

Issue: Group I Written Notice (unsatisfactory attendance) and Termination (due to accumulation); Hearing Date: 03/04/13; Decision Issued: 03/05/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10026; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10026

Hearing Date: March 4, 2013

Decision Issued: March 5, 2013

PROCEDURAL HISTORY

On November 27, 2012, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance. Grievant was removed based on the accumulation of disciplinary action.

Grievant timely filed a grievance to challenge the Agency's action. The grievance proceeded to hearing. On January 28, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 4, 2013, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

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 facts:

The Department of Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate II at one of its facilities. He had been employed by the Agency since May 2011. The purpose of Grievant’s position was to, “provide needed support and treatment to intellectually and physically disabled individuals to enhance the quality of their lives.”¹

Grievant had prior active disciplinary action. On August 30, 2012, Grievant received a Group I Written Notice for unsatisfactory attendance (8th occurrence). On September 12, 2012, he received a Group I Written Notice for unsatisfactory attendance (9th occurrence). On September 12, 2012, he received a Group I Written Notice for unsatisfactory attendance (10th occurrence).

On October 28, 2012, Grievant was absent from work without excuse for an eleventh time in twelve months.

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.”

¹ Agency Exhibit 5.

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

Unsatisfactory attendance is a Group I offense.³ Under the Agency's attendance policy an employee who accumulates eight occurrences within a twelve month period may be issued a Group I Written Notice. Grievant received his eleventh occurrence on October 28, 2012 within a twelve month period thereby justifying the issuance of a Group I offense. Grievant had prior active disciplinary action consisting of three Group I Written Notices. With the issuance of a fourth Group I Written Notice, the Agency has presented sufficient evidence to support 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 Human Resource Management"⁴ 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 I Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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:

³ See, Attachment A, DHRM Policy 1.60.

⁴ Va. Code § 2.2-3005.

Director
Department of Human Resource Management
101 North 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 North 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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.