

Issues: Group II Written Notice (unsatisfactory attendance, excessive tardiness), and Termination (due to accumulation); Hearing Date: 01/08/14; Decision Issued: 01/15/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10237; 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: 10237

Hearing Date: January 8, 2014
Decision Issued: January 15, 2014

PROCEDURAL HISTORY

On October 18, 2013, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory attendance, excessive tardiness. She was removed from employment based upon the accumulation of disciplinary action.

On November 12, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 9, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 8, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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 Forensic Mental Health Technician at one of its facilities. Her position was non-exempt under the Fair Labor Standards Act. The purpose of her position was:

To provide competent nursing care to an adult population ranging from the ages of 18 to 64 and a Forensic/civil setting to maintain a safe, clean and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs.¹

Grievant had prior active disciplinary action. On April 25, 2013, Grievant received a Group I Written Notice for unsatisfactory attendance/excessive tardiness. On May 5, 2013, Grievant received a Group II Written Notice for failure to comply with established written policy. On August 2, 2013, Grievant received a Group II Written Notice with a three workday suspension for unsatisfactory attendance/excessive tardiness.

Agency employees have two pay periods per month. The first pay period begins on the 10th day of each month and the second begins on the 25th day of each month. The Facility operates on a 24 hour basis and must be staffed at all times.

¹ Agency Exhibit 7.

Grievant's work shift began at 7 a.m. She was expected to use her identification card to "swipe in" at a time clock to record the time she reached her post.

On August 29, 2013, Grievant reported to work at 7:03 a.m. On August 31, 2013, Grievant reported to work at 7:05 a.m. On September 9, 2013, Grievant reported to work at 7:04 a.m. On September 11, 2013, Grievant reported to work at 7:30 a.m. On September 23, 2013, Grievant reported to work at 7:55 a.m. Grievant was tardy on five workdays over the course of two pay periods.

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 8-2 governs Tardiness. The purpose of this policy is:

To communicate to all employees the expectation of reporting to work on time as scheduled. Tardiness interferes with the operation and causes an extra burden to co-workers. Punctuality is expected of all employees; however, the guidance and procedures outlined below are directed to non-exempt employees.

The policy defines "Tardy" as "[l]ate arrivals of 3 to 60 minutes would constitute a 'tardy'". "Unacceptable Tardiness" is defined as "[f]ive tardies in a two-pay period time frame is unacceptable and will result in corrective action. The acceptable threshold is 4 tardies in a two-pay period time frame." A First Offense under the policy results in corrective action of a Written Counseling. A Second Offense results in corrective action of a Group I Written Notice.

In August and September of 2013, Grievant was tardy on five occasions over the course of two pay periods. This was at least the fourth example of Grievant having an excessive number of tardies during two pay periods. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for excessive tardiness.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant had an active Group I Written Notice for

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

excessive tardiness. Accordingly, the Agency's decision to issue Grievant a Group II Written Notice for excessive tardiness in this case is upheld.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated more than two Group II Written Notices. The Agency's decision to remove Grievant must be upheld.

Grievant argued that she was tardy to work on September 11, 2013 and September 23, 2013 because of "morning sickness" relating to her pregnancy. On June 27, 2013, Grievant submitted to the Agency a Certification of Health Care Provider for Employee's Serious Health Condition form completed by her physician. The form described Grievant's medical condition as pregnancy with an expected delivery date of February 5, 2014.

The evidence is insufficient for the Hearing Officer to conclude that Grievant was tardy on September 11, 2013 and September 23, 2013 because of her pregnancy. When employees call the Facility to report that they will be late, employees are expected to disclose the reason they are late if that reason relates to a protected status under the family medical leave act. Grievant knew of her obligation to report this information. For example on July 13, 2013, Grievant could not report for her scheduled shift. She called the Facility and told the operator that she was "Using my FMLA."³ On September 11, 2013, Grievant called the Facility and reported that she would be "late." Grievant did not call the facility on September 23, 2013.⁴ In addition, on October 11, 2013, the Supervisor presented Grievant with a Notice of Intent to issue her corrective action under the Standards of Conduct for excessive tardiness. The Supervisor asked Grievant to provide "a written response as to why the offense has occurred and any special circumstances that existed which influenced your performance." The Supervisor asked Grievant to submit a response to the Supervisor by October 16, 2013. Grievant did not respond to the Supervisor. The Agency took disciplinary action without knowledge of Grievant's claim that her tardiness resulted from pregnancy. Grievant raised her defense of "morning sickness" for the first time when she grieved the disciplinary action. By waiting until filing a grievance to raise her defense for the first time, Grievant undermined the credibility of her assertion. The Agency was entitled to base its disciplinary action on the absence of any response from Grievant. The Hearing Officer is not persuaded that Grievant was tardy for a reason related to her pregnancy.

Grievant argued that she did not respond to the Notice of Intent because her Supervisor instructed her not to do so. Grievant argued that the Supervisor told Grievant she would not be terminated due to her defense of FMLA. The Supervisor testified that she gave no such instructions. The Notice of Intent drafted by the Supervisor clearly seeks a response from Grievant about any "special circumstances." Grievant had received Notices of Intent for previous disciplinary actions and responded

³ Agency Exhibit 8.

⁴ Grievant claimed she called the Facility but there is no record in the Agency's log of her doing so.

to those notices. Grievant knew or should have known of her obligation to respond to the Notice of Intent issued to her by the Supervisor.

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”⁵ 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 II Written Notice of disciplinary action is **upheld**. Grievant’s removal from employment is **upheld** due to 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:

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.

⁵ Va. Code § 2.2-3005.

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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.