

Issues: Group II Written Notice (unsatisfactory attendance), and Termination (due to accumulation); Hearing Date: 10/28/13; Decision Issued: 10/30/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10183; 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: 10183**

Hearing Date: October 28, 2013  
Decision Issued: October 30, 2013

**PROCEDURAL HISTORY**

On August 2, 2013, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory attendance. Grievant was removed from employment based on the accumulation of disciplinary action.

On August 26, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 24, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 28, 2013, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
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 Support Associate II at one of its facilities. The purpose of his position was:

Provides direct care for assigned individuals of [Facility] by assisting with all phases of general hygiene and daily living. Places emphasis on maintaining the self-esteem and personal dignity while increasing the self-reliance of individuals.<sup>1</sup>

Grievant had prior active disciplinary action. On June 13, 2013, Grievant received a Group I Written Notice for unsatisfactory attendance. On April 3, 2013, Grievant received a Group II Written Notice with a three workday suspension for unsatisfactory attendance.

Prior to May 28, 2013, Grievant had 15 “occurrences” under the Agency’s attendance policy.

Grievant was scheduled to work but did not report to work on May 28, 2013, June 15, 2013, June 20, 2013, and June 29, 2013. As a result of his absences, the Agency had to have other employees work in his place.

### **CONCLUSIONS OF POLICY**

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<sup>1</sup> Agency Exhibit 3.

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>2</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.”

Human Resources Joint Instruction 8-1 governs Employee Attendance. The policy addresses unplanned or unscheduled absences and patterns of absences. An “Occurrence” is defined as:

An unscheduled absence from work that does not meet the criteria defining a scheduled absence, or being more than 60 minutes late in reporting for work; or calling-in to request time off without having requested the leave before the end of the last workday preceding the day of absence. The most common example: when you wake up in the morning and feel sick, and call in that you will not be coming in that day is an occurrence.

“Unsatisfactory Attendance” is defined as:

When a person exceeds 8 occurrences within a 12-month consecutive period, or when a person has established a pattern of absences.

Section K provides:

Once a Group I Written Notice has been issued for unsatisfactory attendance (occurrences), an employee is eligible for additional disciplinary action for each additional occurrence as long as the record exceeds eight (8) occurrences accumulated during the 12-month consecutive period. DHRM Policy 1.60 Standards of Conduct escalates the severity and discipline for repeated, uncorrected behavior. It indicates that unless there are mitigating circumstances, that a repeat of the same, active Group I Written Notice should result in the issuance of a Group II Written Notice. Group II offenses can carry a suspension of up to ten (10) workdays.

After accumulating 15 occurrence, Grievant had four additional unscheduled absences. He accumulated more than 8 occurrences in a 12 month period thereby establishing the Agency’s assertion that his attendance was unsatisfactory. Because Grievant had prior active disciplinary action for unsatisfactory attendance, the Agency was justified in elevating the level of discipline to a Group II Written Notice.

Upon the issuance of two Group II Written Notices, an agency may remove an employee. With the issuance of a Group II Written Notice in this case, Grievant has

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

Grievant argued that he was experiencing difficult circumstances in his life including the lack of reliable transportation and, thus, his removal should be reversed. The Agency's policy is a "no fault" policy intended to account for unpredictable events preventing an employee from working as scheduled. The policy, however, sets a threshold of 8 occurrences in a 12 months period to determine when unplanned absences become excessive. Grievant crossed that threshold thereby justifying the issuance of disciplinary action.

*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. 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 II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## 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

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<sup>3</sup> *Va. Code § 2.2-3005.*

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.