

Issues: Group I Written Notice (unsatisfactory attendance), and Termination (due to accumulation); Hearing Date: 05/16/08; Decision Issued: 05/21/08; Agency: DMHMRSAS; AHO: William S. Davidson, Esq.; Case No. 8852; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8852

Hearing Date: May 16, 2008
Decision Issued: May 21, 2008

PROCEDURAL HISTORY

On February 2, 2006, the Grievant was issued a Group I WrittenNotice for unsatisfactory attendance on November 22, 2005. This was the eighth occurrence within a twelve (12) month time frame. On March 12, 2007, the Grievant was issued a Group I WrittenNotice for unsatisfactory attendance for the accumulation of eight (8) occurrences with the eighth occurrence taking place on November 16, 2006. The Grievant was issued a twenty-four (24) hour letter and signed that letter on March 6, 2007. On March 12, 2007, the Grievant was issued a Group I WrittenNotice for unsatisfactory attendance for the accumulation of nine (9) occurrences with the ninth occurrence taking place on January 11, 2007. The Grievant was issued a twenty-four (24) hour letter and signed such letter on March 6, 2007. On January 8, 2008, the Grievant was issued a Group I WrittenNotice for unsatisfactory attendance for the accumulation of eight (8) occurrences, with the eighth occurrence taking place on October 28, 2007. The Grievant responded to a twenty-four (24) hour letter which was issued on December 18, 2007 and, as a result of this Group I WrittenNotice that was issued on January 8, 2008, the Grievant was suspended for five (5) days. At this time, she now had four (4) active Group I WrittenNotices. On February 23, 2008, the Grievant was issued a Group I WrittenNotice for unsatisfactory attendance for the accumulation of nine (9) occurrences, with the ninth occurrence taking place on February 3, 2008. The Grievant was issued a twenty-four (24) hour letter on February 4, 2008 and this Group I WrittenNotice, which was issued on February 23, 2008, resulted in the Grievant's termination on February 24, 2008.

On March 12, 2008, the Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Second Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 28, 2008, EDR assigned this Appeal to a Hearing Officer. On May 16, 2008, a hearing was held at the Agency location.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUE

1. Whether the Grievant engaged in the behavior described in the five (5) Group I Written Notices that were issued to her.
2. Whether the behavior constituted misconduct.
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy.
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 Agency provided the Hearing Officer with a notebook containing ten (10) tabbed sections, and that notebook was accepted, with the exception of Tab Number 5, as Agency Exhibit 1. The Grievant provided the Hearing Officer with a plastic sleeve containing seven (7) indexed sections and that sleeve was accepted in its entirety as Grievant's Exhibit 1.

The Department of Mental Health, Mental Retardation and Substance Abuse Services employed the Grievant as a Direct Service Associate Two. This position is responsible for providing clients with basic personal care, therapeutic treatments and other direct services in accordance with individual programs and facility and departmental policies and standards.¹

On February 23, 2008, The Grievant had four (4) outstanding Group I Written Notices for unsatisfactory attendance and on that day was issued a fifth Group I Written Notice for unsatisfactory attendance.² The Grievant signed all five (5) of these Group I Written Notices

¹ Agency Exhibit 1, Tab 7, Page 1

² Agency Exhibit 1, Tab 4, Pages 1-5

indicating that she had received them and, in her testimony, did not dispute the validity of any of them. In her Exhibits, the Grievant did introduce excuse forms from various doctors which had no bearing on this case as the dates for those excuses did not match the dates of the five (5) Group I Written Notices.

The Agency introduced, through testimony of its witnesses, that it had provided the Grievant with numerous twenty-four (24) hour letters, the last of which was dated February 4, 2008.³ The Agency further introduced through witness testimony, that the Grievant had mitigated several prior occurrences and was completely familiar with how to mitigate an occurrence so that it would not be counted against her.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective April 16, 2008. The *Standards* provide a set of rules governing the professional and personal conduct and acceptable standards for performance of employees. The *Standards* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to

³ Agency Exhibit 1, Tab 6

provide appropriate corrective action. Section V.B.3 of Policy No. 1.60 provides that Group I offenses are the least severe.⁴ Unsatisfactory attendance is an example of a Group I offense.

The Agency has a “no fault” attendance policy. Employees who accumulate eight (8) occurrences within a twelve (12) month period are subject to a Group I WrittenNotice. Each additional occurrence subjects them to another Group I WrittenNotice, if they continue to have more than eight (8) Group I WrittenNotices on record during the twelve (12) month period. Upon receipt of the third active Group I WrittenNotice, they may be suspended for one (1) day. Upon receipt of the fourth Group I WrittenNotice, they may be suspended for five (5) to ten (10) days in lieu of termination. Upon receipt of the fifth active Group I WrittenNotice, the employee will normally be terminated.⁵ An occurrence is defined as an unplanned absence of four (4) hours or more but not exceeding one (1) work day. Unplanned absences in excess of one (1) work day shall be considered as one (1) occurrence if the absence on the following work days is documented by a physician as being medically necessary.⁶ An unplanned absence is an absence from the work site when written or verbal approval has not been received from a Supervisor as required under the definition of Planned Absence.⁷ A planned absence is an absence using one of any number of approved leave methods which have been approved in writing or by telephone, either prior to the beginning of the shift for which the absence is requested or prior to the time that leave is taken when the employee is at work and must leave.⁸

Unsatisfactory attendance is a Group I offense.⁹ Prior to February 23, 2008, the Grievant had accumulated four (4) Group I WrittenNotices and on February 23, 2008, received her fifth Group I Written Notice. DHRM Policy 1.60 allows for termination after the accumulation of four (4) active Group I Written Notices. This Agency does not terminate until the issuance of the fifth active Group I Written Notice. The Agency has gone through all procedural processes that are necessary to provide the Grievant with due process under all of its rules and procedures in the issuance of each of the five (5) Group I Written Notices and the Grievant has offered no evidence as to why each of them was not justified. The Grievant contends that she was absent due to illness or for personal reasons. The Agency has not challenged the Grievant’s reasons for being absent. The Grievant argues that she cannot control when she is ill or when a child is ill and thus should not be disciplined for being unable to come to work. Daily attendance of staff is critical to the operation of this Facility.¹⁰ While the Hearing Officer is sympathetic to the Grievant’s medical concerns and that of her children inasmuch as she is a single mother, a showing of unsatisfactory attendance does not depend on whether or not the reasons for her absences were justified. An employee is not required to be at fault for being absent before the Agency may discipline that employee for having unsatisfactory attendance.

⁴ Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct, April 16, 2008. Agency Exhibit 1, Tab 8

⁵ Agency Exhibit 1, Tab 1, Page 3

⁶ Agency Exhibit 1, Tab 1, Page 2

⁷ Agency Exhibit 1, Tab 1, Page 2

⁸ Agency Exhibit 1, Tab 1, Page 1

⁹ Agency Exhibit 1, Tab 8, DHRM Policy 1.60

¹⁰ Agency Exhibit 1, Tab 1, Page 1

MITIGATION

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...”¹¹ Under the Rules for Conducting Grievance Hearings, “a hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

The Hearing Officer finds no basis for mitigation in this matter. The Grievant was disciplined properly. The Grievant was given proper Notice and due process for all five (5) Group I Written Notices.

DECISION

For reasons stated herein, the Agency’s removal of the 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 Street, 12th Floor
Richmond, VA 23219

¹¹Va. Code § 2.2-3005

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 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 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹² 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.¹³

[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]

William S. Davidson
Hearing Officer

¹²An 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).

¹³Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.