

Issue: Group III Written Notice (absence in excess of 3 days without authorization); Hearing Date: 08/23/06; Decision Issued: 08/28/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8397; Outcome: Grievant granted partial relief



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8397

Hearing Date: August 23, 2006
Decision Issued: August 28, 2006

APPEARANCES

Grievant
Six witnesses for Grievant
Warden
Advocate for Agency
Two witnesses 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

Grievant filed a timely grievance from a Group III Written Notice for an absence in excess of three days without proper authorization or a satisfactory

reason.¹ The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.² The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 16 years. He is currently a corrections captain.³ Grievant was assigned as an administrative captain, working Monday through Friday from 8:00 a.m. to 5:00 p.m.

Agency policy requires an employee to obtain advance approval from his supervisor whenever the employee expects to be absent.⁴ When the absence is unanticipated, the employee is required to provide notice to the supervisor before the start of his work shift; an employee who fails to do so may be considered absent without leave. The facility's operating procedure provides that employees who fail to notify the supervisor of an absence due to illness (personal or family member) *may* be charged with unauthorized leave and *may* be subject to disciplinary action.⁵

Grievant's wife broke her wrist in October 2005 and underwent a surgical procedure. Grievant telephoned his direct supervisor – a major – and verbally requested to be off work for the week to assist his wife with her recovery; the major approved the request. Later in the fall, the major directed his subordinates who wanted leave time to make their requests via e-mail to him. On Wednesday, April 5, 2006, grievant's wife reinjured the same wrist. Grievant telephoned the major and told him he had to accompany his wife to see her surgeon and requested the day off. At the same time, grievant reminded the major that he would not be at work on April 6th due to a previously scheduled dental appointment for a root canal procedure. Grievant also advised the major that he could work only limited hours on April 7th because he had to attend to his daughter. The major verbally approved these absences but told grievant to submit a physician's note covering the absences to human resources.

On April 7th, grievant reported to work for three hours. During that time, he gave human resources a patient consent form signed on April 5th by his wife and her physician. The form gives a brief description of the surgery his wife needed but does not state when the surgery would be performed, what the recovery period is, or whether his wife would require assistance during recovery.⁶ Grievant did not speak with the major on Friday, April 7th. Grievant was next scheduled to work from April 10 through April 14, 2006 but did not report to work that week. During that same week, the major was off work on annual leave. Grievant did not contact the major, the assistant warden, or the warden on either April 10th or 11th to advise that he would not be at work. Grievant's wife

¹ Agency Exhibit 1. Group III Written Notice, issued April 25, 2006.

² Agency Exhibit 2. *Grievance Form A*, filed May 25, 2006.

³ Agency Exhibit 5. Employee Work Profile Work Description, November 1, 2004.

⁴ Agency Exhibit 4. Section 5-12.10.C, Procedure 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997.

⁵ Agency Exhibit 3. Section IV.E, Facility Operating Procedure 208, *Employee Work Schedules*, November 10, 2004.

⁶ Agency Exhibit 1. Patient Consent form, April 5, 2006.

underwent surgery on April 11th. On the morning of April 12th, the warden attended morning muster at 5:45 a.m. There were no captains or lieutenants present; the highest ranking officers on the shift were two sergeants. The warden was alarmed by the absence of any higher-ranking officers and, at 8:30 a.m., called the major at his home. The major stated that as far as he knew, grievant should have arrived for work at 8:00 a.m.

By that time another captain had arrived at work. The major directed the captain to contact grievant and have him call the major at home. Later in the day at about 12:20 p.m., grievant and the major spoke by telephone. Grievant told the major he helped his wife with preoperative procedures on April 10th, that he was at the hospital during her surgery on April 11th, and that his children were on spring break from school that week. Because his wife's wrist was in a complicated casting harness, she could not attend to the children or cope with the daily activities of living. Grievant stayed at home to care for his children and to assist his wife with activities of daily living during her recuperation. During the telephone call, the major told grievant that if he did not report to work he would "double X" grievant's absence.⁷

Prior to being disciplined, grievant was advised that he would be considered absent without leave for April 4, 6, 7, 10, 12, 13, & 14, 2006 based on information submitted by the major. In fact, grievant worked an eight-hour shift on April 4th, underwent a dental procedure on April 6th for which the major had granted advance authorization for sick leave, and was excused by the major for the absence on April 7th. When grievant presented this information to the warden, she removed these three dates from the proposed disciplinary action.

The human resources analyst gave grievant a Family and Medical Leave Act (FMLA) application form and said grievant should fill it out if he anticipated being absent for more than 60 hours. Because grievant did not expect to be absent that long, he declined to fill out the paperwork.

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

⁷ The major used the term "double X" because XX is the time sheet code for leave without pay. Grievant avers that the major told him he would "double X" grievant if he did not have a doctor's note to cover the absence; the major denies saying this.

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.⁸

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 of 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.⁹ 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 XII of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.¹⁰ An absence in excess of three days without proper authorization or a satisfactory reason is a Group III offense.

