

Issues: Group I Written Notice (unsatisfactory attendance) and Termination (due to accumulation; Hearing Date: 02/03/10; Decision Issued: 02/09/10; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9260; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9260

Hearing Date: February 3, 2010
Decision Issued: February 9, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group I Written Notice on October 7, 2009 for:

Unsatisfactory attendance and excessive tardiness. You have missed 11 days since February, 2009 and had 4 tardies during the last 5 months. You have received two Group II's and two Group I's since April 2007 for abuse of state time or failure to report. The last Group I in September 08 was in lieu of termination but your excessive absenteeism and tardiness pattern continues. Therefore, you are being removed from state service for unsatisfactory attendance and excessive tardiness.¹

Pursuant to the Group I Written Notice, and two prior active Group II Written Notices and two prior active Group I Written Notices, the Grievant was terminated on October 7, 2009.² On October 30, 2009, the Grievant timely filed a grievance to challenge the Agency's actions.³ On January 12, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On February 3, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Advocate for Agency
Grievant
Advocate for Grievant
Witnesses

ISSUE

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 1 and Tab 6, Pages 65, 71, 75 and 82

³ Agency Exhibit 1, Tab 1, Page 3

1. From the time period of February 10, 2009 through September 14, 2009, did the Grievant have an unsatisfactory attendance and tardy record?
2. Pursuant to the two (2) prior Group II Written Notices and the two (2) prior Group I Written Notices, could the Grievant be terminated based on the current Group I Written Notice?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.

⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

⁴ Ross Laboratories v. Barbour, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ Humphries v. N.N.S.B., Etc., Co., 183 Va. 466, 32 S.E. 2d 689 (1945)

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 eight (8) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant offered no documentary evidence to be introduced.

The Agency alleged that the Grievant was absent from the workplace for eleven (11) days during the time frame of February 10, 2009 through September 14, 2009.⁷ The Agency further alleged that the Grievant was tardy on four (4) separate dates from June 25, 2009 through September 14, 2009.⁸ Within the Agency's evidence, there were several written documents that certified the Grievant's illness and these documents were signed by her physician. Each of these documents indicated that the Grievant was ill on the day that was in question and were used by the Grievant to justify her absences. Only two (2) of these documents pertained to the time frame of February 10, 2009 through September 14, 2009.⁹ On three (3) of the four (4) dates in question that the Grievant was tardy for work, she received a document titled Performance Correction Counseling.¹⁰ Each of these documents indicated that failure by the Grievant to make immediate corrections would result in disciplinary actions under the Standards of Conduct.

When the Grievant had exhausted all of her various types of paid leave on an annual basis, her pay was thereafter docked when she missed time. The Agency introduced evidence that from the time frame of February 28, 2005 through October 7, 2009, the Grievant's pay was docked for approximately 630 hours.¹¹ That translates to the fact that the Grievant, during this period, had her pay docked approximately 2.8 weeks each year above and beyond all of her leave time.

All of the Agency witnesses testified that the Grievant was a good employee when she was at work. Because of that and because the Agency wanted to assist her in becoming an even better employee and one that could be counted on to come to work, on July 9, 2008, the Grievant attended a seminar titled, "The Values of Attendance."¹² The purpose of this seminar was to impress upon the Grievant the need to, not only be a good employee, but to also be an employee who the Agency could have confidence in to come to work on a regular basis and not be absent nor tardy.

The Grievant testified that she understood that her tardiness was an issue. She testified that she did not realize how badly her absences and tardiness were until such evidence was presented at this hearing. The Grievant acknowledged the existence of the prior Written Notices which were for abuse of state time and failure to report to work. The Grievant testified that the problem was either her low blood sugar level or low iron level. The Grievant testified that, since she was terminated, she has made strides in correcting both her blood and iron level and she

⁷ Agency Exhibit 1, Tab 1, Page 1

⁸ Agency Exhibit 1, Tab 1, Page 2

⁹ Agency Exhibit 1, Tab 2, Pages 21 and 22

¹⁰ Agency Exhibit 1, Tab 1, Pages 7 through 9

¹¹ Agency Exhibit 1, Tab 2, Page 12

¹² Agency Exhibit 1, Tab 5, Pages 55 through 64

further requested that she be given another chance to become an employee who could be relied upon to come to work on a timely basis.

Unfortunately, with two (2) prior Group I Written Notices and two (2) prior Group II Written Notices dealing with the same issues as this Group I Written Notice, the Hearing Officer finds that the Agency is well justified in termination pursuant to Policy 135.1(XI)(C)(4) Standards of Conduct wherein the following is stated:

A Group II notice in addition to three (3) active Group I notices, or in addition to another Group II, normally should result in termination...¹³

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...”¹⁴ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph as well as any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that there are no grounds for mitigation in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof and that the Group I Written Notice was validly issued. Pursuant to this Group I Written Notice and the two (2) existing Group I Written Notices and two (2) existing Group II Written Notices, the Hearing Officer finds that the Agency properly terminated the Grievant.

APPEAL RIGHTS

¹³ Agency Exhibit 1, Tab 8, Page 104

¹⁴ Va. Code § 2.2-3005

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

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 Street, Suite 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 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.¹⁵ 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.¹⁶

[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

¹⁵An 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).

¹⁶Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.