

Issues: Group II Written Notice (excessive absences and failure to follow policy), and Termination (due to accumulation); Hearing Date: 10/21/14; Decision Issued: 11/10/14; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10456; 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: 10456

Hearing Date: October 21, 2014
Decision Issued: November 10, 2014

PROCEDURAL HISTORY

On August 1, 2014, Grievant was issued a Group II Written Notice of disciplinary action for attendance/excessive tardiness and failure to follow instructions and/or policy. She was removed from employment based on the accumulation of disciplinary action.

On August 28, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 15, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 21, 2014, 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 Virginia Department of Transportation employed Grievant as an Engineering Tech III at one of its locations. The purpose of her position was to "[p]rocess permit applications and street addition packages. Review and inspect permit and subdivision street construction plans and work to ensure compliance with agency standards and specifications and to ensure the safety of the traveling public where permit work is taking place."¹ She had been employed by the Agency for approximately 25 years.

Grievant had prior active disciplinary action. On July 3, 2013, Grievant received a Group II Written Notice for misuse of a State vehicle. On August 27, 2013, Grievant received a Group I Written Notice for disruptive behavior. On September 11, 2013, Grievant received a Group I Written Notice for unsatisfactory attendance and excessive tardiness. On January 10, 2014, Grievant received a Group II Written Notice with suspension for failure to follow "supervisory instructions to call in advance of your scheduled report time (7:30 a.m.) of any late arrivals."

Grievant suffered many falls throughout her lifetime. These falls have caused numerous injuries to her body including multiple and cumulative brain trauma.

Grievant sought a reasonable accommodation. She presented a note from a doctor stating that Grievant "is currently under our care for neck pain, migraine

¹ Agency Exhibit 15.

headaches, low back pain and right knee pain. She is required to attend medical appointments each month (1 hour) and may require intermittent time off work for 1-2 days due to acute exacerbation of her conditions (particularly the migraines) 1-2 times per month."²

On December 20, 2014, the Assistant District Civil Rights Manager sent Grievant an email stating:

This is to confirm that your medical accommodation request to take intermittent time off up to four days per month due to medical reasons has been approved. Please inform your supervisor of any changes in terms of your medical condition that may impact your ability to perform your assigned duties. If your medical condition is temporary or permanent, additional discussions may be needed in order to determine duties that you may be able to perform that do not negatively impact your medical condition. Please contact me if you have any questions pertaining to the medical accommodations.

Accommodation

- You will be excused for time off work due to migraine, neck/knee pain or any other approved reason maximum 1-2 days twice per month total of 4 days/month.
- If additional time off work due to medical or other reasons is needed, it will be evaluated by the supervisor to assess the impact of the cumulative time off on business need. If it is determined business need is impacted negatively or additional staffing is needed to cover your job duties, you may need to seek other options available to you.
- Any approved time off work will be charged to available leave or leave without pay.³

Grievant was scheduled to work but was late or absent from work on:

- March 7, 2014, March 10, 2014, March 13, 2014, March 19, 2014, March 20, 2014, March 24, 2014, March 25, 2014 and March 27, 2014.⁴
- April 1, 2014, April 4, 2014, April 11, 2014, April 17, 2014, April 18, 2014, April 23, 2014, and April 24, 2014.

² Agency Exhibit 20.

³ Agency Exhibit 20. Because Grievant presented only limited evidence regarding the reasons for absences or tardiness, it is unnecessary for the Hearing Officer to address whether the Agency's four day restriction is consistent with law and policy.

⁴ Grievant was also absent from work for three hours on March 17, 2014 for a doctor's appointment.

- May 2, 2014, May 7, 2014, May 13, 2014, May 14, 2014, May 15, 2014, May 16, 2014, May 21, 2014, May 27, 2014, May 29, 2014.
- June 3, 2014, June 11, 2014, June 13, 2014, June 17, 2014, June 18, 2014, June 19, 2014, June 20, 2014, June 23, 2014, June 26, 2014, and June 27, 2014.
- July 1, 2014, July 7, 2014, and July 8, 2014.

For most of these dates, it is unclear why Grievant was absent or tardy from work.

Grievant applied for short term disability in July 2014. The Third Party Administrator approved Grievant for short term disability on July 15, 2014. She began receiving benefits on July 22, 2014. The Agency decided to remove Grievant from employment effective August 1, 2014.

