

Issues: Group II Written Notice (excessive absences/tardiness), and Termination (due to accumulation); Hearing Date: 02/02/16; Decision Issued: 02/21/16; Agency: VDH; AHO: Ternon Galloway Lee, Esq.; Case No. 10720; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10720

Hearing Date: February 2, 2016

Decision Issued: February 21, 2016

SUMMARY OF DECISION

The Agency had found Grievant failed to follow the attendance policy. The Agency then issued Grievant a Group II Written Notice and terminated her due to an accumulation of Group II notices. The Hearing Officer found Grievant engaged in the behaviors alleged and they constituted misconduct. Next, finding the Agency's discipline was consistent with policy and reasonable, the Hearing Officer upheld the discipline.

HISTORY

On September 28, 2015, the Agency issued Grievant a Group II Written Notice for failure to follow the attendance policy. Grievant timely filed her grievance to challenge the Agency's action. The Office of Employment Dispute Resolution ("EDR") appointed the undersigned as the Hearing Officer in this matter effective November 17, 2015. A pre-hearing conference ("PHC") was held on December 4, 2015,¹ and the related scheduling order was issued on December 11, 2015.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. None were presented. The Hearing Officer admitted, without objection, Agency Exhibits 1 through 12 and 14 and the contents of the Agency's entire binder.² The Hearing Officer admitted, without objection, Grievant's Exhibit 1, consisting of 53 pages.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses.³ Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate/attorney and the Grievant represented herself.

APPEARANCES

Advocate for Agency

¹ This was the first available date for the prehearing conference.

² On information and belief, VEC decisions are inadmissible in other proceedings. Accordingly, the Hearing Officer finds Agency Exhibit 13 is inadmissible.

³ Grievant waived presenting an opening and closing statements.

Agency's Representative
Witnesses for the Agency (1 witness)
Grievant
Witnesses for Grievant (1, the grievant)

ISSUE

Was the Group II Written Notice with termination warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency manages, among other programs, the supplemental food and nutrition program which is commonly referred to as the WIC program. (Testimony of Supervisor).
2. At the time management terminated Grievant, she was assigned to the WIC program. Her work shift started at 8:30 a.m. (Testimony of Supervisor; A Exh. 2).
3. Grievant worked in a satellite office of the Agency. This office staffed 3 employees, including Grievant. Grievant was classified as a "nutritionist associate." When potential/existing clients visited the satellite office in a quest for WIC services, Grievant was the first person the client would see after being greeted by the receptionist. Grievant's task was important as she would obtain income documentation from the client and residential information. The applicant's or client's first step toward obtaining supplemental food and nutrition under the WIC program was his/her intake meeting with Grievant. (Testimony of Supervisor).
4. If Grievant failed to report to work as scheduled or did not report to work as expected, the process of determining if a client was eligible for the WIC program benefits was more than minimally hampered as it was greatly slowed. In addition, the other two employees in the satellite office would be required to perform the tasks that Grievant was assigned to do. Or alternatively, Supervisor would attempt to send an employee from another office over to the satellite office to assist. (Testimony of Supervisor).
5. Supervisor became Grievant's immediate supervisor in July 2014. He observed that overall there was an attendance problem in the office. With respect to Grievant, the supervisor observed that Grievant had a habit of (1) calling in and reporting that she would not be able to

come in and work, (2) being excessively tardy, and (3) exhausting her leave which resulted in Grievant having to take leave without pay. (Testimony of Supervisor; A Exh. 14).

6. On July 21, 2015, Grievant telephoned her supervisor's desk telephone at 9:03 a.m. and left a voice mail message that she would be late for work. At the time Grievant left this message, she was aware that a staff meeting was scheduled at the same time she placed the call and that Supervisor would be attending the staff meeting. Grievant was in possession of Supervisor's mobile telephone numbers and could have reached him on one of those numbers at the time she left the voice mail message in Supervisor's desk telephone voice mail box. (Testimony of Supervisor, Grievant's Exhibit, p. 40).

At 2:28 p.m., that day, Grievant placed another call to Supervisor and left a voicemail message that she would not be in that day due to having to catch the bus to work which would not arrive to work until 4:30 p.m. Like the earlier call, Grievant called Supervisor's desk telephone. (Grievant's Exhibit, p. 40; Testimony of Supervisor).

Prior to calling Supervisor, at 8:00 a.m. Grievant called her co-worker in the satellite office where Grievant worked. She informed the co-worker that she would be late to work that day. Although this co-worker was considered the "lead worker" in the satellite office, Grievant was aware that he was not her supervisor. (Testimonies of Supervisor and Grievant).

7. Grievant had not received prior approval to be tardy or miss work on July 21, 2015. By July 21, 2015, Grievant had exhausted her leave. Thus, in effect, her absence from work on July 21, 2015, was leave without pay, albeit without approval. (Testimony of Supervisor; A Exh. 14).

