

Issues: Group II Written Notice (unsatisfactory attendance) and Termination (due to accumulation); Hearing Date: 09/01/09; Decision Issued: 09/02/09; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9163; 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 Number: 9163

Hearing Date: September 1, 2009
Decision Issued: September 2, 2009

PROCEDURAL HISTORY

On June 30, 2009, Grievant was issued a Group II Written Notice of disciplinary action with removal for unsatisfactory attendance.

On July 6, 2009, 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 August 11, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 1, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate at one of its Facilities. The purpose of her position was:

Provides direct care for assigned individuals of [the Facility] by assisting with all phases of general hygiene and daily living. Places emphasis on maintaining the self-esteem and personal dignity while increasing the self-reliance of the individuals.¹

Grievant had prior active disciplinary action. On July 26, 2008, Grievant received a Group I Written Notice of disciplinary action for unsatisfactory attendance. On December 14, 2008, Grievant received a Group II Written Notice with a three-day suspension for unsatisfactory attendance.²

Agency employees provide direct care services to clients residing at the Facility. Services must be provided on a continuous basis. The Agency's ability to maintain staff to provide critical services is of great importance to the Agency and its clients.

Grievant failed to report to work on several days for which she was scheduled to work. She had unscheduled absences of 71.4 hours as follows:

¹ Agency Exhibit 2.

² Agency Exhibit 4.

February 2, 2009	8 hours
February 9, 2009	1.5 hours
March 2 and 3, 2009	16 hours
March 3, 2009	8 hours
March 19, 2009	8 hours
March 23, 2009	5.6 hours ³
March 28, 2009	5.1 hours
April 20 and 21, 2009	16 hours ⁴
May 18, 2009	3.2 hours
June 1, 2009	8 hours

The Agency did not count leave protected by the Family Medical Leave Act or Worker's Compensation.

Grievant was under the Virginia Sickness and Disability Program policy.

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 disciplinary action."⁵ 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."

Unsatisfactory attendance is a Group I offense. However, if the same offense is repeated, the employee may receive a Group II Written Notice instead of a Group I Written Notice.

Facility Policy 3 governs attendance. This policy provides that, "[r]egular attendance is a condition of employment and it is the employee's responsibility to monitor their own attendance and to appropriately schedule absences." Policy 3 defines "scheduled absence" as:

³ March 19, 2009 and March 23, 2009 do not appear to be part of a multiple day absence. Grievant presented a doctor's note dated March 23, 2009 indicating she was to be under doctor's care from March 19, 2009 to March 23, 2009 with a return to work date of March 24, 2009. Grievant did not testify to explain her work absences, but she wrote in the Step Response that she worked on March 20, 2009. She also appears to have worked on March 23, 2009 and then left early. If Grievant worked on March 20, 2009, her absence on March 19, 2009 and March 23, 2009 would not be multiple day absences.

⁴ Grievant submitted a doctor's note for this absence on June 30, 2009. Agency policy allows the Agency to disregard all but the first day of absence for multiple day absences but only if the doctor's note is presented upon return to work. Grievant did not present the note upon her return to work and, thus, the Agency could disregard the untimely doctor's note.

⁵ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

A period of time away from the work site or job station that has been pre-approved on the Leave Activity Reporting Form according to established procedure.

An unscheduled absence is:

A period of time away from work that does not meet the criteria defining a scheduled absence, to include, leaving work early (citing reason that cannot reasonably be denied by supervision); calling-in to request time off without having requested the leave before the end of the shift of the last workday preceding the planned day of absence, or calling in on a day previously requested and denied. All unscheduled hours absent not meeting the criteria for a scheduled absence must be counted by the supervisor without exception.

When calling in, the employee should state the type of leave desired. Community Services Leave cannot be used when calling in. If an employee does not call in then the hours absent should be treated as docked time and may be treated as a violation under the Standards of Conduct. As unscheduled absence/leave may be subject to docketed time and may be treated as a violation under the Standards of Conduct.

“Once an employee exceeds 64 hours of unsatisfactory leave within any twelve (12) consecutive month period, he/she should normally receive disciplinary action in the form of a Group I Written Notice for Unsatisfactory Attendance.” *** “Once disciplinary action has been taken for unsatisfactory attendance, an employee is eligible for an additional Group I Written Notice for Unsatisfactory Attendance for each additional hour of unscheduled leave accrued as long as the record exceeds 64 hours of unscheduled leave during the twelve (12) consecutive month period.”

On October 5, 2007, the Agency amended its policy to provide:

1. When staff calls in sick, the absence will be documented as unscheduled leave;
2. If a physician's note is submitted upon return to work this will be noted on the leave control log, however the absence will remain notated as unscheduled.
3. If the absence is a multiple day absence and the staff returns with a physician's note, all but the first day will be excused at that time. The first day will remain documented as unscheduled.
4. When (if) a staff accumulates in excess of 64 hours of unscheduled leave within 12 consecutive months and therefore becoming subject to corrective action – then, previous absences documented as unscheduled but notated with physician's documentation may be removed through mitigation, otherwise they will remain on the employee's absence record to show a record of absence.

As of June 1, 2009, Grievant had accumulated more than 64 hours of unscheduled leave. Her attendance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Written Notice. Because Grievant is now being disciplined for the same offense for which she was previously disciplined, she may be disciplined for a Group II offense even though unsatisfactory attendance would otherwise be a Group I offense. Based on the accumulation of two Group II Written Notices, the Agency's decision to remove Grievant employment must be upheld.

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..."⁶ 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. 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 II Written Notice of disciplinary action with removal 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

⁶ *Va. Code § 2.2-3005.*

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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.