

Issue: Group III Written Notice with Termination (absence in excess of 3 days without authorization); Hearing Date: 08/10/17; Decision Issued: 08/22/17; Agency: DBHDS; AHO: John R. Hooe, III, Esq.; Case No. 11060; Outcome: No relief – Agency Upheld; **Administrative Review: Ruling request received 09/05/17; EEDR Ruling No. 2018-4612 issued 10/19/17; Outcome: AHO's decision affirmed.**

**COMMONWEALTH OF VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**DIVISION OF HEARINGS**  
**DECISION OF HEARING OFFICER**

**In the matter of: Case No. 11060**

Hearing Date: August 10, 2017  
Decision Issued: August 22, 2017

**PRELIMINARY MATTERS**

Upon being appointed as the Hearing Officer in this matter, effective July 18, 2017, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on July 20, 2017. The telephone pre-hearing conference was conducted with the Grievant and the Agency Advocate. During the telephone pre-hearing conference, it was agreed that the grievance hearing was to be conducted on Thursday, August 10, 2017 beginning at 10:00 a.m. at the Agency's facility. It was also agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and the other party no later than Thursday, August 3, 2017 by 5:00 p.m.

The Grievant hand delivered to the office of the Hearing Officer a hand written one page letter dated August 2, 2017 together with attached documents. The hand written letter did not indicate that a copy of the letter or the attached documents was delivered to the Agency Representative. At the commencement of the Grievance Hearing, the Hearing Officer confirmed with the Agency Representative that the hand written note and attached documents were not received by the Agency Advocate prior to the hearing. The Hearing Officer excluded the hand written letter and that attached documents from consideration as evidence but has retained them with the Agency exhibits introduced at the hearing.

**APPEARANCES**

Grievant  
Agency Advocate  
Agency Witness 1  
Agency Witness 2  
Agency Witness 3

## **ISSUES**

1. Was the Grievant absent in excess of three days without prior authorization or a satisfactory reason, notification and proper authorization (May 4, May 5 and May 8, 2017) in violation of DHRM Policy 1.60?
2. Did Grievant fail to comply with procedure as outlined in DHRM Policy 4.57 Virginia Sickness and Disability Program?
3. If so, was either violation, or the combination, a Group III violation justifying termination of employment?

## **EXHIBITS**

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

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|---|--|
| 1 | Written Notice-Amended and related documents (52 pages)  |
| 2 | Employee Grievance Form A with attachments (20 pages)  |
| 3 | Employee work profile dated 10/22/15 (actually 2016)<br>Hospital Instruction No. 3050 revised May 18, 2017<br>Hospital Instruction No. 3050 revised October 9, 2012<br>Standards of Conduct Policy 1.60<br>Virginia Sickness and Disability Program Policy No. 4.57<br>Virginia Sickness and Disability Program Handbook for state employees |
| 4 | List of all course taken by Grievant as employee of Agency   |

The Grievant did not offer any Exhibits.

## **FINDINGS OF FACT**

Agency witness 1 testified that as Human Resource Manager she consulted with Grievant's supervisor and the Central Office before terminating Grievant as a housekeeper.

The witness referenced Agency Exhibit 3 Employee Work Profile page 5, item C. Attendance and Use of State Time which states "The employee shall be in accordance with all policies and procedures. Standards of Conduct are enforceable in regards to the severity of the incident and may override the below standard...". She testified that the Grievant did not report to work as scheduled on May 4, 2017, May 5, 2017 and May 8, 2017. She testified that the Grievant's absences were without authorization and with no prior notice or notice to the Agency on the days of absence. She testified that such absences were a violation of Agency Policy 1.60 Standards of Conduct.

In addition, she testified that the Grievant's absence from work had a significant negative impact on the mission of the Agency. The witness cited Agency Exhibit 3 Hospital Instruction No. 3050 regarding the procedures applicable to attendance and hours of work. In addition, the witness testified that the Grievant's violations constituted a Group III offense as set out in the Standards of Conduct, Attachment A which lists as an example "Absence in excess of three work days without authorization...". Attachment A further states that a first offense of such a Group III offense results in written notice and discharge. It also states that in lieu of discharge, the Agency may: (1) Suspend without pay for up to thirty work days, and/or (2) demote or transfer with disciplinary salary action.

In response to Grievant's claim that she was absent due to disability, the witness referred to Agency Exhibit 3 Policy No. 4.57 Virginia Sickness and Disability Program page 29 which states that an employee may be denied disability benefits if the "Employees fail to comply or cooperate with requirements of the TPA for administering VSDP". The witness went on to testify that Policy No. 4.57 requires the employee (at page 32 of Policy No. 4.57) to "Contact the TPA regarding illness/disability as soon as possible or within 14 days of disability in order to receive full retro payment if approved."