Grievant was evaluated by a Dr. P on August 7, 2014. He concluded that Grievant:

is no longer capable, whatsoever, of maintaining any form of gainful employment.” *** Since her problem is chronic and progressive, it can be said, to a reasonable degree of medical certainty, that her condition has been present over the course of several years and probably, with respect specifically, to the chronic traumatic encephalopathy, which is now believed to be a chronic progressive neurological disorder leading to dementia, that [Grievant] has probably suffered from this condition, for at least the past five years, and probably longer. *** It is therefore, my considered medical and neurologic opinion, once again stated to a reasonable degree of medical certainty, that:

1. [Grievant] is incapable of and, totally and permanently disabled from any and all forms of gainful employment.
2. [Grievant] requires disability benefits in order to maintain her life and health.
3. [Grievant] requires ongoing specialized medical care, including neurologic care and neuropsychiatric care, as well as orthopedic care.⁵

If Grievant had remained on short term disability, she would have transitioned to long term disability under the Virginia Sickness and Disability Program. By removing Grievant from employment, the Agency caused Grievant’s short term disability to end and removed her opportunity to receive long term disability.

CONCLUSIONS OF POLICY

⁵ Agency Exhibit 1.

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.”⁶ 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.”

Tardiness and poor attendance are Group I offenses.⁷ Grievant was late or absent from work on eight days in March 2014, seven days in April 2014, nine days in May 2014, ten days in June 2014, and three days in July 2014. The Agency has established a pattern of tardiness and/or poor attendance by Grievant thereby justifying the issuance of a Group I Written Notice.⁸

Grievant previously engaged in similar behavior. She received a Group I for poor attendance and excessive tardiness on September 11, 2013. The Agency has presented sufficient evidence to elevate the Group I offense in this case to a Group II Written Notice for repeated violation of the same offense.⁹

The Agency has presented evidence showing Grievant engaged in a patterns of absences and tardiness. Grievant has not presented sufficient evidence to show that her absences or tardiness could be considered intermittent time off from work or otherwise excused. Without knowing why Grievant was tardy or absent from work, the Hearing Officer does not have evidence to reverse the Agency’s discipline.

Grievant had a prior active Group II Written Notice. With the issuance of the Group II Written Notice in this case, the Agency has presented sufficient evidence to support its decision to remove Grievant based on the accumulation 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

⁶ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁷ See, Attachment A, DHRM Policy 1.60.

⁸ The Agency alleged but did not establish that Grievant failed to follow the call-in procedure when she expected to be late to work. On July 8, 2014, Grievant called to work prior to the beginning of her shift and indicated she would arrive at 8:30 a.m. She did not report to work at 8:30 a.m. and called at approximately 10 a.m. indicating she would be out for the day. The Agency’s call in procedure required her to notify her supervisor prior to 7:30 a.m. which she did. The call in procedure was silent regarding what to do when she had changes in her expected late arrival.

⁹ See, Attachment A, DHRM Policy 1.60.

Management”¹⁰ 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 acknowledges that she cannot work and does not seek reinstatement to her former position to enable her to perform her work duties. She seeks reinstatement to her former status which would be an employee on short term disability. At the conclusion of her short term disability she would transition to long term disability. The effect of transitioning to long term disability would be to end her employment with the Agency but preserve a source of income to her from long term disability benefits.

When an employee engages in behavior giving rise to disciplinary action and then begins receiving short term disability, an agency has the discretion to issue the disciplinary action while the employee is on short term disability or once the employee returns from short term disability. In this case, the Agency chose to issue disciplinary action prior to learning whether Grievant intended to return from short term disability. By issuing disciplinary action, the Agency ended Grievant’s short term disability. If the Agency had waited to see if Grievant returned from short term disability before issuing the disciplinary action, Grievant would not have returned from short term disability and would have transitioned to long term disability. Long term disability is a benefit afforded to employees under the Virginia Sickness and Disability Program. By choosing to discipline Grievant, the Agency ended Grievant’s option of receiving long term disability benefits.¹¹ The Agency’s decision reflected a lack of compassion for Grievant and a lack of respect for her 25 years of service with the Agency. These factors, however, do not form a basis for the Hearing Officer to mitigate the disciplinary action. The Agency’s decision to proceed with disciplinary action was consistent with its discretion and State policy. The Agency’s decision did not exceed the limits of reasonableness. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

¹⁰ Va. Code § 2.2-3005.

¹¹ The Written Notice states, “I have carefully considered your July 26, 2014 mitigating circumstances letter in which you have requested to remain on VSDP/Short Term Disability (STD) with the objective of moving toward Long Term Disability (LTD) (e.g. “permanent disability”) versus the Agency taking action.”

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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 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.¹²

[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

¹² Agencies must request and receive prior approval from EDR before filing a notice of appeal.