

Issues: Group III Written Notice with termination (absence in excess of 3 days without authorization); Hearing Date: 08/28/07; Decision Issued: 09/21/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8667; Outcome: Full Relief; **Administrative Review: EDR Admin Review Request received 10/01/07; EDR Ruling #2008-1832 issued 12/14/08; Outcome: Remanded to AHO; Remanded Decision issued 02/29/08; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8667

Hearing Date: August 28, 2007
Decision Issued: September 21, 2007

PROCEDURAL HISTORY

On April 19, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three days without proper authorization or satisfactory reason. On May 18, 2007, 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 July 30, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 an Engineering Technician II. The purpose of his position was:

To serve as the Department's on-site project manager to ensure Contractor's compliance with all contract documents, also to serve as Department's customer service representative ensuring that the stakeholders' needs are met.¹

On December 15, 2005, a Manager sent Grievant and several other employees an email stating, in part:

Starting immediately all inspectors will need prior approval, from their Construction Manager (C.M.), for all vacation and personal leave. This will involve submitting a leave slip in advance to the C.M. for consideration and their response.

¹ Agency Exhibit 3.

Furthermore when sick, all inspectors must notify the C.M., either personally or through the Project Inspector, at the earliest possible time on the date of the event.²

On January 22, 2007, Grievant stopped working and began receiving benefits under short term disability on the following day. His case was managed by the Third Party Administrator who was responsible for reviewing Grievant's medical documentation and determining whether to continue Grievant's benefits. Short term disability benefits were scheduled to end March 15, 2007.³

On March 14, 2007, the Construction Manager sent Grievant a memorandum stating:

As of [3/12/07] there is no record of continued coverage due to health issues. As of this date your absence from work is unauthorized. [Third Party Administrator] has informed the Department that their expectation is you would return to work on Full Duty on that date. Payroll has you listed as leave without pay.

I last spoke with you on 3/1/07 on the phone and urged you to facilitate the communication between your doctor(s) and the Department. Since you provided no medical documentation, I can only acknowledge your request to be off, but I have no documentation to prove your absence. It is a requirement of employment with VDOT that any documentation justifying leave be handed in to your supervisor for processing in a timely fashion. It is your sole responsibility that this occurs. Every effort should be made by you to be accurate and timely in providing appropriate medical documentation. While I understand and am sensitive to your medical conditions, the Department does not have the ability or responsibility to contact your doctor or coordinates your disability coverage. In reviewing your file I am aware of this responsibility has been expressed to you several times.

If you do not contact me and provide the appropriate documentation to justify your absence and provide [Third Party Administrator] documentation sufficient to justify your disability status, you may be terminated for failure to report and perform assigned work. Three days without proper notification is grounds for termination.

Please resolve this immediately.⁴

² Agency Exhibit 4.

³ Agency Exhibit 8.

⁴ Agency Exhibit 4.

Grievant obtained a note from his physician, Dr. S, dated March 22, 2007 stating:

Since 3/12 -- still ill and unable to work while going through the evaluations.⁵

On Monday, April 16, 2007, at 7:23 a.m., Grievant called the Construction Manager's direct telephone number and left a message on his voicemail. Grievant said, "my doctor has asked that I still stay out through the 16th and please call me back at your earliest convenience. I will not be returning to work today." The Construction Manager did not return Grievant's telephone call because, for some unknown reason, he did not receive the message.

Grievant was removed from employment effective April 19, 2007.

Grievant presented the Agency with a note about Grievant from Dr. S dated May 17, 2007. The note stated, "Under our care for GI problems 4/13 -- 27/07."

On June 25, 2007, Dr. S responded to a letter dated April 18, 2007 sent to him by the Third Party Administrator. The Third Party Administrator asked several questions regarding Grievant's current condition. Dr. S's response is in italics below:

1. What is it about job [Grievant] is unable to do?
Any part of the job due to the abdominal discomfort
2. Do you still currently have him out of work?
Yes
3. What are the patient's current restrictions and limitations? Please be specific.
Unable to work due to undiagnosed abdominal pain
4. What is your prognosis for return to employment on a part-time or full-time basis?
Unclear pending GI evaluations, treatment + possible response to treatment

In response to the Third Party Administrator's request that the doctor answer the questions by April 30, 2007, Dr. S wrote:

*I could not respond at this date since reports from consulting physicians had not yet been received.*⁶

⁵ Agency Exhibit 6.

⁶ Agency Exhibit 1.

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).⁷ 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. At the time of Grievant's removal he had been absent from work for more than three days. His absence had not been authorized by the Agency. He had not provided the Agency with a satisfactory reason. The Agency has met its *prima facie* case to show a violation of the Standards of Conduct.

Mitigation

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 rules established by the Department of Employment Dispute Resolution....”⁸ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

The disciplinary action against Grievant should be mitigated for several reasons. First, contrary to the Agency's assertion, Grievant called the Construction Manager on April 16, 2007 and left a message notifying him that Grievant would be out of work. Thus, Grievant attempted to give the Agency advance notice of his absence.