8. On September 28, 2015, the Agency issued Grievant a Group II Written Notice with termination due to violation of the attendance policy. The Group II Written Notice described the nature of the offense as follows:

On April 28th 2015 [Grievant] was counseled regarding her excessive absences and tardiness. Additionally, on this day [Grievant] was informed that if she was going to be tardy or absent unexpectedly, she must contact her supervisor (WIC coordinator) directly as soon as she realizes that she is going to be late. [Grievant's] shift begins at 8:30 AM. On July 21st, 2015 [Grievant] called and left a voicemail message with the WIC coordinator at 9:03 a.m. to inform him that she would be tardy that day. [Grievant] called and left another message at 2:28p.m. stating that she would not be coming in at all that day.

(A Exh. 2).

9. Prior to receiving the discipline notice on September 28, 2015, Grievant had been verbally counseled about excessive tardiness and leave abuse in April 2014, and again on June 3, 2014. (A Exh. 2 and A Chronology).

10. In addition, on July 25, 2014, Grievant endorsed the unapproved absence policy notice set forth below in "Findings of Fact" Number 16. (See A Exh. 9).

11. Moreover, Grievant received a Group II Written Notice on November 5, 2014, and a two day suspension for excessive tardiness/absences and failure to follow policy. (A Exh. 4). The discipline resulted from Grievant calling in sick on August 25, 2014, and exhausting her sick leave. Then on August 28, 2014, she called in sick again. Essentially, the Agency determined that Grievant mismanaged her leave and was absent from work without pay. Grievant while given the opportunity to provide mitigating circumstances, provided none. (A Exh. 4).

12. Further, on April 28, 2015, Grievant received a counseling memorandum for being absent from work on April 10, 2015, without approval. Specifically, on April 10, 2015, Grievant did not come to work. She did not notify her supervisor that she would be absent from work on that date. Four days later, Grievant submitted to her supervisor a leave slip requesting approval after the fact for her absence. (A Exh. 8; Testimony of Supervisor).

13. Between August 2014 and September 2015, Grievant untimely requested leave on 35 occasions. (Testimony of Supervisor; A Exh. 14).

14. Per Agency Policy leave without pay is required to be approved in advance. In the event an employee could not have anticipated the need for a leave of absence, the employee is required to request approval for the leave as soon as possible after the leave begins. (Testimony of Supervisor; A Exh. 5 (Annual Leave Policy 4.10 (Policy 4.10), pp. 5-6; A Exh. 6 (Leave Policies, Policy 4.30 (Policy 4.30), pp. 1-2; G Exh. pp. 27-29).

15. In addition, according to Agency Policy Grievant was required to directly notify her supervisor if she was going to be tardy to or absent from work. (Testimony of Supervisor; A Exhs. 8 and 9).

16. After reviewing with Grievant and other staff the already existing attendance policy, on July 25, 2014, Grievant signed the statement below acknowledging that she would adhere to the Agency's stated attendance policy:

I understand that being on time for work is part of my job duties and that I will adhere to the following policy:

I will arrive to work at or before my scheduled time. 8:15 AM opening, 12:15 PM or 1:00 PM returned from lunch.

If I am not able to make it on time, I will contact the supervisor directly. I understand that this should only be a 5-10 minute grace period. I also understand that this should not occur often (several times a week, 1x a week, etc.) and that this should only be done when circumstances grant it and that I should expect to be on time every day.

If I am going to be late more than 15 minute that I must contact the supervisor directly and that I must turn in a leave slip.

If I need to request permanent or temporary changes to my work schedule, this needs to be approved by my supervisor prior to adjusting my work schedule.

I understand that this policy has always been in effect and that it will be enforced upon the signing of this letter in the following manner.

1. Verbal warning
2. Informal written warning
3. Formal written notice
4. Further disciplinary actions will be taken

(A Exh. 9).

17. Grievant had worked for 22 years with the Agency at the time she was terminated. (A Exh. 2; G Exh.).

18. After the November 5, 2014 formal discipline and before the April 10, 2015 counseling memorandum, Grievant had shown improvement in adhering to the attendance policy. (A Exh. 8; Testimony of Grievant).

19. Grievant represented that she had missed work on July 21, 2015, because maintenance showed up at her residence to do repairs. Further she stated that maintenance did not finish working until about 2:20 p.m. Grievant also contended in her response to the Agency's due process notice that she did request approval of leave after the fact. Grievant also stated that she was in the process of calling her supervisor prior to 9:03 a.m. when she was interrupted by the maintenance repairmen. Grievant's telephone log does not indicate Grievant telephoned her supervisor prior to 9:03 a.m. (G Exh.).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment

disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁴

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are acts of misconduct that are minor in nature. Group II offenses include misconduct of a more serious nature and/or of a repetitive nature that require more formal disciplinary action. In addition a second Group II offense normally warrants discharge. Finally, the most serious offenses are categorized as Group III offenses. *See* Standards of Conduct Policy 1.60(B)(3).

