

Issue: Group III Written Notice with termination (unauthorized absences); Hearing
Date: 09/19/05; Decision Issued: 10/06/05; Agency: DEQ; AHO: Carl Wilson
Schmidt, Esq.; Case No. 8166



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8166

Hearing Date:	September 19, 2005
Decision Issued:	October 6, 2005

PROCEDURAL HISTORY

On June 13, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

You were issued a written notice for unsatisfactory attendance on May 16, 2005. It was explained at that time that you need to report to work as scheduled. While you were under VSDP and FMLA you were approved to report to work four hours per day, yet you failed to report to work as scheduled. From March 25 through May 19, 2005 (the VSDP coverage period) you did not work the required 4 hours per day. As of May 19th, you were no longer covered under any VSDP approval and were required to report to work 8 hours per day. Attached is a list of days that indicate from May 19, 2005 to present where you did not report to work and did not have proper authorization to be absent. We have been extremely generous and flexible with you, however, your required work is not getting done and the region is suffering from your continued disregard to follow supervisor's instructions and your failure to follow policies.

On June 27, 2005, 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 August 22, 2005, the Department of Employment

Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 Environmental Quality employed Grievant as an Environmental Specialist II until her removal effective June 13, 2005. She began working for the Agency On January 25, 2002.¹ She received an overall rating of "Contributor" as part of her October 2004 performance evaluation.²

The Commonwealth of Virginia utilizes a Third Party Administrator (TPA) to evaluate and process employee claims of disability under the VSDP. Responsibilities of the TPA include receiving medical information from doctors and determining whether an employee should be placed on disability status. The TPA is a private contractor

¹ Grievant had prior service with the Agency for a total of 15 years.

² Grievant Exhibit 21.

selected by the Virginia Retirement System (VRS). Agencies do not have access to the medical information provided by employees to the TPA.

On March 25, 2005, the TPA sent Grievant a letter stating in part:

Our records indicate that your last day worked was March 07, 2005. Your disability date has been determined to be March 08, 2005, the date of your first treatment.³

On April 12, 2005, Grievant submitted to the Agency a written request for family or medical leave due to a serious health condition that made her unable to perform her work duties. She asked the Agency for approval of an intermittent leave schedule of "Up to 4 hour per day."⁴ She attached a Certification of Physician or Practitioner completed by a medical provider. The medical provider attached a note saying "[patient] to work 4 hr work shift per day from 3-17-05 – 4-22-05." The medical provider added another note dated April 27, 2005 stating "[patient] to be on 4hr work schedule per day through 5-5-05."⁵

Grievant received a certified letter from the Regional Director instructing her to return to work otherwise she may be removed from employment.

On May 16, 2005, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions, perform assigned work or otherwise comply with established policy. Grievant's attendance was unsatisfactory to the Agency. On the Written Notice, an Agency manager wrote:

You have been counseled on several occasions regarding your attendance. This could have been a Group III written notice for "Absence in excess of three days without proper authorization or a satisfactory reason." However, I'm trying to work with you on improving your behavior. If these patterns continue you will be disciplined under Standards of Conduct with possible suspension or termination.⁶

From May 16, 2005 through May 18, 2005, Grievant was at work for 8 hours per day. From May 19, 2005 through June 10, 2005, Grievant did not work. She either sent her supervisor an email saying she would be out of the office due to illness on the day of the email or for future specified days. Her status was being on leave without pay.

On May 19, 2005, the TPA sent Grievant a letter stating, in part:

³ Grievant Exhibit 1.

⁴ Grievant Exhibit 2.

⁵ Grievant Exhibit 3.

⁶ Agency Exhibit 8.

We are pleased to inform you that based on the current information in your claim file, your benefits have been approved through May 19, 2005. If you are able to return to work in any capacity before May 20, 2005, please contact us immediately. Because Short Term Disability benefits are not payable after you have returned to work, you will be required to reimburse your employer for any overpayment of benefits. ***

If you cannot return to work full-time full-duty on May 20, 2005 for medical reasons, your attending physician(s) must provide us with the medical information below to support your continued disability. This information must indicate how your medical condition continues to affect your work capacity.⁷

On June 10, 2005, the TPA sent Grievant a letter stating, in part:

We have received and reviewed a note from your attending physician indicating that you were unable to return to work on May 21, 2005 as originally anticipated. *** Regretfully, we must advise you that this information is not sufficient to consider benefits beyond May 19, 2005.⁸

During the second step meeting, Grievant submitted to the Agency a medical provider note, dated May 24, 2005, stating, "[Grievant] has been under my care from 05/19/05 to 05/30/05 and will be able to return to work on 5/31/05."⁹ She also submitted a note dated July 13, 2005 stating, "[patient] to work up to 4 hrs days if possible 3/17/05 to 5/5/05."¹⁰

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).¹¹ 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

⁷ Agency Exhibit 3.

⁸ Agency Exhibit 3.

⁹ Grievant Exhibit 12.

¹⁰ Grievant Exhibit 17.

¹¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

DHRM Policy 4.30, *Leave Policies – General Provisions* states:

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 the actions listed below:

- the absence will be designated as unauthorized;
- the employee will not be paid for the time missed;
- because the employee has experienced Leave Without Pay, he or she will not accrue annual or traditional sick leave for the pay period(s) when the absence occurred; and
- the agency may also take disciplinary action under Policy 1.60, Standards of Conduct.

“Absence in excess of three days without proper authorization or a satisfactory reason” is a Group III offense.¹² Grievant did not work after May 18, 2005. She was expected to work 4 hours per day. The Agency did not authorize Grievant to be absent from work.¹³ Grievant’s continuing pattern of absences and the fact that the Agency explained to Grievant that her pattern of absence was no longer acceptable justifies the Agency’s conclusion that absence due to illness was not a “satisfactory reason” for being absent. The Agency has presented sufficient evidence to uphold its issuance of a Group III Written Notice. Removal from employment is permitted upon the issuance of a Group III Written Notice. Accordingly, Grievant’s removal from employment is upheld.¹⁴

Grievant argues that her medical provider authorized her to work up to 4 hours but did not say that she always could work a full 4 hours. She contends that she asked her medical provider to write the notes that way in order to enable her to come to work if she could do so; but she was unable to do so. Although Grievant’s position is understandable, the Agency is authorized to rely on authorizations from the TPA and statements from Grievant’s medical provider. The Agency may not contact Grievant’s medical provider and conduct an independent investigation regarding her medical condition. The Agency interpreted these authorizations to mean that Grievant could work 4 hours per day for the full 4 hours. Grievant’s medical provider wrote a note on April 27, 2005 stating that “[patient] to work 4 hr work shift per day.” The Agency’s interpretation was reasonable. Based on that interpretation, the Agency denied Grievant’s request for leave after May 19, 2005. The Agency’s decision to deny was

¹² DHRM Policy 1.60(V)(B)(3)(a).

¹³ Grievant’s short term disability and Family and Medical Leave excused her absence from work for only 4 hours per day. On the remaining 4 hours, Grievant was expected to be at work.

¹⁴ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

reasonable based on the information it received from the TPA and Grievant's medical provider.

This case is unfortunate. Grievant's life has been materially altered by a physical ailment over which she has little control. The Agency had ongoing business needs that were not being met in Grievant's absence. So long as the Agency complied with State policy, it was free to remove Grievant from employment.

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 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 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.¹⁵

[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.
Hearing Officer

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.