

Issues: Group I Written Notice (unsatisfactory job performance), Group I Written Notice (unsatisfactory job performance), and Termination (due to accumulation); Hearing Date: 11/25/08; Decision Issued: 12/02/08; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 8971; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8971

Hearing Date: November 25, 2008
Decision Issued: December 2, 2008

PROCEDURAL HISTORY

On July 17, 2008, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance. On July 17, 2008, Grievant was issued a second Group I Written Notice of disciplinary action for unsatisfactory attendance. Grievant was removed from employment on July 17, 2008 based on the accumulation of disciplinary action.

On July 21, 2008, 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 October 15, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 25, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

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 Motor Vehicles employed Grievant as an Administrative and Office Specialist III at one of its Facilities. She had been employed by the Agency for approximately 12 years prior to her removal effective July 17, 2008. The purpose of her position was:

Performs customer service transactions, administers vision, knowledge and road tests, and issues DMV credentials. All programs and services are administered in a customer service-focused manner and in accordance with statutory and administrative procedural requirements such as the Motor Vehicle Code of Virginia, DMV policies, procedures, rules and regulations, the Privacy Protection Act and the Freedom of Information Act.

Grievant had three prior active Written Notices. On September 11, 2007, Grievant received a Group I Written Notice for unsatisfactory attendance. On October 26, 2007, Grievant received a Group I Written Notice for failure to report to work as scheduled. On January 19, 2008, Grievant received a Group I Written Notice for failing to report work as scheduled. She did not report to work due to personal health issues.

Grievant's attendance at work is especially important to the Agency. When Grievant has unscheduled absences, she causes other employees to assume her worked duties. Grievant's Employee Work Profile lists attendance as a core responsibility. She is expected to have "[n]o excessive unplanned absences."

Grievant displayed a history of unscheduled absences. She received an overall rating of "Below Contributor" on her 2007 annual evaluation. Grievant's evaluator wrote:

Her absences have put a burden on the office operations and her co-workers. This attendance is unacceptable and can no longer be tolerated. Improvement is needed immediately and progress will be monitored continuously and evaluated monthly with feedback at that time.

Grievant was placed on a 90-day work performance plan. Her attendance improved during that time frame.

Grievant was scheduled to work on June 19, 20, and 21, 2008. On June 19, 2008, Grievant called the Agency's staff and said she was not feeling well and would be going to the doctor due to cold/flu-like symptoms. Grievant did not report to work as scheduled on these days. She presented a doctor's excuse to the Agency for her absences.

In order to ensure adequate staff are present to work at the Facility on any given workday, Agency managers attempt to avoid having more than one customer service employee on vacation at a time. When employees request leave for the same day, the employee with the most seniority receives approval for leave.

On February 26, 2008, Grievant submitted a leave request to the Supervisor asking for leave to be out of the office from July 5, 2008 through July 16, 2008.¹ Grievant planned to attend an athletic event of her child to be held in another state. Grievant's request was denied because another employee with more seniority asked for vacation dates overlapping Grievant's dates. Grievant resubmitted her leave request to ask for leave from July 5, 2008 through July 14, 2008. Her second request was approved. The Agency expected Grievant to report to work on July 15 and July 16, 2008 as scheduled. On July 15 and July 16, 2008, Grievant did not report to work. She remained in another state attending her child's athletic event.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal

¹ At the time of Grievant's request, she had a zero balance for annual, family personal, compensatory, overtime, and sick leave.

disciplinary action.”² Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

State employees are expected to, “[r]eport to work as scheduled and seek approval from their supervisors in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures.”

Poor attendance is an example of a Group I offense.³ Grievant demonstrated a pattern of unacceptable attendance. As that pattern of behavior continued, Grievant was advised that unplanned absences were unacceptable to the Agency and that she should report to work as scheduled. Grievant understood the Agency’s expectations for attendance. On June 19, 20, and 21, 2008, Grievant did not report to work as scheduled because she had a cold and flu. On July 15 and 16, 2008, Grievant did not report to work as scheduled because she was in another state attending her child’s athletic event and could not re-arrange her flight to an earlier date. The Agency has met its prima facie case to support the issuance of two Group I Written Notices for poor attendance. The question becomes whether mitigating circumstances exist to reduce the disciplinary actions.

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...”⁴ 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.

Grievant contends the Group I Written Notice for her absence due to cold and flu should be mitigated. Grievant could not control when she became ill. Her illness was sufficient to prevent her from working more than one day. There is no reason for the Hearing Officer to believe that if she had been at work she would have been able to perform her job duties. The discipline exceeds the limits of reasonableness.

² The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ DHRM Policy 1.60 Attachment A.

⁴ *Va. Code § 2.2-3005.*

Accordingly, the Hearing Officer finds mitigating circumstances to reverse the Group I Written Notice for poor attendance due to cold and flu.

Grievant contends the Group I Written Notice for her absence when she attended her child's athletic event should be mitigated. Grievant was in control of her travel schedule. She could have chosen not to attend the athletic event. She could have planned her flight schedule better to accommodate an earlier return date. While Grievant was at the event, she attempted to readjust her flight schedule. Although flights were available for her return, she was not willing to pay the additional amount necessary to return early. Grievant's failure to pay the additional amount necessary for a timely flight was her choice and within her control. No mitigating circumstances exist to reduce the second Group I Written Notice.

Grievant argues that some of the prior active group notices were for absences that might otherwise have been protected under the Family Medical Leave Act. Grievant's argument fails because those prior active group notices are not before the Hearing Officer and the merits of those written notices cannot be addressed by the Hearing Officer.

"Accumulation of four active Group I Offenses normally should result in termination unless there are mitigating circumstances."⁵ After considering the Group I Written Notice resulting from Grievant's failure to return from her child's athletic event, Grievant has accumulated four active Group I Written Notices. Accordingly, her removal from employment must be upheld.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for her absence on June 19, 20, and 21, 2008 is **rescinded**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for her absence on July 15 and July 16, 2008 is **upheld**. Grievant's remove 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.

⁵ DHRM Policy 1.60 (B) (2) (a).

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
600 East Main St. STE 301
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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.