

Issue: Group III Written Notice with termination (absence in excess of 3 days without proper authorization); Hearing Date: 12/16/03; Decision Issued: 12/22/03; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq; Case No. 452



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 452**

Hearing Date: December 16, 2003  
Decision Issued: December 22, 2003

**PROCEDURAL HISTORY**

On June 24, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for "Absence in excess of three (3) days without proper authorization or satisfactory reason."

On July 23, 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 November 19, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 16, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Party Representative  
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 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 Transportation employed Grievant as a public relations specialist until his removal on June 24, 2003. He began working for the agency in November 1999. No evidence of prior disciplinary action against Grievant was introduced.

On May 22, 2003, Grievant had an adverse reaction to medication he was taking causing him to black out. The following day, Grievant called his Supervisor to say that he was sick and having problems with his medication. The Supervisor asked Grievant if he had been to the doctor. Grievant replied that he had not been to the doctor. The Supervisor told Grievant to seek evaluation by his doctor and to provide documentation to the Supervisor about Grievant's need to be absent from work and confirm the length of time Grievant would be absent from work. Grievant indicated he would do so.

On May 27, 2003, Grievant contacted CORE. CORE is the "company designated by the Virginia Retirement System (VRS) to administer the daily operation of the Virginia Sickness and Disability Program, and to handle participants' absences for Family and Medical reasons ...."<sup>1</sup> Grievant also contacted a receptionist in the Agency's District Office on May 27, 2003 and asked to speak with the Supervisor, but was told she was not available. Grievant did not leave a return telephone number. Grievant failed to provide any medical documentation to the Supervisor.

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<sup>1</sup> DHRM § 4.57, *Virginia Sickness and Disability Program Leave*.

On May 30, 2003, Grievant contacted CORE and further discussed his disability claim. On May 30, 2003, the Agency received an initialization report from CORE indicating that Grievant had contacted CORE to file a claim.

On June 5, 2003, Grievant called a receptionist at the District Office and indicated he had been in an automobile accident on June 2, 2003.<sup>2</sup> He did not leave a return telephone number.

After not speaking with Grievant since May 23, 2003, the Supervisor sent Grievant a letter dated June 16, 2003 notifying him of her intention to remove him from employment.<sup>3</sup>

### 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.” DHRM § 1.60(V)(B).<sup>4</sup> 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.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

“Before taking a leave of absence from work, whether with or without pay, employees should request and receive their agencies’ approval of the desired leave.”<sup>5</sup> \*\*\* “If an employee could not have anticipated the need for a leave of absence, the employee should request approval for the leave as soon as possible after leave begins. In reviewing the request for approval, the agency should consider, among other things, the circumstances necessitating leave and whether the employee could have anticipated the need.”<sup>6</sup> \*\*\* “If an agency does not approve an employee’s request for leave, but the employee still takes the requested time off from work, the employee may be subject to ... disciplinary action, including discharge.”<sup>7</sup>

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<sup>2</sup> No evidence was presented suggesting the automobile accident prevented Grievant from contacting the Supervisor or obtaining the necessary medical documentation.

<sup>3</sup> Agency Exhibit 2.

<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>5</sup> DHRM § 4.30(III)(A).

<sup>6</sup> DHRM § 4.30(III)(B)(2).

<sup>7</sup> DHRM § 4.30(III)(E).

“Absence in excess of three days without proper authorization or a satisfactory reason” is a Group III offense.<sup>8</sup> Grievant was absent from work in excess of three days.<sup>9</sup> His absence was not authorized because he failed to obtain the permission of the Supervisor and he failed to provide his Supervisor with the medical documentation necessary to establish the necessity and expected length of his absence. His absence was not for a satisfactory reason because he was capable of contacting his Supervisor to obtain her permission and capable of providing the necessary medical documentation. The Agency has met its burden of proof to establish its basis for issuing Grievant a Group III Written Notice.

*Va. Code § 2.2-1001* requires the EDR Director to “[a]dopt rules ... for grievance hearings.” The *Rules for Conducting Grievance Hearings* set forth the Hearing Officer’s authority to mitigate disciplinary action. The Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant contends he properly notified CORE of his ongoing medical problems and such notice constitutes sufficient notice to the Agency of his reasons for being absent. This argument fails because nothing in policy suggests that communication with CORE is a substitute for communication with one’s supervisor.<sup>10</sup> Grievant adds that he followed the same notification procedures he followed on a prior occasion of his absence due to medical conditions, yet the Agency did not remove him from employment on the prior occasion. Because the Agency acted consistently with policy in this instance, how Grievant was permitted to give notice on a prior occasion is irrelevant.

Grievant contends he sufficiently attempted to notify his Supervisor of his illness and that the Supervisor should have made greater efforts to contact him. DHRM Policy places the notification burden on the Grievant and not on the Agency. Grievant left messages for his Supervisor thereby indicating that he had called the Agency, but he did not leave a return telephone number except on one occasion, June 14, 2003. On

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<sup>8</sup> DHRM § 1.60(V)(B)(3)(a).

<sup>9</sup> His last day of work was May 22, 2003.

<sup>10</sup> For example, *VSDP Policy Interpretation Guidelines* drafted by DHRM indicate that the VSDP Coordinator should communicate to the employee the “need to maintain contact with employee’s supervisor during disability and to provide updates as changes occur.”

that occasion the Supervisor returned<sup>11</sup> Grievant's call but that was after the Agency had already notified Grievant of its intention to remove him from employment.

On July 8, 2003, CORE sent Grievant a letter approving him for short-term disability from May 27, 2003 to July 7, 2003.<sup>12</sup> CORE's action does not supercede the Agency's decision to remove Grievant from employment. Accordingly, CORE's decision has no bearing on the outcome of this decision.

## 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:

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 14<sup>th</sup> St., 12<sup>th</sup> 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

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<sup>11</sup> On a prior date, the Supervisor had obtained Grievant's home telephone number from the Human Resource Department and called Grievant at his home. She left a message for Grievant but he did not return the call. He no longer resided at that address and had not notified the Agency of a change of his residence or telephone number.

<sup>12</sup> Agency Exhibit 4. Grievant Exhibit 4.

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.<sup>13</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.