

Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 06/01/15;  
Decision Issued: 06/12/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 10532; 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: 10532**

Hearing Date: June 1, 2015  
Decision Issued: June 12, 2015

### **PROCEDURAL HISTORY**

On September 9, 2014, Grievant was issued a Group I Written Notice of disciplinary action for attendance/excessive tardiness.

On September 10, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 20, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for February 26, 2015 but was continued to April 2, 2015 and then June 1, 2015 for good cause shown. On June 1, 2015, 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 Corrections employs Grievant as a Corrections Officer at one of its facilities. She began working for the Agency in November 2007. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant has been suffering from severe migraine headaches since 2000.

On August 31, 2013, Grievant was placed on leave restriction because she had used all of her allotted sick leave. She was notified that her leave record reflected unsatisfactory attendance. She was instructed, "If you are unable to work due to medical reasons, you will be required to bring a statement from your physician for every absence. \*\*\* You are required to bring in medical documentation for every absence necessitated by personal or family illness."

Grievant was schedule to work on February 7, 2014. She did not report to work because she was sick. She presented the Agency with a note from her medical provider.

Grievant was scheduled to work on March 12, 2014. She did not report to work because she was sick. She presented the Agency with a note from her medical provider.

Grievant was scheduled to work on April 12, 2014 and April 13, 2014. She did not report to work because she was sick. She presented the Agency with a note from her medical provider.

Grievant was scheduled to work on May 15, 2014 and May 16, 2014. She did not report to work because she was sick. She presented the Agency with a note from her medical provider.

Grievant exhausted all of her sick leave on May 16, 2014.

Grievant was scheduled to work on May 30, 2014. She did not report to work because she had to take care of her child who was sick.

Grievant was scheduled to work on July 11, 2014. She did not report to work because she was sick. She presented the Agency with a note from her medical provider.

On July 30, 2014, Grievant received a Notice of Improvement Needed/Substandard Performance. She was informed that:

This Notice of Improvement Needed is to address your use of unscheduled leave for leave year 2014. You were placed on leave restriction on August 31, 2013 due to unsatisfactory attendance. You have called in sick on five occasions this leave year. In addition, you have called in one day for your sick child. This combination totals eight working days. This exceeds the number of unscheduled absences permitted by Implementation Memorandum 110.2.

Improvement Plan: You are to achieve a satisfactory attendance record and submit documentation for all unscheduled absences for 12 months from the date of this notice. Failure to do so may result in a Written Notice under the Standards of Conduct.<sup>1</sup>

Grievant was scheduled to work on August 12, 2014. She did not report to work because she was sick. She presented the Agency with a note from her medical provider.

Grievant was scheduled to work on August 17, 2014 and August 18, 2014. She did not report to work because she was sick. She presented the Agency with a note from her medical provider.

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<sup>1</sup> Agency Exhibit 4.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”<sup>2</sup> Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

“Unsatisfactory attendance” is a Group I offense.<sup>5</sup> In January 2014, Grievant was allotted a sick leave balance of 64 hours under the Virginia Sickness and Disability Program. As of May 16, 2014, she had exhausted her allotted sick leave balance. She had unscheduled absences from work on May 30, 2014 and July 11, 2014. She received a Notice of Improvement Needed/Substandard Performance notifying her of her obligation to achieve a satisfactory attendance record. She had unscheduled absences from work on August 12, 2014, August 17, 2014, and August 18, 2014. The Agency has presented sufficient evidence to show that Grievant displayed a pattern of absences that were unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that she presented notes from her medical provider for each of her absences thereby excusing her absences. The provision of doctor’s notes does not minimize Grievant’s obligation to report to work as scheduled. The doctor’s note may explain why Grievant was absent, but the notes do not excuse Grievant’s pattern of absences.

Grievant argued that she suffered from a serious health condition justifying her absences under the Family Medical Leave policy. Although Grievant may very well suffer from a serious health condition justifying intermittent leave under the Family Medical Leave Policy, she did not apply for FMLA prior to the disciplinary action. When the Agency believes an employee may be absent for a reason qualifying under the FMLA, the Agency is obligated to provide specific notice to the employee of the employee’s rights under the FMLA.<sup>6</sup> An employee may be sick for many reasons including reasons that would not constitute a serious health condition requiring intermittent leave. When an employee exhibits a pattern of absences due to illness, that

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<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(B)(2)(a).

<sup>6</sup> In particular, the Agency’s duty arises, “when the employer acquires knowledge that an employee’s leave may be for an FMLA-qualifying reason.” See, 29 CFR § 825.300.

pattern alone is not sufficient to place the Agency on notice that the employee may have a serious health condition. For example, an employee could be absent from work one day every month for 12 months due to sickness with each illness being different from the others. In this case, Agency staff attempted to discuss the reasons why Grievant was absent due to illness. She was resistant to discuss the nature of her illness. The Agency was not placed on notice that Grievant may have had a serious health condition. The Family Medical Leave Policy does not prevent Grievant from being disciplined for a pattern of absences because the Agency was not placed on notice that Grievant may have had a serious health condition.

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 ....”<sup>7</sup> 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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>8</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant’s evidence shows by a preponderance of the evidence that the Agency’s stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency’s explanation was pretextual.<sup>9</sup>

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<sup>7</sup> Va. Code § 2.2-3005.

<sup>8</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>9</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

Grievant argued that the Agency retaliated against her because she filed a sexual harassment claim against one of her supervisors. Filing a claim of sexual harassment is a protected activity. Grievant suffered an adverse employment action because she received disciplinary action. Grievant has not established a connection between her protected activity and the adverse employment action. The Agency notified Grievant of her poor attendance before she filed her claim of harassment. The Agency followed progressive disciplinary action by notifying her of its concerns about her attendance prior to issuing disciplinary action. The Agency did not retaliate against Grievant or issue disciplinary action as a pretext for retaliation.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>10</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.