The evidence establishes that grievant was absent for five days during the week of April 10-14, 2006, and that he had not received proper authorization to be absent during that time. Grievant knew that his direct supervisor required an e-mail request prior to incurring a planned absence. Grievant also knew in advance that his children would be out of school during the week at issue, that his wife required a surgical procedure, and that he would have to assist her in the

⁸ § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

⁹ Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁰ Agency Exhibit 6. Operating Procedure 135.1, *Standards of Conduct*, September 1, 2005.

daily activities of living for a few days following surgery. Therefore, grievant had ample opportunity to give this information to his supervisor, the assistant warden, or the warden on April 7th, during the weekend, or on Monday, April 10th. However, grievant did not contact anyone in his chain of command to give them this information and request time off. Accordingly, grievant had not received proper authorization to be absent in excess of three days.

Grievant has not offered a satisfactory reason for failing to obtain proper authorization. His assertion that the major had told him a week earlier to “handle his business and turn paperwork into Human Resources” is not persuasive.¹¹ The conversation of April 5th focused on grievant’s absences of April 5, 6, & 7, 2006. Grievant did not tell the major that his wife was scheduled for surgery on April 11th or that he wanted time off to care for his children and tend to his wife. Based on the context of the conversation on April 5th, it is reasonable to assume that the major’s instructions applied to the absences of April 5, 6 & 7, 2006. Grievant did not specifically request any leave time after April 7th and the major could not have reasonably inferred that grievant was requesting the entire following week as leave.

Grievant denies that the major told him he would “double X” grievant if he did not report to work. Grievant maintains that the major said he would penalize grievant if he did not have a doctor’s note to cover his absence. However, the major’s statement was corroborated by the human resources officer who testified that grievant had told her that the major would “double X” grievant if he did not come to work. The warden also partially corroborated the major’s statement because the major told her that he had told grievant to report to work.

Grievant knew, or reasonably should have known, that the patient consent form he submitted on April 7th did not constitute a valid physician’s excuse from work. The form provides only one meaningful piece of information, viz., that grievant’s wife needed a surgical procedure on her right wrist. The form does not advise when the surgery was to be performed, whether a recovery period would temporarily prevent his wife from caring for herself, or whether she would require assistance from grievant during the recuperation. Agencies need such information in order to assess when the employee’s absence will begin and, what will be the expected duration of the absence. Agency management requires this information to assure that the facility is properly staffed to fulfill its mission. This is particularly critical in a correctional center where proper staffing levels must be maintained in order to protect public safety. Not only did the consent form fail to provide this information but grievant did not verbally communicate this information to his supervisor or anyone else in the chain of command.

Agency policy permits an employee to utilize up to thirty-three percent of their sick leave for the illness or injury of a family member when the illness

¹¹ Agency Exhibit 2. Grievance Form A, filed May 25, 2006.

qualifies under the provisions of FMLA.¹² However, when offered an opportunity to utilize FMLA, grievant declined to complete the application paperwork.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. The policy provides for reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long service and otherwise satisfactory work performance. The agency took these mitigating factors into consideration by suspending grievant for ten days in lieu of removing him from state employment. However, there are aggravating circumstances that counterbalance the mitigating factors. In view of grievant's position as a captain, he must be held to a higher standard than corrections officers. Grievant knew that maintaining adequate coverage of security positions and having a sufficient number of supervisors is of paramount importance in a correctional center. With his many years of experience, grievant knew that he should have made a clear, unambiguous, date-specific request for leave and assured that it was approved in advance. After weighing all of these factors, it is concluded that the agency's decision to discipline with a Group III Written Notice and suspension was within the limits of reasonableness.

However, there is one other mitigating circumstance regarding the decision not to pay grievant for April 12, 13, & 14, 2006. The agency has accepted the physician's excuse as a reason to grant grievant leave on April 11th – the date of his wife's surgery. But, the agency declined to accept the physician's excuse as a reason to grant leave for the days of April 12, 13 & 14 when the physician certified that grievant's wife needed his assistance during the initial recovery period. The agency has presented neither any medical evidence to contradict the physician's excuse nor any testimony to rebut grievant's testimony about the complex nature of her surgery, the unusual postoperative sling arrangement, and her need for assistance during the days following surgery. Under these unique circumstances, grievant's need to be absent on those three days was at least equal to the need to be off on the day of surgery. Therefore, to be consistent, grievant should be granted medical leave for April 12, 13, & 14, 2006.¹³ The fact that grievant should be paid for those days does not alter the fact that he failed to obtain proper authorization and, therefore, he is nonetheless subject to the appropriate discipline for that offense.¹⁴

¹² Agency Exhibit 3. Operating Procedure 208, *Employee Work Schedules*, November 10, 2004.

¹³ The physician's letter does not certify that grievant was needed to attend his wife on April 10, 2006 and grievant has not offered a satisfactory explanation for his absence on that date.

¹⁴ Procedure 208 provides that the employee *may* be charged with unauthorized leave and *may* be disciplined. The policy's language is therefore permissive – not mandatory – and accordingly does not require that the employee *must* be charged.

DECISION

The decision of the agency is modified.

The Group III Written Notice issued on April 25, 2006 and the ten-day suspension are hereby AFFIRMED.

The agency is directed to grant medical leave to grievant for the dates of April 12, 13 & 14, 2006 and to reimburse him for pay withheld on those dates.

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 one copy of any appeal to the other

party and one copy to the Director of the Department of Employment Dispute Resolution. 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.¹⁵ 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.¹⁶ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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]

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

¹⁵ 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).

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.