



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11894

Hearing Date: February 13, 2023
Decision Issued: March 6, 2023

PROCEDURAL HISTORY

On September 2, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for three days absence without authorization.¹

On October 2, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 17, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 13, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

¹ The Agency incorrectly listed the offense date as June 24, 2020. This typographical error does not affect the outcome of this case.

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 Corrections employed Grievant as a Corrections Officer at one of its facilities. She began working for the Agency on June 8, 2015. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on May 16, 2022 for failure to work overtime.

Grievant's last day of work at the Facility was April 21, 2022.

On May 3, 2022, Grievant filed a claim for Short-term Disability (STD) with the Third Party Administrator (TPA). She sought benefits from April 29, 2022 through June 23, 2022.

On May 9, 2022, Grievant sent an email to the Facility's email address stating that her return to work date was not until June 23, 2022.

On June 6, 2022, the Human Resource Officer sent Grievant a letter by certified mail notifying her that "your short term disability claim has not been approved as of June 6, 2022. *** This is to notify you that continued absence from the workplace without proper

approval may subject you to disciplinary action under the Standards of Conduct. *** If you are unable to work due to a medical condition, it is your responsibility to contact your supervisor and to initiate a claim for short-term disability and/or ensure your health care provider provides the information to [Third Party Administrator] to make a decision of approval or extension of your claim. *** It is your responsibility to make ensure that the [Third Party Administrator] receives medical information in a timely manner to make a decision regarding the approval of your claim. At this time, the [Third Party Administrator] is still awaiting documentation in order to review your claim which prevents them from making a timely decision on your claim. *** As a result, you are currently absent without approved leave.”²

On June 20, 2022, the TPA notified the Agency that Grievant’s STD request was denied and that Grievant had been instructed to contact the Agency. The reason for denial was “[m]edical information not received.”³

The Agency expected Grievant to return to work on June 24, 2022. She was also expected to work on June 25, 2022, June 26, 2022, July 4, 2022, July 5, 2022, July 8, 2022, and July 9, 2022. Grievant did not report to work. She did not provide the Agency with medical information excusing her absences.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.” Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

DHRM Policy 4.57 governs Virginia Sickness and Disability. This policy provides:

Employees who fail to comply with VSDP program requirements such as contacting the TPA regarding an illness or injury, compliance with return to work arrangements, or completing and returning LTD information to the TPA may have their benefit reduced or terminated and/or may be subject to disciplinary action up to and including termination of employment.

Group III offenses include, “[a]bsence in excess of three days without proper authorization or a satisfactory reason.” Grievant was scheduled to report to work on June

² Agency Exhibit p. 15.

³ Agency Exhibit p. 12.

⁴ See, Virginia Department of Corrections Operating Procedure 135.1.

24, 2022 and also work on June 25, 2022, June 26, 2022, and July 4, 2022. She did not report to work. She was not authorized to be absent from work. She did not provide the Agency with a satisfactory reason for failing to report to work. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for absence in excess of three days without authorization or satisfactory reason. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that she was diagnosed with post traumatic stress disorder and major depressive disorder and unable to report to work. As part of the hearing, Grievant presented notes from medical providers. At the time of the disciplinary action, however, Grievant had not provided similar medical records to the TPA and her STD case was closed. On June 6, 2022, the Agency notified Grievant of her obligation to provide medical records to the TPA but Grievant failed to do so. The Agency was justified in issuing disciplinary action because Grievant's STD case had been closed and Grievant did not return to work or provide justification for her absences.

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 ..."⁵ 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 III 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.

⁵ Va. Code § 2.2-3005.

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.