

Issue: Group I Written Notice with Suspension (unexcused absence); Hearing Date: 01/24/14; Decision Issued: 02/20/14; Agency: VDOT; AHO: Jane E. Schroeder, Esq.; Case No. 10244; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA

*Department of Human Resource Management
Office of Employment Dispute Resolution*

DECISION OF THE HEARING OFFICER

In the matter of Case Number 10244

Case Heard: January 24, 2014

Decision Issued: February 20, 2014

PROCEDURAL HISTORY

The Grievant was employed as a Transportation Operator at the agency. On May 31, 2013, the Grievant received a Group I Written Notice for Offense Code 01: Attendance. The Grievant initiated the Employee Grievance Procedure on June 15, 2013 by completing Grievance Form A. The Grievance was not resolved during the three resolution steps. The grievance was subsequently qualified for hearing. On December 16, 2013, the hearing officer was assigned to hear the case.

A telephonic pre-hearing conference was held on December 17, 2013. The hearing was set for January 22, 2014. Due to snow conditions, the hearing was postponed and was heard on January 24, 2014. Five witnesses, including the Grievant, testified. The Agency's exhibits, identified as Agency's Exhibits 1-10 were entered into evidence without objection. The Grievant had no exhibits. The two-hour hearing was recorded on a digital recorder and stored on one compact disk.

APPEARANCES

Grievant

Agency's Residency Maintenance Administrator

Advocate for Agency

Witnesses for Agency: #1: Grievant's supervisor
#2: Superintendent
#3: Agency's Civil Rights Investigator

Witnesses for Grievant: #1 Co-worker
#2 Grievant

ISSUE

Whether to sustain, modify or revoke the Group I Written Notice issued to the Grievant

on May 31, 2013, for violation of Code 01: attendance, based on an unexcused absence on May 13, 2013.

BURDEN OF PROOF

In disciplinary actions, the agency must present its evidence first and the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual). This case is a disciplinary action. The burden of proof is on the agency. The Agency must prove that it is more likely than not that the Grievant was not at work on May 13, 2013, that his absence from work was unexcused, and that the Agency issuing a Group I Written Notice and designating the day as LWP (leave without pay) was warranted and appropriate.

FINDINGS OF FACT

1. The Grievant works as Transportation Operator at the agency.
2. On May 9 and May 10, 2013, the Grievant was not at the job site. He was doing approved community service.¹
3. On Sunday, May 12, 2013, the Grievant called his supervisor at home shortly before midnight to inform him that the Grievant would not be able to come to work in the morning. The supervisor testified that, the Grievant did not give a reason why he could not come to work. The next morning, the Grievant again called the supervisor to say that he would not be in to work. The Grievant was not at work on May 13, 2013.²
4. On May 15, 2013, the supervisor gave the Grievant a Memorandum to inform the Grievant of his intent to issue a Group II Written Notice for failure to follow instructions. The Grievant was advised in the memo that he had until Friday, May 17 to respond in writing with any reasons that the Grievant should not receive a Written Notice. In the memorandum, the Supervisor informs the Grievant of the supervisor's intent to issue a Group II Written Notice for failure to follow instructions "with potential for suspension (leave without pay)."³
5. In a handwritten response from the Grievant dated May 16, 2013, the Grievant explained told the supervisor that he and his family were returning from out-of-state but there was a family emergency, that he could not make it to work on Monday, and that he would be using a personal leave day. When the supervisor said he had told the whole crew that no one could take Monday off, the Grievant said he did not know about that because he was out Thursday and Friday. When the supervisor asked for more details of his family problems, the Grievant told him that the Grievant did not want to go into details. The

1 Testimony of Supervisor

2 Testimony of Supervisor

3 Agency Exhibit 2, pages 13-15.

Grievant also wrote in his response that he was concerned that three other crew members took off on Monday, but the Grievant was the only one given a Written Notice, and that the Grievant thought the Written Notice was given to the Grievant based on race, "personal likeness" or a past disagreement.⁴

