutive month period, he/she should normally receive disciplinary action in the form of a Group I Written Notice for Unsatisfactory Attendance." An occurrence is defined as, "[a]n unscheduled absence from work that does not meet the criteria defining a scheduled absence, to include, leaving work early (citing reasons that cannot reasonably be denied by supervision); or calling-in to request time off without having requested to leave before the end of the shift the last workday preceding the planned a one absence." A scheduled absence is a "period of time away from the work site or job station that has been pre-approved (preferably in writing) on the Leave Activity Reporting Form according to established procedure."

³ Agency Exhibit 1, p. 13.

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

“Unsatisfactory attendance” is a Group I offense.⁵ As of August 6, 2006, Grievant had accumulated 12 occurrences thereby exceeding the eight permitted by Agency policy. Grievant’s attendance was unsatisfactory to the Agency and justified the issuance of a Group I Written Notice.

Grievant argues the Agency incorrectly calculated the number of occurrences. Upon review of the documents provided, the Hearing Officer concludes that Grievant had at least eight occurrences in a 12 months period to support the issuance of a Group I Written Notice.

Grievant contends he cannot afford to go to the doctor’s office and obtain a note every time he cannot work. Grievant’s argument fails because nothing in policy prohibits an Agency from requiring employees to present medical excuses covering their absences. In addition, by permitting employees to have eight occurrences before disciplinary action is taken, the Agency, in essence, is permitting employees to be absent due to illness without providing medical documentation for up to eight times.

Grievant argues the Agency failed to properly notify him when he approached eight or more occurrences. The evidence showed that the employee has the burden of tracking his occurrences under the Agency’s procedure. When Grievant received leave slips approved by his supervisor, the supervisor would write the word “occurrence” to indicate the supervisor had recorded Grievant’s absence as an occurrence under Procedure 3. Grievant could have asked his supervisor at any time how many occurrences he had accrued.

Procedure 3 provides, “[a]n employee will not be credited with an occurrence (whole or half) if the absence: ... is leave specifically covered by the Family Medical Leave Act (FMLA) with authorization on file for which has been approved in short term disability under the Virginia Sickness and Disability Program (VSDP).”⁶ No evidence was presented suggesting Grievant applied for or was qualified for FMLA or short term disability.

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....”⁷ 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

⁵ DHRM Policy 1.60(V)(B)(1).

⁶ Facility Policy No. 3.

⁷ *Va. Code § 2.2-3005.*

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."

The Agency carefully considered Grievant's reasons for being absent and applied its mitigation policy with respect to counting occurrences. No further mitigation is appropriate. In light of the standard set forth in the *Rules*, 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 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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.