

Issue: Group III Written Notice with Termination (absence in excess of 3 days without authorization); Hearing Date: 07/31/17; Decision Issued: 08/18/17; Agency: DOC; AHO: Carl Wilson Schmidt; Case No. 11029; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11029

Hearing Date: July 31, 2017
Decision Issued: August 18, 2017

PROCEDURAL HISTORY

On April 18, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for being absent in excess of three days.

On May 11, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 31, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 31, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 Corrections employed Grievant as a Corrections Officer at one of its facilities.

Grievant was in a car accident. Grievant's last day of work was January 29, 2017. Grievant was discharged from a Hospital on January 30, 2017. He received treatment from the Hospital because of a fractured foot and upper respiratory infection (cold).

Grievant informed the Agency that he had a fractured foot and upper respiratory infection that prevented him from returning to work until February 3, 2017 with an accommodation. The HRO called Grievant and told him that the Agency would accommodate his "limited walking/standing desk job with your boot" and that he should return to work on February 10, 2017. Grievant said he did not want to return to work yet because he was taking classes and wanted to get his license. The HRO told Grievant to provide doctor's notes to excuse his absences.

Grievant presented a note from a LCSW indicating that "I have begun seeing [Grievant] in my practice."¹ The HRO called Grievant and told him the note was not sufficient because it was not from a medical doctor and it did not relate to his foot. Grievant said he wanted to see the email from the Major about his restrictions. Instead of providing the email to Grievant as she should have, the HRO told him he could not

¹ Grievant Exhibit 1.

have the email because he did not need it. This angered Grievant and their relationship became hostile. Grievant said he would get that email and he would come see her. He spoke in a loud voice.

On March 3, 2017, Grievant spoke with the HRO by telephone. He was concerned about his pay check. Grievant was angry and upset at the HRO. At some point later on, she sought and obtained a protective order preventing Grievant from being near her.

The Warden instructed Grievant not to return to the Facility until he could produce a document showing that he was physically and mentally fit to return to duty. Because of his conversation with the HRO that she perceived as threatening, Grievant was placed on pre-disciplinary leave.

Grievant was informed that his absences beginning March 21, 2017 were unauthorized because he did not return to work or provide appropriate medical documentation supporting his disability claim. He was placed on leave without pay beginning March 21, 2017.

Grievant submitted a note from a medical provider stating that he had an appointment with that provider on March 27, 2017.

Grievant filed a claim with the Third Party Administrator for short term disability. His claim was denied on March 17, 2017. Grievant appealed that denial. On May 22, 2017, Grievant was informed by the Third Party Administrator that his request for short term disability was approved for the period February 4, 2017 through February 22, 2017. His request was denied for the period February 23, 2017 through April 16, 2017² “due to no objective medical information being received in the appeals process to support functional limitations and inability to work.”³

Grievant was scheduled to work on February 24, 2017, February 25, 2017, February 26, 2017, March 1, 2017, and March 2, 2017. Grievant did not report for work on these days.

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.”⁴ Group II offenses “include acts and behavior that are more severe in

² Grievant Exhibit 1.

³ Grievant Exhibit 1.

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

nature and are such that an accumulation of two Group II offenses normally should warrant removal.”⁵ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁶

“Absence in excess of three days without proper authorization or a satisfactory reason”⁷ is a Group III offense. Grievant’s last day of work was January 29, 2017. He was not obligated to report to work on any days he was approved for short term disability. He was on short term disability from February 4, 2017 through February 22, 2017. Grievant was obligated to report to work on February 24, 2017, February 25, 2017, February 26, 2017, March 1, 2017, and March 2, 2017. Grievant did not report for work on these days.⁸ Grievant did not present sufficient evidence to justify his absence from work on those days. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for absence in excess of three days. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

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”⁹ 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**.

⁵ Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

⁶ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

⁷ DOC Operating Procedure 135.1(D)(2)(a).

⁸ Grievant was not obligated to report to work on March 3, 2017 and thereafter because he was told he could not return without a medical note confirming that he was fit for work.

⁹ Va. Code § 2.2-3005.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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