On September 28, 2015, management issued Grievant a Group II Written Notice. Grievant already had an active Group II Written Notice. Accordingly, the Agency terminated Grievant. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group II Written Notice and did that behavior constitute misconduct?

The evidence shows that the Agency policy required workers to report to work as scheduled. This means being present at work and timely to work. In addition the Agency's leave policy required employees to get approval of leave in advance. Further, in the instances where approval could not be obtained in advance due to an unforeseen event, an employee was required to request leave approval as soon as possible after the leave commenced. In addition, employees were expected to manage their leave appropriately to avoid exhausting it. Further, the Agency policy required Grievant to notify her supervisor if she was not going to report to work timely.

The evidence illustrates that on July 21, 2015, Grievant violated all of the policies mentioned here. First, Grievant failed to directly notify her supervisor prior to her 8:30 a.m. start time that she would not arrive timely to work. The evidence shows that it was not until 9:03 a.m.

⁴ GPM §5.8

that Grievant called her supervisor's desk telephone number and left a voice mail message indicating she would be tardy to work. This was the telephone number called even though the evidence establishes that Grievant had her supervisor's mobile telephone numbers and could have called her supervisor on either of those numbers to reach him. Moreover, Grievant knew Supervisor was attending a staff meeting at the time she placed her call to his desk phone. Considering this evidence, the Hearing Officer finds that Grievant was able to directly contact her supervisor on July 21, 2015, to inform him that she would be tardy to work. But Grievant elected to not contact Supervisor directly. Grievant's conduct failed to follow the procedure and obstructed the purpose of the policy: to give the supervisor direct and timely notification of any anticipated tardiness.

Second, Grievant failed to obtain approval of leave in advance, or in a case where approval could not be obtained in advance, Grievant failed to obtain approval as soon as possible after the leave commenced. After calling in and leaving a message that she would be late to work, Grievant called Supervisor's desk telephone over five hours later saying she would not be able to come in to work that day. Grievant did not receive approval in advance to take leave on July 21, 2015. In addition the evidence is insufficient to establish that Grievant requested leave to obtain approval retroactively. Also, even if Grievant had requested approval of leave, after the fact, her failure to contact Supervisor within the "5 hour plus" span shows violation of the attendance mandate. That is, Grievant could have requested leave during the time she was waiting for maintenance to complete the repairs and long before the work day was over. She failed to do so. Hence, Grievant also violated the Agency's attendance policy regarding seeking approval of leave.

Furthermore, the evidence shows that as of January 2015, Grievant had a leave balance of 176 hours. Yet, according to the evidence, the unapproved leave taken by Grievant on July 21, 2015, was deemed "leave without pay." This was so because by July 21, 2015, Grievant had exhausted all her leave. Thus, the Hearing Officer finds that Grievant's lack of available leave only seven months into the calendar year suggests Grievant had mismanaged her leave.

Considering all the evidence, the Hearing Officer finds Grievant engaged in the conduct alleged on July 21, 2015 and that it violated the Agency's attendance/leave policies.

B. Was the discipline consistent with policy and law?

Policy 1.60's Attachment A provides several examples of Group II offenses. One such offense is failure to report to work without proper notice. As discussed above, the evidence clearly demonstrates Grievant did not report to work as scheduled and that she failed to provide proper notice to her supervisor of her tardiness and absence from work on July 21, 2015.

In addition, Policy 1.60 states that a "second active Group II Notice normally should result in termination. The evidence also establishes that when Grievant was issued the Group II Notice on September 28, 2015, she had an active Group II written notice that was issued on November 4, 2014.

Further, under Policy 1.60, it is proper for an agency to issue a Group II Written Notice for an offense of a repeat nature. The evidence shows that less than 12 months after violating the

rules of conduct for attendance, Grievant's current offense is for similar misconduct.

Accordingly, for the multiple reasons set forth above, the Agency's discipline is consistent with policy and law.

II. Mitigation

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."⁵ EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."⁶ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁷

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notices and that the behaviors constituted misconduct. Further, the Hearing Officer has found, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has considered Grievant's 22 years of employment with the Agency. In addition, the Hearing Officer has given thought to Grievant's claim that other employees in the satellite office missed more time than she and that there had been some improvement in Grievant's attendance for several months. She has also considered that Grievant telephoned her co-worker and informed him that she would be arriving tardy to work and Grievant's report that maintenance was being performed at her residence and was not completed until 2:20 p.m. That said, the Hearing Officer also takes note of Grievant's history of attendance problems.

After careful deliberation of all evidence, the Hearing Officer finds that the Agency's

⁵ Va. Code § 2.2-3005 and (c)(6)

⁶ *Rules for Conducting Grievance Hearings* VI(A)

⁷ *Rules for Conducting Grievance Hearings* VI(B)

discipline is within reason.

DECISION AND ORDER

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

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 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 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov. or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15 calendar day period has expired, or when requests for administrative 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.⁸

Entered this 21st day of February, 2016.

Ternon Galloway Lee, Hearing Officer
cc: Agency's Advocate/Representative
Grievant
EDR

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.