The Agency argued that Grievant did not contact the Construction Manager and leave a message on the Construction Manager's voicemail. The Construction Manager

⁷ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ *Va. Code § 2.2-3005.*

testified that he had not received a message from Grievant on that day. Grievant testified that he had called the Construction Manager on April 16, 2007 at 7:23 a.m. and left a message informing the Construction Manager that he would not be at work. The message asked the Construction Manager to call Grievant.

The Hearing Officer finds that Grievant's assertion is supported by the evidence. Grievant presented a copy of his cell phone record showing that on April 16, 2007 at 7:23 a.m. he called the Construction Manager's direct telephone number for two minutes. From this evidence, the Hearing Officer concludes that Grievant called the Construction Manager on April 16, 2007 at 7:23 a.m. The cell phone record shows that Grievant's call lasted two minutes. If Grievant had simply called and hung up without leaving a message, the length of his call likely would not have been recorded as two minutes. Thus, it is reasonable to conclude that Grievant left a message. Grievant testified that in his message he said, "my doctor has asked that I still stay out through the 16th and please call me back at your earliest convenience. I will not be returning to work today." Grievant's testimony was credible.

The Agency argued Grievant should have continued to call the Construction Manager until Grievant actually spoke with the Construction Manager. The Agency's expectation was not justified under the circumstances of this case. On several occasions after Grievant went on short term disability, Grievant called the Construction Manager and left messages for the Construction Manager on his voicemail. Those messages asked the Construction Manager to return Grievant's telephone calls. The Construction Manager received the messages but did not return telephone calls because he believed he had no control over the circumstances since Grievant was on short term disability. Based on this pattern of behavior, it was reasonable for Grievant to assume that after leaving a message for the Construction Manager on April 16, 2007, that the Construction Manager would return to Grievant's telephone call only if the Construction Manager felt it was necessary. Grievant had no reason to believe that the Construction Manager had not received his April 16, 2007 message.

Second, this is not a case where an employee was removed from employment and only then started trying to obtain necessary doctors excuses. In this case Grievant was in consultation with his doctors and attempting to obtain the necessary documents from his physicians. Part of the problem was that Grievant's physicians had difficulty determining how to resolve his medical problems. On June 25, 2007, Dr. S completed the necessary excuse for the Third Party Administrator and wrote that he could not respond earlier because he had not received reports from the consulting the physicians. Grievant cannot control how quickly medical tests are completed and physician reports generated. Because of the complexity of Grievant's medical condition, delays in generating medical documentation are not surprising. The medical documents provided showed that Grievant was unable to perform his job in April 2007 due to abdominal discomfort. For these reasons, the disciplinary action against Grievant must be reversed.

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 **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. Notwithstanding the foregoing sentence, the Agency need not provide Grievant with back pay, etc. for the days Grievant was on short-term disability.

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 all of your appeals to the other party and to the EDR Director. 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.⁹

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8667-R

Reconsideration Decision Issued: February 29, 2008

RECONSIDERATION DECISION

The EDR Director issued Ruling 2008-1832. The Hearing Officer received additional evidence and argument from the parties. This Reconsideration Decision is based on the original evidence and argument, reconsideration evidence and argument, and the EDR Director's Ruling.

"Absence in excess of three days without proper authorization or a satisfactory reason" is a Group III offense. At the time of Grievant's removal he had been absent from work for more than three days. His absence had not been authorized by the Agency because the Agency did not realize Grievant had called on April 16, 2007 and left a voice message for the Construction Manager. However, Grievant had a satisfactory reason for being absent on April 16, 2007; namely that his health prevented him from working. He informed the Agency as part of his message that "my doctor has asked that I still stay out through the 16th."

The Construction Manager contends he did not receive Grievant's telephone message on April 16, 2007. Grievant had no control over whether the Agency's employee and telephone equipment would enable the receipt and consideration of Grievant's voice message. It was appropriate for Grievant to assume that the Construction Manager had received his voice message and that the Construction Manager would act on that message in accordance with the Construction Manager's judgment. The inability to work due to health reasons is a legitimate reason to be absent from work. Grievant took the appropriate steps to deliver that message to his supervisor.

The Agency argued Grievant should have continued to call the Construction Manager until Grievant actually spoke with the Construction Manager. That expectation

was not communicated to Grievant. The Construction Manager testified that a voice message would be an acceptable method of notifying him of an employee's absence from work, although he prefers to speak directly with an employee who expects to be absent from work.

Grievant did not provide documentation of his illness on April 16, 2007 prior to his removal effective April 19, 2007. Grievant did not provide documentation for April 16, 2007 because he was not asked for that documentation prior to his removal. On June 25, 2007, Dr. S responded to a letter dated April 18, 2007 sent to him by the Third Party Administrator. The Third Party Administrator asked several questions regarding Grievant's current condition. Dr. S stated that Grievant should be out of work due "to undiagnosed abdominal pain."

A central objective of removing an employee because of an absence in excess of three days without proper authorization or a satisfactory reason is to identify those employees who have abandoned their jobs. There is no reason whatsoever to believe that Grievant intended to abandon his job.¹⁰

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 **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

¹⁰ Because the Hearing Officer concludes on reconsideration that the Agency did not meet its *prima facie* case, the remaining considerations in the EDR Ruling are moot. The Hearing Officer will not address those moot considerations.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer