

Issue: Group III Written Notice with termination (absence in excess of 3 days without authorization or satisfactory reason); Hearing Date: 08/12/04; Decision Issued: 08/17/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 799



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 799

Hearing Date: August 12, 2004
Decision Issued: August 17, 2004

PROCEDURAL HISTORY

On June 15, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for "Did not return to work after disability release date. Did not call Commander." On June 15, 2004, 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 she requested a hearing. On July 20, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 12, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for absence in excess of three days without proper authorization or a satisfactory reason.

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 Virginia Department of Corrections employed Grievant as a Corrections Officer Senior at one of its facilities. The purpose of her position was to: “Provide security and supervision of adult offenders.” She received an overall rating of “Contributor” in her 2003 performance evaluation.¹

Grievant was out of work for several weeks on disability leave (maternity). She was notified by the Third Party Administrator and knew that she was scheduled to return to work on June 2, 2004. Grievant was scheduled to work on June 2, 3, 4, 7, 8, and 9, 2004. She did not contact the Agency to indicate that she would be unable to work on those days or that she intended to take annual or other leave. Grievant assumed that it would be permissible for her to return from disability at a time of her choosing because she had done so at the end of her maternity leave in the prior year. No one at the Agency had objected to her late return to work in the prior year.

On May 19, 2004, human resource staff attempted to call Grievant at the telephone number she had given the Agency. That telephone number was disconnected. On May 25, 2004, a Sergeant called Grievant’s emergency contact telephone number and spoke with Grievant’s brother. The Sergeant asked Grievant’s brother to inform Grievant that she should contact the Agency as soon as possible. Grievant’s brother did not forward the message to Grievant and she did not respond.

CONCLUSIONS OF POLICY

¹ Agency Exhibit 4.

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.

Group III offenses include, “absence in excess of three days without proper authorization or a satisfactory reason.”² Grievant was absent on more than three scheduled work days. Her absence was not authorized and she has not provided a satisfactory reason for her absence. Accordingly, the Agency has met its burden of proof to support its issuance of a Group III Written Notice.

Grievant contends she did not know she had to report to her supervisor before taking additional days of leave following her disability return date. This argument fails because the Agency has provided Grievant with adequate notice of its requirements for her to notify her supervisor of expected absences. For example, on August 10, 2001, Grievant signed a document entitled “Expectations of Employment” requiring Grievant to “[n]otify the institution two (2) hours in advance of scheduled reporting time in cases of unplanned absences (i.e. sickness).”³ On March 31, 2004, the Major counseled Grievant regarding her attendance and told her that she was to report to work and be on time and that if she failed to do so, her behavior would be addressed under the Standards of Conduct.⁴ Grievant’s assumption that the Agency would permit her to take additional leave following her disability is an assumption she made at her own risk.

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

² DOCPM § 5-10.17(B)(1).

³ Agency Exhibit 5.

⁴ Agency Exhibit 7.

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. Please address your request to:

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

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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.⁵

[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].

Carl Wilson Schmidt, Esq.

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Hearing Officer