

Issues: Group II Written Notice (failure to follow policy/instructions and poor attendance), and Termination (due to accumulation; Hearing Date: 04/25/14; Decision Issued: 04/29/14; Agency: VDH; AHO: Frank G. Aschmann, Esq.; Case No.10315; Outcome: No Relief – Agency Upheld; **Administrative Review:** **EDR Ruling Request received 05/14/14; EDR Ruling No. 2014-3888 issued 06/11/14; Outcome: AHO's decision affirmed; Administrative Review:** **DHRM Ruling Request received 05/14/14; DHRM Ruling issued 05/29/14; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10315

Hearing Date: April 25, 2014
Decision Issued: April 29, 2014

PROCEDURAL ISSUE

The Grievant received two Group II Written Notices relevant to this matter, one on September 3, 2013 and one on September 28, 2013. The Grievant initiated the grievance procedure on both notices. At hearing the parties indicated to the hearing officer that both notices had been grieved and were subject of the hearing. This is not correct. The Group II Written Notice from September 3, 2013, was not qualified for hearing by the Office of Employment Dispute Resolution (hereafter EDR). EDR issued a Compliance Ruling, number 2014-3795, on February 7, 2014. EDR's ruling held that the Grievant had not complied with required procedure and allowed the Agency to administratively close the case in regard to the September 3, 2013, Group II Written Notice. The matter in regard to the September 28, 2013, Group II Written Notice was qualified for hearing and this hearing officer was appointed to conduct a due process hearing on that matter. Therefore, this decision makes findings and rulings only as they relate to the grievance of the Group II Written Notice from September 28, 2013. The Group II Written Notice from September 3, 2013, is a matter of record in the Grievant's personnel file.

APPEARANCES

Grievant
Two Grievant Witnesses
Agency Representative
Four Agency Witnesses

ISSUE

Did the Grievant violate Agency policy by failing to comply with required attendance and excessive tardiness and failure to follow instructions and/or policy such as to warrant the issuance of a Group II Written Notice with employment termination for accumulated written notices?

FINDINGS OF FACT

The Grievant was employed by the Agency as a Nutritionist Assistant and has worked for the Agency for approximately eight and one half years. The Grievant's job duties included working a window to check in clients of the Agency. The Agency has two Nutritionist Assistants that work the same hours and work next to each other staffing the windows. On August 7, 2013, the Grievant and the other Nutritionist Assistant engaged in an argument at their windows. A line of clients had formed and the Grievant requested the assistance of her co-worker. She refused to assist because she was engaged in other duties and complained that the Grievant's frequent late arrival for work kept her from her duties. The Grievant verbally abused her co-worker about her age, her personal relationship and accused her of excessive drinking. This occurred in front of Agency clients. The argument was heard by staff and another employee of the Agency came to the window to assist clients. Both of the Nutritionist Assistants were disciplined for disrupting the work place, each receiving a Written Group II Notice and a five day suspension. The Grievant has this active Group II Written Notice in her personnel file (reference EDR Compliance Ruling #2014-3795 for further detail).

The Grievant's Supervisor took her current position approximately three years ago. When she took the position she encountered numerous problems with staff performance. One of the major issues was the failure of the staff to follow policy in regard to absenteeism, tardiness and unauthorized leave. In order to correct this problem the Grievant's Supervisor held staff meetings, handed out written copies of Agency policy and made her expectations regarding time and attendance clear to the staff. The Supervisor began taking leave time for tardiness to correct the problem.

The Grievant was frequently late to work and, at times, took long lunches and left early. The Grievant was advised with the rest of the staff that this was a violation of policy and that staff was expected to be at work on time and ready to serve the Agency clients from the moment the office opened. The staff, including the Grievant, was notified by email that leave would have to be taken for late arrivals. A staff meeting was held on June 27, 2013, advising the Grievant and the rest of the staff that they must arrive on time in the morning and from lunch. The Grievant continued to arrive late to work and the Supervisor began to document her arrival times (see Agency exhibits #4, #17, #18). On August 6, 2013, the Grievant was counseled by her Supervisor again about being late. The Grievant continued to arrive late for work and not return from lunch in a timely manner. On September 25, 2013, the Grievant was issued a Group II Written Notice with employment termination for accumulated written notices because of her failure to follow instructions and/or policy and poor attendance.

