

Issues: Group II Written Notice (excessive absenteeism) and Termination (due to accumulation); Hearing Date: 11/01/10; Decision Issued: 11/03/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9439; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9439

Hearing Date: November 1, 2010
Decision Issued: November 3, 2010

PROCEDURAL HISTORY

On August 17, 2010, Grievant was issued a Group II Written Notice of disciplinary action for accumulating 66.3 hours of unplanned leave contrary to the Agency's policy. Grievant was removed from employment effective August 17, 2010 based upon the accumulation of disciplinary action.

On August 18, 2010, 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 12, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 1, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 Behavioral Health and Developmental Services employed Grievant is a Direct Service Associate II at one of its Facilities. She began working for the Agency in March 2008. Grievant had prior active disciplinary action. On March 17, 2010, Grievant received a Group I Written Notice of disciplinary action for the excessive accumulation of unplanned leave. On June 7, 2010, Grievant received a Group II Written Notice with suspension for unauthorized time away from assigned work area and misuse of State time.

The Agency has an attendance policy permitting employees to accumulate a balance of up to 64 hours of unplanned leave. Unplanned leave is defined as:

Time an employee is scheduled to work but is absent without a signed leave slip approved in advance (no later than the end of the employee's last work shift preceding day of absence).¹

The number of hours of unplanned leave for a given month is added to the number of hours accumulated in prior months to determine whether the threshold of 64 hours has been exceeded. If an employee has no unplanned leave for two consecutive months, eight hours of unplanned leave is removed from the employee's balance. For each

¹ Agency Exhibit 1.

additional month the employee has no unplanned leave, eight hours is removed from the employee's unplanned leave balance.

Unplanned leave does not include an absence for which the employee used Family/Personal leave, workers' compensation leave, Family Medical Leave, and leave approved by a supervisor on the day the leave is taken provided that the employee was at work and obtained written approval prior to leaving.

At the end of July 2010, Grievant had accumulated 66.3 hours of unplanned leave. The number of hours was verified through an audit by the Human Resource Analyst.

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."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."

Agency Policy 053-19 governs attendance for the Facility's employees. Unacceptable attendance is defined as "accumulation of more than 64 hours of unplanned leave." Regarding disciplinary action, the Policy provides, "[a]t the accumulation of 65 hours of unplanned leave, the employee may be issued a Group I Written Notice by the supervisor, after an audit is done by Human Resource Staff."

At the end of July 2010, Grievant had accumulated 66.3 hours of unplanned leave. The number of hours was audited and verified by the Human Resource Analyst. The Agency has presented sufficient evidence to support the issuance of a Written Notice of disciplinary action. Under DHRM Policy 1.60, an agency may issue a Group II Written Notice (and suspension without pay for up to 10 workdays) if the employee has an active Group I Written Notice for the same offense. In this case, Grievant received a Group I Written Notice for accumulating excessive unplanned leave. Accordingly, the Agency's issuance to Grievant of a Group II Written Notice of disciplinary action must be upheld.

Upon the accumulation of two Group II Written Notices of disciplinary action, an employee may be removed from employment. With the Written Notice giving rise to this disciplinary action, Grievant has received two Group II Written Notices. Accordingly, Grievant's removal must be upheld.

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

Grievant argued that the Agency did not correctly calculate the number of hours of unplanned leave. The Hearing Officer has reviewed the Agency's calculation and concludes that the Agency correctly calculated the number of hours of unplanned leave. Grievant argued that she received 32 hours of Family/Personal Leave on January 10, 2010 and that the Agency did not properly credit those hours toward Grievant's absences. The Agency's calculations included only Grievant's absences for which she did not receive prior approval. If Grievant obtain prior approval for an absence and used Family/Personal Leave to cover that absence, the absence would not have been unplanned regardless of whether Grievant used Family/Personal Leave to justify the absence. In other words, the Agency's failure to show 32 hours of Family/Personal Leave as part of the Agency's calculation of Grievant's unplanned leave, does not mean the Grievant was denied credit for some of her hours of Family/Personal Leave. Grievant most likely used as additional hours of Family/Personal Leave to justify planned absences from work.

Grievant argued that the Agency issued a Group I Written Notice for unsatisfactory attendance for hours of unplanned leave accruing in March 2010 and prior months. Grievant argued that the Agency incorrectly "reused" the hours of unplanned leave addressed in the March 2010 Written Notice to justify issuance of the Group II Written Notice giving rise to this disciplinary action. Nothing in the Agency's policy indicates that the issuance of a Written Notice automatically returns the Employee's unplanned leave balance to zero. Grievant has not established that the Agency failed to properly apply its attendance policy.

Grievant argued that her absence in July 2010 related to the death of her grandmother with whom Grievant lived and should be excused as Family Sick Leave. Grievant's argument fails. The Agency's attendance policy addresses Family Sick Leave. Unplanned leave does not include absences where the employee used Family Sick Leave. Family Sick Leave is available only to employees who are not covered by the Virginia Sickness and Disability Program. Grievant was covered by VSDP and therefore did not accrue Family Sick Leave.

Grievant argued that her absence in July 2010 should have been excused as Family Medical Leave. DHRM Policy 4.20 governs Family Medical Leave. An employee may receive Family Medical leave to care for his or her spouse, son, daughter, or parent with a serious health condition. Family Medical Leave is not available with respect to grandparents.

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...."³ 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

³ *Va. Code § 2.2-3005.*

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 disciplinary action should be mitigated because her absences from work in July related to the death of her grandmother on July 7, 2010. Grievant was the primary caretaker of her grandmother. The Agency's attendance policy already accounts for unplanned absences without evaluating the merits of each absence. The policy permits a supervisor to not count an absence as unplanned leave if mitigating circumstances exist. In this case, Grievant's Supervisor mitigated three of the six days of Grievant's unplanned leave relating to the death of Grievant's grandmother. The Supervisor was not obligated to disregard three days of unplanned leave, but he did so out of consideration of Grievant's hardship. No credible evidence was presented to suggest that the Supervisor failed to properly exercise that discretion. If the Hearing Officer were to find that the death of Grievant's grandmother was a mitigating circumstance justifying a reduction of the disciplinary action, the effect of that decision would be to circumvent the Agency's policy. The Agency's policy already permits employees to have up to 64 hours of unplanned leave for any reason including the death of a family member and the Agency properly exercised its discretion under the policy to disregard three days of unplanned leave. The Agency's issuance of disciplinary action in this case does not exceed the limits of reasonableness. 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 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
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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.