

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE
MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
CASE NUMBER: 12078**

DECISION OF HEARING OFFICER

I. INTRODUCTION

The Virginia Department of Behavioral Health and Developmental Services issued the grievant a Group III Written Notice on January 18, 2024 for attendance issues. The grievant had a prior active Group III Written Notice, issued on April 8, 2022 for falsifying time records. The agency terminated the grievant from employment concurrently with the issuance of the January 18, 2024, formal discipline. The grievant challenges these actions. For the reasons stated herein, I find the actions of the agency should be upheld.

II. PROCEDURAL BACKGROUND

The grievant commenced this proceeding by filing her Form A on January 18, 2024. The Department of Human Resource Management, Office of Employment Dispute Resolution appointed me as hearing officer effective February 12. I conducted a prehearing conference call with the grievant and the agency. By agreement of the parties, the matter was set for hearing on April 2.

The agency was represented by a lay advocate at the hearing. It presented two witnesses and forty-six pages of exhibits. All exhibits had been submitted prior to the hearing and were admitted into evidence without objection.

The grievant was also represented by a lay advocate. The grievant testified but presented no additional witnesses. She presented no exhibits and the hearing lasted approximately one hour.

III. ISSUE PRESENTED

Whether the agency was justified in issuing to the grievant a Group III Written Notice and terminating her from employment on January 18, 2024?

IV. FINDINGS OF FACTS

The grievant worked for the agency for over six years. In 2022, her position was that of recreational therapist. Her established work schedule was 7:30 AM until 4:00 PM on Monday through Friday.

In December 2023, the supervisor of the grievant received a report the grievant had been working overtime hours without prior approval. The supervisor investigated the allegation by reviewing the time records of the grievant. That investigation revealed that during the last six months of 2023 the grievant had arrived late for work on approximately forty-seven occasions. On 27 days, she left more than 10 minutes prior to the scheduled end of her workday. On eleven of the occasions when she arrived late, she worked the required number of hours. On six of the days when she clocked out early, she had arrived early enough to work the scheduled number of hours.

The grievant was issued a Group III Written Notice in April 2022 for having a fellow employee clock her in even though the grievant had not arrived for work. On December 6, 2023, she received a rating of “Contributor” on her annual evaluation.

V. ANALYSIS

The Commonwealth of Virginia provides protections to its employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Human Resource Management (DHRM) Office of Employment Dispute Resolution has developed a Grievance Procedure Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). The GPM sets the applicable standards for this type of proceeding. Section 5.8 provides that in disciplinary grievance matters (such as this case) the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of evidence, that its actions were warranted and appropriate. The Rules state that in a disciplinary grievance a hearing officer shall review the facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice?
- II. Whether the behavior constituted misconduct?
- III. Whether the discipline was consistent with policy? and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

The grievant testified that she would be allowed to vary her schedule from the normal work hours at the request of the supervisor. The supervisor denied that such happened. She testified that she delayed issuing a formal discipline to the grievant during the last six months of 2023. The supervisor instead provided oral counseling on multiple occasions.

Through its exhibits, the agency presented the pattern of the grievant choosing her work hours based on her own needs rather than those of the agency. The grievant did not explain her not working the assigned hours for any specific date. Her defense is more a global one, that the supervisor knew what was happening and did not object to it. The supervisor testified she did not know of any approved adjustments to the schedule. I find the testimony of the supervisor to be more believable. I base this determination not only on observing the demeanor of the witnesses and their statements, but on the lack of any apparent reason for the supervisor to fabricate these events. No evidence was presented that the discipline was issued for anything other than legitimate business reasons.

Under Facility Policy 12.03.10 an employee is defined as being tardy if more than four minutes late for the beginning of a scheduled shift. As stated above, I found forty-seven instances where the grievant was tardy during the last 6 months of 2023. That same agency policy provides that tardiness on more than five occasions in a year count as an unexcused absence. Eight unexcused absences can be sufficient to justify termination. The unapproved tardies and early leaving from work are sufficient to justify termination under the facility policy.

Policy 1.60 of the DHRM (“Standards of Conduct”) classifies tardiness or abuse of work hours as a possible Group 1 offense. Policy 1.60 further provides that an agency may consider as an aggravating factor the existence of prior formal discipline based on similar conduct. I see no reason to find that the conduct of the grievant was misclassified as a Group III offense in this instance. Although none of the individual variations of the work schedule of the grievant would likely have justified anything greater than a Group 1 offense, the sheer number of events presented here amply support the greater discipline. Under Section 5.8 of the GPM, I am required to give deference to the decision of an agency in determining the appropriate level of discipline, assuming that level is reasonable. I concur that the level is reasonable, aside from any deference to be given.

The grievant was absent for work for some hours for reasons alleged to be covered by the Federal Family Medical Leave Act. I was presented with no evidence showing that the grievant had sought and received the necessary approval for coverage under that statute, as implemented by DHRM Policy 4.20. Therefore, even if every date on which the schedule of the grievant was varied was approved, I am not presented with sufficient evidence to make that finding. I also cannot find that the discipline was issued in violation of any other statute or policy.

VI. DECISION

This extremely streamlined hearing presented me with sufficient evidence to uphold the termination of the grievant from employment pursuant to the Group III Written Notice issued on January 18, 2024.

VII. APPEAL RIGHTS

The parties may file an administrative review request within fifteen calendar days from the date this decision is 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 Resources Management to review the decision. You must state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

Director, Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or send by facsimile to (804) 371-7401, or by email.

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your requests to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th street, 12th floor
Richmond, VA 23219

or send by email to EDR@dhrm.virginia.gov, or by facsimile 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 fifteen calendar days of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The 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 contrary to law. You must file a notice of appeal with the clerk of circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.

See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or you may call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights help from an EDR Consultant.

DECIDED this April 10, 2024

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer