

Issue: Group III Written Notice with termination (absence in excess of 3 days without authorization); Hearing Date: 06/30/03; Decision Issued: 07/01/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5729; **Administrative Review: HO** **Reconsideration Request received 07/11/03; Reconsideration Decision issued 07/21/03; Outcome: No newly discovered evidence or incorrect legal conclusions identified. Request to reconsider denied.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5729

Hearing Date: June 30, 2003
Decision Issued: July 1, 2003

PROCEDURAL HISTORY

On March 3, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for "Absence in excess of three days without proper authorization. On March 17, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 27, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 30, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Four witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

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. 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 from December 1998 until his removal. Grievant consistently either met or exceeded the Agency’s expectation for work performance.¹ On February 28, 2001, Grievant received a Group II Written Notice for “Unprofessional behavior and acting in a threatening manner toward a supervisor.” On February 5, 2003, Grievant received a Group II Written Notice for “Failure to follow a supervisor’s instructions or otherwise comply with applicable established written policy.” On March 3, 2003, Grievant received a Group II Written Notice for “Failure to follow supervisor’s instructions, perform assigned work or otherwise comply with applicable established written policy.”²

On January 17, 18, and 19, 2003, Grievant was away from work on approved leave. January 20 and 21, 2003 were Grievant’s rest days. He was scheduled for work on January 22, 23, 27, and 29, 2003. He called the Lieutenant on each of those days and advised that he would not be coming to work because he remained in New York to care for his ill mother. Each day Grievant called the Lieutenant, the Lieutenant informed Grievant that his absence was not approved and that he would be “XX’d” for the day.³ On January 23rd or 27th, the Lieutenant reminded Grievant to bring in a written statement documenting the reason for his absence. Grievant return to work on January 31, 2003 but did not bring in any documentation explaining his absence. He mistakenly believed that documentation was required only if the employee himself was ill and not if a family member was ill.

¹ See Grievant Exhibits 1 through 4.

² Agency Exhibit 4.

³ “XX’d” for the day means that an employee would be placed on leave without pay status.

During the second process, Grievant informed the Warden that he did not know exactly the nature of his mother's illness but that he thought it was "walking pneumonia."⁴

On March 3, 2003, Grievant received a written statement from his mother's physician stating:

Date: 1/23/03

To Whom It May Concern:

This letter is to verify that [Grievant's mother] was under my care on 1/23/03. He/she may return to work/school on 1/28/2003.

[s/ medical provider]

He presented the doctor's note to the Agency shortly after the second step of his grievance.

Correctional facilities operate on a 24-hour per day, seven-day per week basis. Employee work schedules are set several weeks in advance. When an employee is unable to work on a particular day, the Correctional Institution must force another employee to work when that employee may not have otherwise been scheduled to work. Maintaining a fully staffed correctional facility is essential to public safety.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

This case does not rise to the level of a Group III offense, namely an offense that would normally warrant removal. Before each workday, Grievant called the Lieutenant to inform the Agency that Grievant would not be available to work. Grievant informed the Lieutenant of the reason why he would be unavailable to work. Caring for an ill

⁴ Grievant described his mother as a person who is always at work and only something very serious would keep her away from work. When his mother told Grievant she could not go to work, he knew her illness was significant.

parent is an appropriate reason to be away from work. Grievant's mistake, however, was that he failed to comply with the details of the policy setting forth the excuse for being unexpectedly absent from work.

Institutional Operating Procedure 200-7.6, regarding sick leave, requires employees to provide written verification of illness in the form of a doctor's note.⁵ An employee must present the note to his supervisor within three workdays after returning to work.⁶ The note must state "that the employee was temporarily disabled from work, the extent of the employee's disability and the length of the absence."⁷ When the absences is due to sickness of a family member, the "sickness will be verified in the same manner as absences due to personal illness." Grievant failed to timely present the note to the Agency. The note lacked the detail required by Agency policy. When an employee fails to comply with established written policy, the employee's behavior rises to the level of a Group II offense. The disciplinary action against Grievant must be reduced to a Group II Written Notice.

Accumulation of a second active Group II Written Notice "should normally result in removal."⁸ Grievant has three prior active Group II Written Notices. When those Written Notices are combined with the current disciplinary action, there exists a sufficient basis to support Grievant's removal. Accordingly, Grievant's removal is upheld.

Grievant contends he was not aware of the policy requirements for the doctor's note and, therefore, should not be disciplined. Grievant is obligated to comply with the policy requirements regardless of whether he has actual notice of those requirements. In any event, Agency staff adequately informed Grievant of the requirements for his absence to be excused because Agency staff repeatedly asked Grievant for the details surrounding his mother's illness. It is appropriate for Agency managers to inquire into the facts surrounding an employee's claim of family illness in order to determine whether the employee's claim is valid.

Grievant contends DHRM Policy 4.20, Family and Medical Leave, excuses his failure to comply with Agency leave policy. Grievant did not request Family and Medical Leave and nothing in DHRM Policy 4.20 suggests the Agency is obligated to grant Family and Medical leave to an employee who has not requested it. DHRM Policy 4.20 is not applicable.

⁵ IOP § 200-7.6(4)(B).

⁶ IOP § 200-7.6(4)(C).

⁷ IOP § 200-7.6(4)(C)(1).

⁸ DOCPM § 5-10.16(C)(2).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's removal from employment is **upheld**. The Agency is ordered to issue a revised Written Notice in accordance with this decision.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.⁹

[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].

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer