

Issues: Group I Written Notice (unsatisfactory attendance) and Termination (due to accumulation); Hearing Date: 12/07/11; Decision Issued: 12/08/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9719; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9719**

Hearing Date: December 7, 2011  
Decision Issued: December 8, 2011

**PROCEDURAL HISTORY**

On June 9, 2011, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance. Grievant was removed based upon the accumulation of disciplinary action.

On July 8, 2011, 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 November 14, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
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 as a DSA II. Grievant had prior active disciplinary action. On January 24, 2009, Grievant received a Group II Written Notice of disciplinary action for refusal to work overtime as required. On January 22, 2010, Grievant received a Group II Written Notice of disciplinary action for failure to follow facility policy by not providing a required note for verification of absence on a holiday or designated holiday. On January 7, 2011, Grievant received a Group I Written Notice with a one workday suspension for unsatisfactory attendance after having accumulated nine occurrences. On March 26, 2011, Grievant received a Group I Written Notice with a five workday suspension for unsatisfactory attendance.

The Agency has a policy designed to determine when unplanned absences require corrective action. The Policy defines Unplanned Absence as:

An absence from the work site when written or verbal approval has not been received from the supervisor as required under the definition of planned absence.

An Occurrence is defined as:

An unplanned absence of four (4) hours or more but not exceeding one (1) workday. Unplanned absences in excess of one (1) workday shall be

considered as one (1) occurrence if the absence on the following workday(s) is documented by a physician as being medically necessary.

Grievant had unplanned absences from work for four hours or more on July 12, 2010, July 30, 2010, October 15, 2010, October 28, 2010, November 12, 2010, December 1, 2010, December 7, 2010, December 11, 2010, and February 18, 2011. These absences were occurrences under the Agency's Attendance Policy.

In March of 2010, Grievant's Supervisor discussed with Grievant the availability of Family Medical Leave and presented Grievant with the necessary forms to claim Family Medical Leave. Grievant did not submit a request for Family Medical Leave.

Employees who accumulate eight occurrences within a 12 month period are subject to a Group I Written Notice.

On May 20, 2011, May 28, 2011, and June 6, 2011, Grievant was scheduled to work at the Facility. She did not contact the Supervisor and obtain permission to be absent from work on any of those days. Grievant did not report to work as scheduled. The Agency concluded that Grievant's absences on these days constituted occurrences and that Grievant had accumulated at least eight occurrences within a 12 month period.

## **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."<sup>1</sup> 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."

"[P]oor attendance" is a Group I offense.<sup>2</sup> Under the Facility's Attendance Policy, "employees who accumulate eight (8) occurrences within a twelve (12) month period are subject to a Group I Written Notice." Grievant was scheduled to work on May 20, 2011, May 28, 2011, and June 6, 2011. She did not report to work. Her absences were unplanned thereby resulting in occurrences under the Agency's Attendance Policy. Grievant accumulated more than eight occurrences. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. With the issuance of the Group I Written Notice in this case,

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

Grievant has accumulated more than two active Group II Written Notices thereby justifying the Agency's decision to remove Grievant from employment.

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...."<sup>3</sup> 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 argued that the disciplinary action should be mitigated because she was absent from work due to medical illness or family hardship. Grievant did not testify or did not present any documents from a medical provider to excuse her absences. Accordingly, there is no basis for the Hearing Officer to mitigate the disciplinary action under the mitigation provisions of the Agency's Attendance Policy or under the EDR Rules.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action with removal based on the accumulation of disciplinary action 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

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<sup>3</sup> Va. Code § 2.2-3005.

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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>4</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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