Agency Witness 1 further testified that the Grievant did not give the timely notices required by policy, that the Grievant was responsible for knowing the requirements and that the Grievant should have been familiar with the procedures since she had been through the disability benefits procedure in 2016.

Agency Witness 1 also pointed out that the Grievant's short-term disability claim was denied for the period 4-4-2017 to 5-3-2017 by letter dated May 4, 2017.

Agency witness 2, Employee Relations Manager, testified that the Agency has been consistent on terminating other employees who violated that same policy provision as the Grievant.

Agency Witness 3, direct Supervisor of Grievant, testified that he supported the action to terminate the Grievant.

The Grievant testified that she was not familiar with the procedure for applying for disability benefits because her claim in 2016 was handled by [an employee] who is no longer employed by the Agency. The Grievant further explained what happened in this regard at Agency Exhibit 2 by her email dated May 8, 2017. In the email, the Grievant explains that on April 25, 2017 she received a message from a co-worker that she had been made aware from payroll that I (the Grievant) had been placed on "lost time" and that I need to contact Human Resources. The Grievant explained in the email that she contacted human resources that day and said that she was not aware of her short-term disability claim status and that no one from human resources had contacted her.

The Grievant also testified that she believed the termination was actually retaliation due

to her other complaints and grievances related to the Agency denying her applications for employment in other positions with the Agency.

At the conclusion of the evidence, the Agency's Advocate made a closing statement as did the Grievant.

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code ' 2.2-2900 et. seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee=s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code ' 2.2-3000 (A) sets forth the Commonwealth=s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.....  
To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under ' 2.2-3001.

Standards of Conduct (Policy 1.60) apply to the Agency and to the Grievant as an employee of the Agency. The Standards of Conduct states as follows:

**Group III Offense Attachment A:**

This level generally includes acts of misconduct of a most serious nature that severely impact Agency operations.

Examples:

Absence in excess of three work days without authorization; ... (Agency Exhibit 3).

### **DECISION**

The Written Notice-Amended issued June 8, 2017 alleges "Absence in excess of three days without prior authorization or a satisfactory reason, notification and proper

authorization (May 4, May 5, and May 8, 2017) DHRM Policy 1.60 Standards of Conduct (failure to comply with procedures outlined in the DHRM Policy 4.57 Virginia Sickness and Disability Program).

Section IV-Circumstances Considered of the Written Notice-Amended states that (Grievant's) short-term disability claim was denied by Read Group for the period of 04/04/2017-05/03/2017, letter dated May 4, 2017. (Grievant) failed to return to work even after communication from Human Resources May 4, 2017 about the denied claim and expectation she was to return. In addition, Read Group letter dated May 2, 2017 indicates (Grievant) should return to work May 4, 2017. Grievant did not maintain required communications with her Supervisor's or HR which is the employee's responsibility per DHRM Policy 4.57. (Grievant) did not provide medical documentation to support her absence.

The evidence was in conflict as to whether the Grievant was contacted on or before May 4, 2017 by HR with respect to denial of the short-term disability claim and the expectation that she would return to work on May 4, 2017. The Agency's evidence was that an attempt was made to contact the Grievant. The Grievant testified that despite HR having multiple ways to contact her, she was not contacted by anyone from Human Resources.

It is the Hearing Officer's conclusion that the following facts are not in dispute:

1. The Grievant as an employee of the Agency is responsible for knowing Agency policy and procedure, both as to short-term disability and work attendance.
2. The Grievant became aware or upon reasonable inquiry should have become aware that she was expected to return to work on May 4, 2017.
3. The Grievant did not report to work on May 4, 2017, May 5, 2017 and May 8, 2017 and did not notify the Agency on any of those days that she would not be reporting to work.

The Hearing Officer finds that the Grievant failed to comply with Policy 4.57 and was in violation of Policy 1.60 with respect to work attendance.

The Hearing Officer finds that the Agency met its burden to show by a preponderance of the evidence that the conduct of the Grievant constituted a Group III violation of Standards of Conduct as alleged by the Agency and the termination of employment is consistent with applicable law, policy and procedures.

### **APPEAL RIGHTS**

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A hearing decision is subject to administrative and judicial review. Once the administrative

review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. A Received by@ means delivered to, not merely post-marked or placed in the hands of a delivery service.

**Requesting Administrative Review:**

1. **A challenge that the hearing decision is inconsistent** with state or agency policy is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director=s authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.

2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, as well as a request to present newly discovered evidence, is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance. EDR=s authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or fax to 804-786-1606 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests

for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

**Final Hearing Decision.** A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision. **Judicial Review of Final Hearing Decision:** Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

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John R. Hooe, III  
Hearing Officer