

Issue: Group III Written Notice with termination (absence in excess of 3 days without authorization); Hearing Date: 03/24/08; Decision Issued: 03/26/08; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8812; Outcome: Full Relief;
Administrative Review: DHRM Ruling Request received 04/09/08; Outcome pending.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8812

Hearing Date: March 24, 2008
Decision Issued: March 26, 2008

PROCEDURAL HISTORY

On October 30, 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 a satisfactory reason.

On November 1, 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 March 3, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 24, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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 Department of Corrections employed Grievant as a Corrections Officer Senior until his removal effective October 30, 2007. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant contracted a MRSA infection in July 2007. He was hospitalized for four days and continued to receive treatment from his doctor after he left the hospital. Grievant began taking several prescribed medications as part of his treatment. As the MRSA diminished in significance, Grievant continued to have side effects from the medication he was taking.

Grievant's last day of work was July 19, 2007. The Agency provided Grievant with the necessary written notification of his rights under the Family Medical Leave Act. Grievant was covered by the Virginia Sickness and Disability Program. He contacted the Third Party Administrator and authorized the necessary communication between the Third Party Administrator and Grievant's Doctor. Grievant began receiving Short Term Disability effective July 23, 2007. In accordance with the DHRM Policy 4.57, Virginia Sickness and Disability Program, Grievant's FMLA benefits ran concurrent with his short-term disability claim. Grievant's FMLA benefits under DHRM Policy 4.20, Family and Medical Leave, began July 20, 2007 and ended 12 weeks later on October 12, 2007.

On October 3, 2007, Grievant's Doctor provided the Third Party Administrator with a note stating:

[Grievant] is medically cleared to return to work on October 15, 2007 with the following work restrictions. (1) non-smoking building, (2) 8 hour shifts with duties rotated, maximum 90 days, (3) must carry at least 2 ounce hand sanitizer for personal use, [and] (4) use gloves when in contact with inmates or inmate property.¹

On October 11, 2007, the Third Party Administrator wrote a letter to Grievant stating:

We have received and reviewed the additional medical information provided by your attending physician for your disability claim.

We are pleased to inform you that, based on the current information in your claim file, your benefits have been approved through November 2, 2007. If you are able to return to work in any capacity before November 5, 2007, 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 over payment of benefits.
***²

On October 15, 2007, the Third Party Administrators sent the Personnel Assistant an email containing a copy of the Doctor's October 3, 2007 note indicating Grievant could return to work on October 15, 2007 with restrictions. The Personnel Assistant contacted Grievant and informed him of the email she had received from the Third Party Administrator. Grievant immediately contacted his Doctor.

On October 16, 2007, the Doctor modified his handwritten note dated October 3, 2007. He changed the date to October 16, 2007. He changed the note to say that Grievant "is medically cleared to return to work on 11/5/07" The note was given to the Agency and given to the Third Party Administrator. The Third Party Administrator called the Doctor and discussed the note.

On October 17, 2007, the Third Party Administrator sent Grievant a letter stating:

We have received and reviewed the additional medical information provided by your attending physician for your disability claim.

We are pleased to inform you that based on the current medical information in our claim file, your return to work with modifications of

¹ Agency Exhibit 2.

² Agency Exhibit 2.

working in a non-smoking building, must be able to carry hand sanitizer for personal use, use gloves when in contact with inmates and work eight hour shifts has been approved from October 15, 2007 through November 02, 2007.³

Grievant met with the Warden on October 26, 2007 and was instructed to return to work. Grievant refused to return to work based on his October 16, 2007 Doctor's note. Grievant was removed from employment effective October 30, 2007 because he failed to report to work.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."⁴ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."⁵ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁶

"[A]bsence in excess of three days without proper authorization or a satisfactory reason" is a Group III offense.⁷ Grievant was absent in excess of three days prior to his date of removal from employment, October 30, 2007. The question is whether Grievant had a satisfactory reason for being absent. Grievant presented the Doctor's note as evidence of his satisfactory reason for his absence. He also testified that he felt weak and was not sure if he could work on the dates that the Agency expected him to be at work. The Agency presented evidence of the Third Party Administrator who concluded that the October 16, 2007 Doctor's note should be rejected. To resolve this conflict, the Hearing Officer must weight the evidence presented by each party.

One function of the Third Party Administrator is to determine whether an employee has presented sufficient medical evidence to support the issuance or extension of Short Term Disability benefits to that employee. The Third Party Administrator's decision must be consistent with DHRM Policies governing Short Term Disability. The issue before the Hearing Officer, however, is not whether Grievant qualified for STD. The issue is whether Grievant should be disciplined pursuant to the

³ Agency Exhibit 2.

⁴ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁷ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(1).

Standards of Conduct. The Third Party Administrator has no role with respect to decision-making under the Standards of Conduct. The Third Party Administrator's decision that the Doctor's note is inadequate under the STD program does not mean that same note is inadequate to establish a basis for the employee to be absent from work. It is the Agency's role to make that determination and that determination must be made in accordance with the Standards of Conduct.

An agency must give appropriate consideration to the validity of a note from a physician regarding an employee's medical condition. That does not mean the agency must adopt blindly all aspects of a doctor's note as true without being able to question the doctor's opinion or seek clarification or further information about that doctor's opinion.⁸

In this case, Grievant presented the Agency with a doctor's note saying he should be out of work until November 5, 2007. The Agency has not presented any evidence explaining why the Doctor's opinion should not be believed. The Agency has presented evidence that the Third Party Administrator did not believe opinion expressed in the Doctor's note, but the Agency did not present any explanation as to why the Third Party Administrator disregarded that Doctor's note. Grievant, on the other hand, presented evidence to show that his Doctor's note should be believed. For example, he showed that he had a medical condition requiring hospitalization and continuing medical treatment including the prescription of medication. Grievant showed that he was under the treatment of the Doctor for several weeks and possibly months. The evidence before the Hearing Officer is that the Doctor had enough involvement in Grievant's medical health to form a valid opinion regarding Grievant's medical condition. Based on the evidence presented to the Hearing Officer, Grievant has established that he had a satisfactory reason for being absent from October 15, 2007 until November 5, 2007. Grievant did not engage in misconduct and, thus, there is no basis to take disciplinary action against him.

The Agency may argue that it is bound by the decision of the Third Party Administrator. This may very well be true with respect to the Third Party Administrator's decision regarding whether an employee has presented sufficient evidence to become or maintain eligibility for Short Term Disability.⁹ The Third Party Administrator's decision regarding STD, however, does not affect the Agency's obligation to make an independent decision under the Standards of Conduct as to whether an employee is absent from work for an appropriate reason. The Agency took no action to determine why the October 16, 2007 Doctor's note should be rejected and presented no evidence

⁸ DOC Procedure Number 5-12.13(B)(1) authorizes the Agency to verify at any time the justification for sick leave. The Agency could have required the Doctor to submit a note with justification describing Grievant's disability, that Grievant was unable to work because of the disability, and the duration of the disability. In this case, the Agency has not acted under this provision.

⁹ The Hearing Officer makes no finding regarding whether Grievant was entitled to STD after October 15, 2007 because that issue was not before the Hearing Officer.

that would raise doubt about the legitimacy of that note in the context of the Standards of Conduct.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

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

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.