

Issues: Group III Written Notice (absence in excess of 3 days without authorization) and Termination; Hearing Date: 09/08/08; Decision Issued: 12/31/08; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8935; Outcome: Partial Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8935**

Hearing Date: September 8, 2008  
Decision Issued: December 31, 2008

**PROCEDURAL HISTORY**

On March 25, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for the failure to report to work as scheduled.

On May 2, 2008, Grievant time filed a grievance to challenge the Agency's action.<sup>1</sup> The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 5, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 8, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

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<sup>1</sup> The EDR Director issued EDR Ruling No. 2008-2029 concluding that Grievant filed her grievance timely.

## **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 Social Services employed Grievant as a Fiscal Technician at one of its Facilities. The purpose of her position was:

Reviews, analyzes and processes a variety of data associated with fiscal accounts to ensure accuracy and conformity. Collects monies received through the district office, resolves inquiries related to tax intercepts, account balances and payments. Initiates and completes actions to accomplish payment transfers, refunds and adjustments to accounts.

The Agency provides its employees with an "Employee Handbook" containing the Agency's policies. The Agency's most recent policy regarding "Attendance" is as follows:

You are expected to report to work in accordance with the work schedule agreed upon by you and your supervisor. If you expect to be late or absent, you are responsible for phoning and speaking with your supervisor (in person) as soon as possible. If you are unable to reach your

supervisor, you should phone (speak with) another member of the Management Team. If you cannot reach any Management Team Member, you must leave a message on the District Manager's phone. Failure to follow this protocol may result in disciplinary action including termination.<sup>2</sup>

Grievant has a history of poor attendance. On October 4, 2006, Grievant received a Group II Written Notice for failure to comply with established policy. This Written Notice stated, in part: "nor did you comply with established District policy by properly notifying your supervisor of your continued absence during this period."

On March 13, 2007, the District Manager sent Grievant a memo stating in part:

I encourage you to address your low leave balance by being conscientious in the use of your leave and allow your leave balance to build. A doctor's excuse continues to be required for the use of sick leave and prior approval is required for the use of all of the leave. Should you have any questions about this matter, please discuss this with [Mr. N] or me.<sup>3</sup>

On June 14, 2007, Grievant received a Group I Written Notice for unsatisfactory attendance.

On November 6, 2007, Grievant received a Notice of Improvement Needed. This Notice stated, in part:

If you need to call in sick/late for any reason you are expected to speak directly with [Mr. N, Ms. P] or another supervisor in the office. A voicemail letting us know you will be in late will no longer be acceptable due to the current circumstances of your leave balance.<sup>4</sup>

Grievant was expected to return from work on March 3, 2008. She had been on short-term disability. During the period March 3, 2008 to March 7, 2008, Grievant did not speak directly to her supervisor nor did she call and speak directly to any other supervisor or member of management at the Facility regarding her absence. On March 3, 2008 at 7:18 a.m. and 7:21 a.m. Grievant called the Agency. Grievant did not speak with a manager or supervisor when she called and, thus, the Agency did not consider those calls to be adequate notice of her absence.

Grievant's last day of work at the Agency was February 4, 2008. On February 28, 2008, Grievant initiated a request for short term disability under the Virginia Sickness and Disability Program. On March 4, 2008, the Third Party Administrator sent

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<sup>2</sup> Agency Exhibit 4. Grievant acknowledged her receipt of this policy on July 27, 2007.

<sup>3</sup> Agency Exhibit 7.

<sup>4</sup> Agency Exhibit 6.

Grievant a letter saying that her disability date was determined to be February 5, 2008, "the date your physician disabled you." Her benefits were approved through March 2, 2008.

On March 19, 2008, the Third Party Administrator sent Grievant a letter saying, "[w]e are pleased to inform you that, based on the current information in your claim file, your benefits have been approved through March 16, 2008. \*\*\* If you do not return to work full-time full-duty on March 17, 2008 for medical reason, your attending physician(s) must provide us with medical information below to support your continued disability." On March 24, 2008, the Third Party Administrator sent Grievant a letter saying "[t]o date, we have not received the additional information necessary to consider benefits beyond March 16, 2008. \*\*\* Please ask your attending physician to provide us with the requested information by March 31, 2008, or your file will be closed." On April 2, 2008, the Third Party Administrator sent Grievant a letter stating, "[s]ince we did not receive the requested information within the specified time period, regrettably, we must close your file."

Grievant was removed from an employment effective March 25, 2008 because she was absent from work without authorization or approval.

