



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11623

Hearing Date: February 10, 2021
Decision Issued: February 11, 2021

PROCEDURAL HISTORY

On October 2, 2020, Grievant was issued a Group II Written Notice of disciplinary action for excessive unscheduled absences. She was removed from employment based on the accumulation of disciplinary action.

On October 26, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On November 16, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 10, 2021, a hearing was held by remote conference.

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Service Associate at one of its facilities. Grievant had prior active disciplinary action. On December 19, 2019, Grievant received a Group I Written Notice for accumulating excessive unplanned leave resulting in poor attendance. On January 8, 2020, Grievant received a Group II Written Notice for accumulating excessive unplanned leave resulting in poor attendance. On August 13, 2020, Grievant received a Group II Written Notice with a suspension from August 14, 2020 and return to work August 20, 2020 for failure to follow instructions.

The Agency tracked when employees had unscheduled absences from work. Upon the accumulation of 65 hours of unscheduled absences after January 10th of each year, the Agency could take disciplinary action.

In January 2020, Grievant had zero unscheduled absences.

In February 2020, Grievant had unscheduled absences of 8 hours on February 5, 2020 and 8 hours on February 15, 2020.

In March 2020, Grievant had unscheduled absences of 8 hours on March 8, 2020, 8 hours on March 12, 2020, and 2.2 hours on March 22, 2020.

In April 2020, Grievant had zero unscheduled absences.

In May 2020, Grievant had zero unscheduled absences.

In June 2020, Grievant had unscheduled absences of 1 hour on June 26, 2020 and 8 hours on June 27, 2020.

In July 2020, Grievant had unscheduled absences of 3.3 hours on July 1, 2020, 12 hours on July 4, 2020, 1.9 hours on July 25, 2020, and 8 hours on July 31, 2020.

In August 2020, Grievant had unscheduled absences of 4.7 hours on August 3, 2020, 2 hours on August 6, 2020, and 1.6 hours on August 8, 2020.

In September 2020, Grievant had unscheduled absences of 4 hours.

Grievant had unscheduled absences totaling 80.7 hours from January 10, 2020 through September 23, 2020.

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.”¹ 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 a “no fault” attendance policy allowing for disciplinary action based on the accumulation of unscheduled absences. Under this policy, “[u]nscheduled leave” is:

An absence from work of 60-minutes or more from the start of your scheduled shift without prior approval.

If an employee presents an excuse from a medical provider, the absence is not counted as unscheduled leave. Upon the accumulation of 65 hours of unscheduled absences after January 10, 2020, the Agency may issue disciplinary action.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Poor attendance is a Group I offense.² If an employee repeats the same Group I offense then that offense may be elevated to a Group II offense. In this case, Grievant displayed poor attendance by accumulating over 65 hours of unscheduled leave after January 10, 2020. She had a prior written notice for the same offense. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the accumulation of two or more Group II Written Notices, an agency may remove an employee. Grievant has accumulated three Group II Written Notices. Accordingly, Grievant's removal must be upheld.

Grievant argued she met with a manager and was told she had accumulated only 64 hours of unscheduled leave and that she was only absent on August 31, 2020 following that conversation. Grievant presented a note from her medical provider excusing her absence on August 31, 2020. The Hearing Officer removed August 31, 2020 from consideration as unscheduled leave. Without counting 8 hours on August 31, 2020 there remains over 65 hours of unscheduled leave. Grievant argued that she had been absent due to COVID19 and, thus, she should not be held accountable for being absent from work for those days. The evidence showed that the Agency excused the days Grievant was absent due to COVID19 and did not include those days in its calculation of the numbers of unscheduled leave.

Grievant argued she had had a difficult year with family illness and other difficulties. The evidence showed the Agency imposed discipline progressively and had adequately informed Grievant of her obligation to report to work as scheduled. The Agency has presented sufficient evidence to support 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 ..."³ 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

² See, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.