In June 2013, the Grievant gave the Agency a "progress note" from her doctor (see Agency exhibit #20). The Grievant and Agency personnel discussed options under the Americans with Disabilities Act, the Family Medical Leave Act and Agency disability programs. The Grievant did not provide any further medical documentation and did not complete any applications for relief under the above mentioned programs.

On August 8, 2013, the Grievant filed a complaint with the Agency about her co-worker in regard to the August 7, 2013 incident (see Grievant's exhibits Q-U).

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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. The Standards of Conduct define a Group II violation as acts of misconduct of a more serious nature that significantly impact Agency operations. An employee failing to follow a supervisor's instructions or comply with written policy are examples of Group II offenses.

The Standards of Conduct establish a system of progressive discipline which provides employees an opportunity to correct errors and improve performance in all but the most serious cases. Sanctions increase with continued violations of the Standards of Conduct. The Standards of Conduct maintain that an accumulation of two active Group II Written Notices should result in employment termination. Group II Written Notices remain active for three years from date of issue.

The Agency presented credible evidence from two witnesses who had first hand knowledge of the Grievant's absenteeism. The Grievant's supervisor maintained a professional demeanor and appeared sincere in her recitation of the facts. When she could not remember a specific fact she openly admitted such adding to her credibility. The Grievant's co-worker also appeared sincere and gave a reasonable account of events which was consistent with other evidence. The testimony of these witnesses along with the documentary evidence are sufficient to

establish the Grievant was late to work on many occasions, was late returning from lunch at times and left early at times. The testimony of these witnesses and the documentary evidence showed unequivocally that the Grievant had been informed of the Agency's policy on attendance and was counseled to comply. The Grievant failed to conform to the policy and disregarded her Supervisor's instructions with her absenteeism. The Grievant's absenteeism strained the morale of the staff and interfered with the Agency's ability to complete its mission and serve its clients properly. Thus the Grievant's absenteeism had a significant impact on Agency operations.

The Grievant never denied being late to work frequently but argued in her defense that she was entitled to take leave because she had a medical condition which necessitated an accommodation to her schedule under the law. The Grievant failed to establish any such defense. The only medical evidence presented was the "progress note." The progress note was insufficient to establish a disability or need for an accommodation. No expert witness was called to establish a medical condition or to demonstrate a need for an accommodation. The Agency's evidence showed that the issue had been discussed and the Grievant had not taken the proper steps to make a claim under any statute or policy which might have granted her relief for a medical condition. Further, the Grievant's evidence did not establish that the accommodation she was requesting could be granted for her position as attendance during the hours when the Agency was serving clients was required in her position.

The Grievant also raised a defense that she was a whistle blower and employment termination was retaliation for protected activity. The burden to establish this defense is on the Grievant. St. Mary's Honor Ctr. V. Hicks, 509 US 502 (1993). The Grievant produced evidence that she had filed a complaint against her co-worker for the incident that occurred on August 7, 2013. However, the Grievant did not produce any evidence which tied this action to the written notice with termination which is the subject of this decision. The Agency's evidence showed that the two employees were treated exactly the same in regard to the incident. The Agency's evidence further showed that the Grievant's failure to report timely to work never changed while attendance problems with the other employees improved. The Grievant's evidence failed to establish that the Agency retaliated against her for filing a complaint against her co-worker.

The Grievant called two witnesses and testified herself. Both witnesses corroborated the Agency's position indicating that the Supervisor had been clear in her expectations on time and attendance and that the Grievant was often late for work. Both witnesses also established that everyone was treated equally in regard to the attendance policy. Neither witness testified beneficially in regard to the Grievant's affirmative defenses. The Grievant's testimony was delivered in a hysterical manner and often contradicted documentary evidence, specifically denying that she had ever been counseled about her absenteeism. The Grievant's allegations were not credible and her defenses were not substantiated.

Wherefore, it is found that the Agency has met its burden of proof establishing violations of Agency policy which justify a Group II Written Notice with employment termination for accumulated written notices.

DECISION AND ORDER

The disciplinary action of the Agency is affirmed.

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 email.

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

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.

Frank G. Aschmann
Hearing Officer