

Issues: Group I Written Notice (unsatisfactory attendance) and Termination (due to accumulation); Hearing Date: 08/14/13; Decision Issued: 08/15/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10138; 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: 10138**

Hearing Date: August 14, 2013

Decision Issued: August 15, 2013

#### **PROCEDURAL HISTORY**

On May 28, 2013, 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 May 29, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 17, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 14, 2013, 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 Registered Nurse at one of its facilities. She had been employed by the Agency for approximately 26 years.

Grievant had prior active disciplinary action. On October 28, 2011, Grievant received a Group I Written Notice for unsatisfactory attendance. On January 5, 2012, Grievant received a Group I Written Notice for unsatisfactory attendance. On May 12, 2012, Grievant received a Group I Written Notice for unsatisfactory attendance. On August 6, 2012, Grievant Received a Group I Written Notice for unsatisfactory attendance.

Grievant worked at a Facility that operates on a 24 hour basis. If an employee fails to report to work as scheduled, the Facility must either force an employee to work who was not scheduled to work or force an employee on an existing shift to work an additional shift. Because of the hardship on other employees and the Facility's needs for continuous staffing, the Agency has established a policy setting forth disciplinary action once an employee misses work without excuse.

In 2012, Grievant sought and obtained a Family Medical Leave Certificate which she provided to the Agency. The certificate must be renewed annually. Grievant considered seeking renewal of her certificate in 2013 but decided that having the certificate made her more likely to claim Family Medical Leave in circumstances in which she might otherwise have reported to work. She changed her medication to

make her less likely to become drowsy while at work. She did not have a Family Medical Leave Certificate in 2013.

Grievant was scheduled to work on May 6, 2013. She did not report to work. She did not provide any medical or other excuse for her absence. It is unclear for what reason Grievant was absent on May 6, 2013.

On some occasions, Grievant would come to work in addition to her customary work scheduled to accommodate the Agency's needs.

## **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."<sup>1</sup> 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."

The Agency has an Attendance Policy setting forth its requirements for employees' attendance. Under this policy:

Employees who accumulate eight (8) occurrences within a twelve (12) month period are subject to a Group I Written Notice. Each additional occurrence subjects them to another Group I Written Notice if they continue to have eight (8) or more occurrences on record during the twelve (12) month period. Upon receipt of the third active Group I Written Notice, they may be suspended for one (1) day. Upon receipt of the fourth active Group I Written Notice, they may be suspended for five (5) – (10) days in lieu of termination. Upon receipt of the fifth active Group I Written Notice, the employee may normally be terminated.

An occurrence is defined as:

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.

On May 6, 2013, Grievant was scheduled to report for work. She failed to do so. Her absence was an unplanned absence and, thus, an occurrence. The occurrence was the ninth occurrence within a twelve month period. The Agency has presented

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory attendance.

Upon the accumulation of four active Group I Written Notices, an employee may be removed from employment.<sup>2</sup> Grievant has accumulated five active Group I Written Notices thereby justifying the Agency's decision to remove Grievant from employment.

Grievant was given notification of her 8<sup>th</sup> and 9<sup>th</sup> occurrence on May 16, 2013 and given an opportunity to provide an explanation of her absences. Grievant argued that the 8<sup>th</sup> occurrence concerned her absence on March 24, 2013 and if she had been given notification in March or April 2013, she would have realized she was in jeopardy and, thus, obtained a FMLA certification and avoided the 9<sup>th</sup> occurrence. Grievant's argument fails. Grievant already had four Written Notices for unsatisfactory attendance. She had more than adequate notice of her obligation to attend. In addition, under the Agency's policy, the Agency was authorized to give her a Group I Written Notice once she receives an 8<sup>th</sup> occurrence. Upon the accumulation of four Group I Written Notices, an employee may be removed. The Agency could have removed Grievant with the issuance of a Group I Written Notice for the 8<sup>th</sup> occurrence. The Agency did not present evidence that it issued Grievant a Group I Written Notice for her 8<sup>th</sup> occurrence. Only the discipline relating to Grievant's absence on May 6, 2013 was assigned to the Hearing Officer for consideration.

*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>3</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.

Grievant argued that her satisfactory work performance and length of service should serve as a basis for mitigation. Rarely is an employee's work performance or length of service a sufficient basis to mitigate disciplinary action. Grievant's work performance and length of service in this case are not reasons to mitigate the disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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<sup>2</sup> DHRM Policy 1.60 (B)(2)(a).

<sup>3</sup> *Va. Code § 2.2-3005.*

## 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:

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>4</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>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.