Issue: Termination due to absence in excess of three days without proper authorization or satisfactory reason; Hearing Date: 06/22/05; Decision Issued: 06/23/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8090

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8090

Hearing Date: June 22, 2005
Decision Issued: June 23, 2005

APPEARANCES

Grievant
Warden
Advocate for Agency
One witness for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from his removal from state employment due to failure to report in excess of three days without proper

authorization or a satisfactory reason.[1] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 19 years. He was a sergeant at the time of removal from state employment.

Grievant has three active prior disciplinary actions: a Group II Written Notice for making abusive and profane statements about supervisors in the presence of subordinates;[3] a Group I Written Notice for unsatisfactory absence and tardiness;[4] and a Group II Written Notice for failure to provide requested medical documentation for an absence.[5] All of the active disciplinary actions have become final since the appeal periods have expired. Grievant has previously been counseled in writing about the requirement for submitting medical documentation when requested.[6]

Agency policy requires that employees who are unable to perform their duties due to temporary medical disabilities shall submit documentation from their medical care provider indicating the extent of the disability and anticipated length of time before the employee will be able to fully resume his job.[7] The policy also provides that medical documentation must be from a physician, dentist, nurse practitioner, or a physician's assistant licensed to practice in the Commonwealth.[8] As a supervisor, grievant was aware, or reasonably should have been aware of this policy.

On January 24, 2005, grievant notified the Human Resource Officer that his doctor had excused him from work. The Human Resource Officer instructed grievant to submit medical documentation from the physician and to communicate regularly with his supervisor. A counselor who was seeing grievant sent a letter to human resources on January 28, 2005. The warden wrote to grievant advising him to submit proper medical documentation from one of the licensed professionals cited in Procedure 5-12 not later than February 4, 2005.[9] Grievant failed to comply with this instruction.

On February 8, 2005, the agency received a letter from a Physician's Assistant excusing grievant from work for two weeks. The agency approved sick leave for grievant through February 22, 2005.[10] As a matter of routine, the

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[1] Agency Exhibit 2. Letter from warden to grievant, March 7, 2005.
[2] Agency Exhibit 1. Grievance Form A, filed April 4, 2005.
[3] Agency Exhibit 5. Group II Written Notice, issued August 23, 2002.
[4] Agency Exhibit 5. Group I Written Notice, issued October 21, 2004.
[5] Agency Exhibit 5. Group II Written Notice, issued January 18, 2005.
[6] Agency Exhibit 6. Counseling memorandum, July 29, 1996.
[7] Agency Exhibit 4. Section 5-12.13.A, Procedure 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997.
[8] Agency Exhibit 4. Section 5-12.13.B, *Ibid.*
[9] Agency Exhibit 2. Letter from warden to grievant, January 31, 2005.
[10] Agency Exhibit 3. Grievant's attendance record, January-March 2005.

agency then mailed to grievant a standard Family & Medical Leave Act (FMLA) Notification letter affirming that grievant had notified the agency of a health care condition for which he needed care. The letter advised grievant that the designated leave period available under FMLA would be from February 15, 2005 through a tentative ending date of May 5, 2005 **"upon receipt of supporting medical documentation."** (Emphasis added)[11] By the time grievant's approved leave period (based on the February 8th letter from a physician's assistant) expired on February 22, 2005, grievant had not contacted the agency or provided any new medical documentation extending his period of disability.

On February 24, 2005, a major called grievant to advise him that his leave had expired on February 22nd and that the agency had not received any medical documentation to extend his approved leave beyond that date. A personnel analyst from the human resource office was conferenced into the telephone call and gave grievant a further explanation of why he must provide medical documentation if he wanted to have his medical leave approved. Grievant said he would obtain the documentation. By February 28th, the agency had still not received any medical documentation to extend grievant's disability beyond February 22nd. Accordingly, the warden sent a certified letter to grievant advising him that he could be removed from state employment for an absence in excess of three days without proper authorization or satisfactory reason.[12] Even though grievant's unexcused absence was already in excess of three days, the warden gave grievant a deadline of March 4, 2005 to contact him or be discharged.