6. On May 31, 2013, the Grievant was given a Group I Written Notice. In Section II of the Written Notice: "Offense", the nature of the alleged offense and evidence as is described as follows:

"Attendance/excessive tardiness. On 5/13/2012[sic], you failed to report to work. Sunday, May 12, 2013 at 11:50 pm, you called me at my home and requested Monday, May 13, 2013 off. I told you that you were not approved and you were to report to work due to a very large project. I explained that at the end of last week that the entire crew was informed that no person will be approved to take Monday May 13th off unless their leave was already approved. On Monday morning, May 13th, you called the office at 6:45 am saying you would not be in to work. When I questioned why you could not be in to work, you said "I called you last night". I again explained what was stated the prior night. While trying to find out why you were not at work, the phone became disconnected. I attempted to contact you for the next 1 ½ hours but was not successful. At 11:18 am, I was able to reach you, and again asked what circumstances were preventing you from coming to work. You stated, "It was not sickness. I'm ok. I just did not get back home till late." Tuesday morning, May 14th, you came into my office to talk. Again, I asked what prevented you from coming to work? You stated personal reasons; I do not have to tell you. I provided examples of things that would prevent a person from reporting to work (road closure, car accident, and family sickness). I provided you the chance to explain but you said that you got in late; and would not explain further. Because of your unexcused absence, it put us behind on a large project (removing the homeless shelter off a state right of way). We did not have enough crew members to complete all the tasks for day one."⁵

7. The supervisor testified that, even at the date of the hearing, he did not know the reason why the Grievant could not come to work on May 13, 2013. Yet, when the supervisor was asked if he had seen the Grievant's statement on Grievance Form A submitted on June 15, 2013, the supervisor said he had seen the statement.⁶ In the Grievant's written statement, the Grievant gives his reason for his absence that his

4 Agency Exhibit 2, pages 16-19.

5 Agency Exhibit 3, page 1.

6 Testimony of supervisor.

pregnant wife had an emergency.⁷ Upon further questioning the Superintendent testified that the Grievant had given the reason that his pregnant wife had an emergency, but the Grievant did not give any proof that the wife had an emergency.⁸

8. In Section III of the Written Notice: “-Disciplinary action taken in addition to issuing written notice,” no disciplinary action is listed. The Superintendent testified that the Grievant was given leave without pay for one day because of his absence on May 13, 2013.⁹ The time records of 2013 show that the only day in 2013 that the Grievant was given leave without pay was May 13, 2013.¹⁰
9. In Section IV of the Written Notice: “-Circumstances considered” is the following statement:

“Mr. Yirenkyi provided his mitigation statement dated 05/17/2013. Mr. Yirenkyi’s statement was reviewed and consideration was given to reduce the original Group II down to a Group I for poor attendance based on the fact that although he was not granted authorization for leave, he did try to contact his supervisor for authorization. Consideration was given due to the fact that that he was out on approved leave for the prior 2 work days which prevented him from knowing about a mandatory work plan and leave restriction. His request was late at night and did not allow management proper advance notice resulting in poor attendance. He was previously given a written counseling memorandum for poor attendance during a snow event; therefore, a Group I written notice is warranted for poor attendance.”

10. In a February 22, 2013 Memorandum from the Supervisor to the Grievant, the Grievant was counseled for having a full mailbox on his contact number. As a result, he could not be informed that his approved leave had been cancelled due to emergency snow operations.
11. The Agency’s Civil Rights Investigator testified that he investigated the Grievant’s allegations that the Grievant was discriminated against because of race and because of retaliation. The investigation did not find any evidence to support the Grievant’s allegations.
 - a. The Grievant alleged that two other crew members were not at work on that day and were not given written notices. The investigation found that one of the crew members had a previously approved leave and the other was at work that day.
 - b. The Grievant alleged that a co-worker heard the supervisor say he was going to terminate the Grievant’s employment. In a written statement, the co-worker denied this.¹¹

7 Agency Exhibit 2, page 1.

8 Testimony of Supervisor

9 Testimony of Superintendent

10 Agency Exhibit 9.

11 Agency Exhibit 10.

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 4.30: Leave Policies – General Provisions

Leave Policies – General Provisions establishes uniform policies by which employees are permitted to take time off from work.