### **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."<sup>5</sup> 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

The Agency contends Grievant should receive a Group III Written Notice with removal for being absent in excess of three days without proper authorization or a satisfactory reason. Grievant presented a doctor's note dated March 7, 2008<sup>6</sup> indicating that she was ill from March 3, 2008 to March 17, 2008. Grievant presented a doctor's note dated April 18, 2008<sup>7</sup> indicating that she was ill from March 18, 2008 to April 8, 2008. The Hearing Officer does not have reason to doubt the validity of the doctor's notes. Accordingly, Grievant had a satisfactory reason (illness) for being absent from work for more than three days.

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<sup>5</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>6</sup> It is unclear when Grievant presented the March 7, 2008 doctor's note to the Agency.

<sup>7</sup> Grievant presented the April 18, 2008 doctor's note to the Agency after she had been removed from employment and during the grievance step process.

The Agency has established that Grievant failed to follow a supervisor's instructions, a Group II offense.<sup>8</sup> Grievant was instructed by a supervisor that she must speak directly with a supervisor or a member of the management team each time she would be absent from work. Grievant knew of that instruction, yet she ignored it. She has not offered any credible explanation as to why her failure to contact her supervisor should be disregarded. Grievant was able to speak with her supervisor on March 3, 2008 as evidenced by her two attempts to call the Agency that morning. Grievant should have continued to call the Agency until she spoke with a supervisor as she had been instructed.<sup>9</sup> The Written Notice issued to Grievant must be reduced to a Group II Written Notice.

If the Hearing Officer considers that the Third Party Administrator extended Grievant's benefits until March 16, 2008, the result is the same. The Third Party Administrator did not consider Grievant's disability to extend beyond March 16, 2008. Grievant should have returned to work on March 17, 2008. She did not contact a supervisor to indicate she could not return to work on March 17, 2008 and, thus, Grievant failed to comply with a supervisor's instruction thereby justifying the issuance of a Group II Written Notice.

[A]ccumulation of two Group II offenses normally should warrant removal."<sup>10</sup> Grievant has an active Group II Written Notice issued on October 4, 2006. With the disciplinary action giving rise to this grievance, Grievant has accumulative two Group II Written Notices. Thus, Grievant's removal from employment must be upheld.

*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..."<sup>11</sup> 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

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<sup>8</sup> The Agency's explanation for its reasons for terminating Grievant focus on Grievant's failure to speak directly with her supervisor to inform the Agency of her status.

<sup>9</sup> No credible evidence was presented to show that Grievant was unable to call her supervisor later in the day and speak directly with the supervisor.

<sup>10</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(C)(2).

<sup>11</sup> *Va. Code § 2.2-3005.*

disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

The Hearing Officer inquired of the Agency as to whether it had considered Grievant's absences under the Family Medical Leave Act and Americans with Disabilities Act. The District Manager testified that she did not know whether Grievant was eligible for FMLA or an accommodation under the ADA. Grievant had been on short term disability which was approved through the Commonwealth's Third Party Administrator. Under State policy, FML typically runs concurrently with short term disability.<sup>12</sup>

Hearing Officers may inquire as to issues that may benefit a party, but Hearing Officers are not advocates for any party. Grievant has not presented any credible evidence that her absences after March 3, 2008 were protected.<sup>13</sup> Regardless of whether Grievant's absences were protected, she failed to comply with a supervisor's instructions to speak directly with a supervisor. Grievant's medical condition and whether it created a protected status did not affect her ability to contact the Agency as evidenced by her early morning calls and voice messages to the Agency. Grievant has the burden of proving any available defenses and she has not established any.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's removal from employment is **upheld** based on the accumulation of disciplinary action.

## 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:

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<sup>12</sup> Grievant contends she did not receive notice from the Agency of her rights for FML, but it is likely that Grievant did not remember all of the paperwork she received from the Agency when she sought short term disability. For example, in a letter dated March 4, 2008, the Third Party Administrator wrote:

Your certified disability may qualify for leave under the Family and Medical Leave Act (FMLA). Please contact your agency's benefit administrator regarding eligibility for, and tracking of FMLA hours. If your agency certifies your absence as qualifying for FMLA, your time on short-term disability will be counted toward your 12 week allotment of FMLA leave.

<sup>13</sup> If the Hearing Officer assumes Grievant had available FML concurrent with her short term disability, the date would be March 16, 2008, the last day of her short term disability.

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 14<sup>th</sup> St., 12<sup>th</sup> 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  
600 East Main St. STE 301  
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.<sup>14</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.