

Issues: Group I Written Notice (unsatisfactory attendance), and Termination (due to accumulation); Hearing Date: 05/29/15; Decision Issued: 06/01/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10597; 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: 10597

Hearing Date: May 29, 2015

Decision Issued: June 1, 2015

PROCEDURAL HISTORY

On March 31, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance. She was removed from employment based on the accumulation of disciplinary action.

On April 1, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 20, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 29, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Direct Care Professional at one of its facilities. She had been employed by the Agency since 2002.

Grievant had prior active disciplinary action. She received a Group II Written Notice on March 29, 2013 for refusal to work overtime on January 26, 2013. She received a Group II Written Notice on March 29, 2013 for refusal to work overtime on February 9, 2013.

The Agency took disciplinary action against Grievant based on "occurrences" for the dates of April 12, 2014, May 9, 2014, June 14, 2014, July 27, 2014, August 15, 2014, August 16, 2014, October 11, 2014, November 4, 2014, and January 26, 2015.

Grievant was scheduled to work on April 12, 2014 but did not report to work because "no babysitter."¹ Her absence was an occurrence under the Agency's Attendance policy.

Grievant was scheduled to work on May 9, 2014 but did not report to work due to her son's doctor's appointment. The absence was initially considered an occurrence. Grievant submitted a doctor's note and the absence was changed from an occurrence to "Approved".

¹ Agency Exhibit 3.

Grievant was scheduled to work on June 14, 2014 but did not report to work because of “car trouble.” Her absence was an occurrence under the Agency’s Attendance policy.

Grievant was scheduled to work on July 27, 2014 but did not report to work because she was sick. Her absence was an occurrence under the Agency’s Attendance policy.

Grievant was scheduled to work on August 15, 2014 and August 16, 2014 but did not report to work. Her absences were two occurrences under the Agency’s Attendance policy.

Grievant was scheduled to work on October 11, 2014 but did not report to work because “something came up with her babysitter.” Her absence was an occurrence under the Agency’s Attendance policy.

Grievant was scheduled to work on November 4, 2014 but did not report to work because “called and stated couldn’t come in.” Her absence was an occurrence under the Agency’s Attendance policy.

Grievant was scheduled to work on January 26, 2015 but did not report to work because “called out (sp) with dr. note.” Grievant submitted a doctor’s note stating that Grievant was “a patient seen by me on 01/26/2015. [Grievant] may return to work 01/27/2015.”² A supervisor, Ms. T, reviewed the note and declined to mitigate the occurrence, “per attendance policy 703 – 1st day unplanned absence occurrence.”³

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.”⁴ 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.”

Unsatisfactory attendance is a Group I offense.⁵ The Agency measures unsatisfactory attendance using an Attendance policy setting forth a threshold of

² Grievant Exhibit 1.

³ Grievant Exhibit 1.

⁴ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ See, Attachment A, DHRM Policy 1.60.

unplanned absences before disciplinary action may be taken. The Agency's Attendance Policy provides:

Unplanned Absence: An absence from the work site when written or verbal approval has not been received from the supervisor as required under the definition of planned absence.

Occurrence: An unplanned absence of four (4) hours or more but not exceeding one (1) work day. Unplanned absences in excess of one (1) workday shall be considered as one (1) occurrence if the absence on the following work day(s) is documented by a physician as being medically necessary.

If an occurrence or tardy incident is the result of an unusual or emergency situation, employees may request that it be mitigated. *** Employees must provide adequate documentation to support their request for mitigation. ***

Employees who accumulate eight (8) occurrences within a twelve (12) month period are subject to a Group I Written Notice.

Grievant accumulated eight occurrences in a twelve month period thereby justifying the issuance of a Group I Written Notice. Grievant had two prior active Group II Written Notices. When an employee has two Group II Written Notices, any additional disciplinary action supports removal of an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she provided doctor's notes for several of her absences counted as occurrences. Under the Agency's policy, submitting a doctor's excuse does not necessarily mitigate an occurrence. Only if the unplanned absence results from an unusual or emergency situation may the absence be mitigated. Grievant presented doctor's notes but not sufficient evidence to show that any of the eight unplanned absences resulted from unusual or emergency situations.

Grievant argued that the Agency did not provide her with a Notice of Improvement Needed/Substandard Performance after she accumulated her sixth occurrence. Although the Agency states that if possible such a notice may be given to an employee with six occurrences, "[f]ailure to issue a written counseling will not invalidate the requirement for disciplinary action ... when ... eight (8) or more occurrences are reached." In addition, for each occurrence, Grievant received a copy of a Leave Request and Call Out Form showing whether a supervisor listed Grievant's absence as an occurrence. Under the Attendance Policy, "[i]t is the responsibility of the

employee to maintain a current knowledge of their own attendance record and the number of tardies, and occurrences that may be on the books.”

Grievant argued that the Agency changed its enforcement of the attendance policy. According to Grievant, prior managers were more likely to mitigate disciplinary action but within the prior seven months, new managers were strictly enforcing the attendance policy for all employees in the building where Grievant worked. If the Hearing Officer assumes Grievant’s assertion is true, Grievant benefited from less lenient enforcement in the past. This benefit would not form a basis to reverse the disciplinary action. Grievant received notice of each time the Agency listed her unplanned absence as an occurrence.

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”⁶ 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 with removal 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:

⁶ *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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.