Section III.A. provides that “Before taking a leave of absence from work, whether with or without pay, employees should request and receive their agencies’ approval of the desired leave.”

Section III.C.1. provides that, “When practicable, and for as long as the agency’s operations are not affected adversely, an agency should attempt to approve an employee’s request for a leave of absence for the time requested by the employee”

Section III E. provides that “if an agency does not approve an employee’s request for leave, but the employee still takes the requested time off from work, the employee may be subject to the actions listed below.

- The absence will be designated as unauthorized;
- The employee will not be paid for the time missed;
- Because the employee has experienced Leave Without Pay, he or she will not accrue annual or traditional sick leave for the pay period(s) when the absence occurred; and
- The agency may also take disciplinary action under Policy 1.60, Standards of Conduct.¹²

In this case, the Grievant requested the time off work. He called his supervisor just before midnight on a Sunday night requesting Monday off. He also called the next morning. The supervisor had determined that the agency would be affected adversely because the Grievant was needed to participate in the project to remove the homeless shelter that day. The Grievant’s request for leave was denied. The Grievant took the day off work. The project was not completed as scheduled. The supervisor asked the Grievant for proof that his pregnant wife had an emergency. No proof was ever provided. The Grievant was not paid for the day he missed, and disciplinary action under the Standards of Conduct was taken.

¹² Agency Exhibit 5.

Policy Number 1.60: Standards of Conduct.

Standards of Conduct provides a set of rules governing the professional 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.

Section B.2.a. provides that Group I offenses include acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention.

In the present case, the Grievant was given a Group I Written Notice for a violation of attendance. The Grievant filed Grievance Form A, and a hearing was scheduled and conducted to determine whether the Group I Written Notice should be upheld.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section A Framework for Determining Whether Discipline was Warranted and Appropriate¹³ states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).¹³

Using this framework, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

In this case, the Grievant asked for leave and it was denied. He took the day off anyway. The Grievant did engage in the behavior described in the Written Notice.

(ii) Whether the behavior constituted misconduct

The Grievant took the day off after leave was denied. This was a direct violation of leave policy 4.30 III E. Under this policy, the agency may take disciplinary action. Therefore, the behavior constitutes misconduct.

(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy The Grievant was given a Written Notice of a Group I Offense and lost one day's pay.

¹³Rules for Conducting Grievance Hearings, VI.B1., Effective Date 7/1/2012.

He had previously been counseled for a prior absence. This level of discipline is consistent with the leave policies and Standard of Conduct analyzed above. This Hearing Officer finds that the agency=s disciplinary action is consistent with law and policy.

Mitigating Circumstances

The grievant provided a statement on May 17, 2013. He said that he needed the day off for a family emergency. He accused the supervisor of discrimination and retaliation. The agency refers to this statement in Section IV of the Written Notice -Circumstances considered. The proposed Group II Written Notice was reduced to a Group I Written Notice, because he did contact his supervisor to ask for authorization. No proof a family emergency was provided. The charges of discrimination and retaliation were investigated and found to be unsupported by evidence.

According to the Rules for Conducting Grievance Hearings, AA hearing officer must give deference to the agency=s consideration and assessment of any mitigating and aggravating circumstances. A hearing officer may mitigate the agency=s discipline only if, under the record evidence, the agency=s discipline exceeds the limits of reasonableness.@¹⁴

After review of the mitigating circumstances, this Hearing Officer finds that the agency=s discipline of imposing a Group I Written Notice and the one day Leave Without Pay does not exceed the limits of reasonableness.

DECISION

The Grievant=s Group I Written Notice of May 31, 2013 is upheld. The one day Leave Without Pay 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 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

¹⁴ Rules for Conducting Grievance Hearings, p. 17

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.¹⁵

[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].

February 20, 2014

Jane E. Schroeder, Hearing Officer

¹⁵Agencies must request and receive prior approval from EDR before filing a notice of appeal.