On March 2, 2005, grievant called the warden. The warden told grievant that he must have medical documentation not later than March 4th or grievant would be removed from state employment. When the documentation was not received, the warden notified grievant by letter that his employment was terminated.[13] More than one week later, the agency received a letter on March 15th (11 days after the deadline) from the physician's assistant.[14]

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

[11] Agency Exhibit 2. Letter from Human Resource Officer to grievant, February 17, 2005.
[12] Agency Exhibit 2. Letter from warden to grievant, February 28, 2005.
[13] Agency Exhibit 2. Letter from warden to grievant, March 7, 2005.
[14] Agency Exhibit 2. Letter from physician's assistant to human resource officer, March 11, 2005.

and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[15]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's *Department of Human Resources Policies and Procedure Manual* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[16] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.[17] An absence in excess of three days without proper authorization or a satisfactory reason is one example of a Group III offense.

The agency has demonstrated, by a preponderance of evidence, that grievant was absent in excess of three days without proper authorization or

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[15] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[16] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[17] Agency Exhibit 7. Procedure Number 5-10*, Standards of Conduct,* June 15, 2002.

satisfactory reason. The facts in this case are not in dispute. Grievant acknowledges that he received the agency's correspondence and that he participated in the telephone conversations described above. Therefore, it was abundantly clear to grievant that if he did not provide medical documentation by March 4, 2005, he would be removed from state employment. When grievant failed to comply with this deadline, the agency followed through and terminated his employment.

Grievant asserts that he was "stressed out" in February and March. Even though there is no evidence to document this assertion, the agency did not dispute grievant's characterization. However, the evidence is sufficient to conclude that despite grievant's situation, he was fully aware of the requirement for medical documentation. Further, he knew from his conversations with the major, a personnel analyst, and the warden that he must submit medical documentation, and he understood that the warden had given him (both verbally and in writing) a deadline for submission of the documentation. It was within grievant's control to submit such documentation by the deadline. Grievant has not offered any reason that prevented him from obtaining documentation from his physician and faxing it to the warden. Instead, grievant merely asked his medical provider to send in documentation but grievant did not take any steps to assure that the information was sent to the warden prior to the deadline.

While grievant's length of service is a mitigating circumstance in this case, there are four aggravating circumstances that outweigh the mitigating factor. First, grievant had previously been counseled some years ago about the necessity for submitting medical documentation when asked by supervision to do so. Second, grievant had been disciplined in January 2005 for the very same offense, i.e., failing to submit requested medical documentation for an absence. Thus, grievant clearly knew that the agency was very serious about the requirement to provide medical documentation to justify absences due to illness. Third, the agency gave grievant ample opportunity to submit documentation even after he had been absent in excess of three days. The agency could have terminated grievant's employment earlier but gave him one last chance when it gave him a deadline of March 4, 2005. Finally, grievant had accumulated more than enough disciplinary actions prior to the current offense to be removed from state employment. When grievant incurred a second active Group II Written Notice in January 2005, the agency could have terminated grievant's employment at that time. Thus, grievant had already been given a second chance when the agency elected to suspend him for only one day in lieu of removal from state employment.

Grievant argues that the agency should have called him on March 4th to remind him. However, the agency had given grievant a letter with the deadline, and the warden had talked with grievant only two days before the deadline to reinforce the message that grievant must submit his documentation not later than March 4th. Accordingly, the agency had done everything that it reasonably could

be expected to do. The ball was in grievant's court but he dropped it when he failed to immediately go to his medical provider and have the documentation faxed to the warden before the deadline.

DECISION

The decision of the agency is affirmed.

The agency's decision to remove grievant from employment for being absent in excess of three days without proper authorization or satisfactory reason is hereby 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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.[18] 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.[19]

[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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David J. Latham, Esq.
Hearing Officer

[18] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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