

Issue: Group III Written Notice with termination (absence in excess of 3 days without authorization); Hearing Date: 03/21/25; Decision Issued: 03/25/05; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 8011



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8011**

Hearing Date: March 21, 2005  
Decision Issued: March 25, 2005

**PROCEDURAL HISTORY**

On November 30, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Failure to report to work in accordance with standards of conduct policy #1.60.*

On December 27, 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 February 17, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 21, 2005, 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 Health employed Grievant at one of its local health Facilities. She has been employed by the Commonwealth for approximately 23 years. Grievant provided good customer services to patients and guests at her Facility. On July 12, 2004, Grievant received a Group I Written Notice for unauthorized use or misuse of State property.<sup>1</sup>

Grievant reported to the Supervisor. This reporting relationship began in April 2003. The Supervisor spoke to certain people in the office, including Grievant, in a harsh tone. She made belittling statements to patients and staff. It was not unusual for the Supervisor to be short in her responses to Grievant and to interrupt Grievant as Grievant spoke. The Supervisor discouraged communication between clerical and nursing staff at the Facility. On one occasion while Grievant was working, the Supervisor, without comment, sat behind Grievant and watched Grievant perform her duties for several hours. The Supervisor created stress among staff in the office. Two public health nurses decided to retire early because of the stress caused by the Supervisor.

In the Fall of 2003, a local charity nursing program offered flu immunization clinics in its community. The Supervisor attended one of the charity's clinics. A nurse at the clinic observed the Supervisor and described her as "extremely difficult to work with and was very rude to my volunteers as well as to the people attending the clinic. \*\*\* She appeared very angry that our volunteers had interfered with her routine. I received many complaints about her attitude and behavior from the volunteers and

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<sup>1</sup> Agency Exhibit 5.

customers alike.” The Supervisor’s behavior was not reported to the Agency because the charity was “not in the habit of making waves with agencies or businesses in the community.” Charity staff decided to partner with an organization in another county in order to avoid having the Supervisor return to the clinics it was providing.<sup>2</sup>

From March 13, 2004 until May 5, 2004, Grievant was under the care of a mental health professional. Grievant’s diagnoses were Major Depressive Disorder, Recurrent, Moderate, and Generalized Anxiety Disorder.<sup>3</sup> Grievant was under extreme stress. The decline in Grievant’s mental health was caused by the Supervisor’s poor management style. Grievant did not obtain services from the mental health professional after May 5, 2004.

From September 28, 2004 to October 12, 2004, Grievant’s work attendance and notification practices became sporadic. On October 15, 2004, Grievant’s Supervisor sent Grievant a memorandum citing the Employee Handbook stating, in part, “Ask your supervisor about your agency’s procedure for reporting absences. Failure to notify your supervisor appropriately may result in disciplinary action, including termination.” The Supervisor added, “An employee absent from the office without prior approval must contact me as soon as possible on the day of the absence. If I am not available the district business manager is contacted. The Standards of Conduct Attendance policy III.A.2.b states that employees should report unexpected absences, including reporting to work late or having to leave early, to supervisors as promptly as possible.”<sup>4</sup>

On Monday, October 25, 2004 through Thursday, October 28, 2004, Grievant was absent from work without notifying her supervisor.

On October 28, 2004, the District Director sent Grievant a due process memorandum regarding her failure to report to work and failure to notify her supervisor of absences. The memorandum asked Grievant to explain why she should not be disciplined for being absent in excess of three days without proper authorization or a satisfactory reason. Grievant was instructed to respond in writing as to why she believed the disciplinary action should not be taken.

Grievant did not respond in writing. On November 3, 2004, Grievant called her workplace and said she was on “mental leave” due to work-related stress. She said she was under a doctor’s care<sup>5</sup> and could not return to work.<sup>6</sup> She did not request medical leave.

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<sup>2</sup> Grievant Exhibit 4.

<sup>3</sup> Grievant Exhibit 3.

<sup>4</sup> Agency Exhibit 3.

<sup>5</sup> Grievant was not under a doctor’s care at that time.

On November 15, 2004, the District Director sent Grievant a letter advising Grievant that the District Director's October 28, 2004 letter required Grievant to respond in writing yet Grievant had not done so. The District Director stated again, "I expect to hear from you, **in writing**, within three (3) business days."<sup>7</sup> Grievant again failed to respond in writing.

The Agency took disciplinary action against Grievant on November 30, 2004. At that time, Grievant had not been to work from October 25, 2004 to November 30, 2004.

### **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>8</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).

"Absence in excess of three days without proper authorization or a satisfactory reason" is a Group III offense.<sup>9</sup> The Agency gave Grievant adequate notice of her obligation to report expected absences to the Agency. Grievant was absent from work without proper authorization or a satisfactory reason from October 25, 2004 through November 15, 2004. With the exception of November 3, 2004, Grievant did not contact the Agency to indicate she would be absent. Grievant failed to inform the Agency of her expected absences. Grievant was not hospitalized. She was neither under a doctor's care nor seeking medical attention during her absence from work. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group III Written Notice with removal.

Grievant contends the disciplinary action should be mitigated. *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

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<sup>6</sup> Based on Grievant's statement, the Agency initiated a claim on Grievant's behalf for worker's compensation benefits and also contacted the Third Party Administrator handling short term disability claims for State employees.

<sup>7</sup> Agency Exhibit 1.

<sup>8</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>9</sup> DHRM Policy 1.60(V)(B)(3)(a).

rules established by the Department of Employment Dispute Resolution....”<sup>10</sup> Under the EDR Director’s *Rules for Conducting Grievance Hearings*, 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.” Grievant’s mental health was weakened by the poor management practices of the Supervisor. This is not basis to mitigate disciplinary action under the *Rules*. Accordingly, 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**.

## APPEAL RIGHTS

You may file an administrative review request within **15 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:

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<sup>10</sup> Va. Code § 2.2-3005.

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 15 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 15-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>11</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>11</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.