

Issue: Termination for failure to return to work; Hearing Date: 06/28/10; Decision Issued: 06/29/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9352; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9352**

Hearing Date: June 28, 2010  
Decision Issued: June 29, 2010

**PROCEDURAL HISTORY**

Grievant was removed from employment effective November 18, 2009 for failing to report to work as scheduled. Although the Agency should have issued a written notice of disciplinary action, it chose to remove Grievant by letter. On December 16, 2009, 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. The EDR Director issued Ruling No. 2010-2540 on May 12, 2010 qualifying the matter for hearing. On June 2, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 28, 2010, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate

**ISSUES**

1. Whether Grievant engaged in the behavior described in the letter of removal?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?
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 at one of its Facilities. Grievant transferred to the Facility in June 2006. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant filed a Virginia Sickness and Disability Claim on July 17, 2008. She returned to work on October 29, 2008 with restrictions. She was released to full duty on January 2, 2009. She stopped working at the Facility on July 29, 2009 and began short term disability on August 7, 2009.

On October 6, 2009, Grievant exhausted her personal leave. On October 24, 2009, Grievant exhausted her Family Medical Leave.

On November 2, 2009, the HR Manager sent Grievant's Doctor a letter by fax stating, in part:

This is in reference to [Grievant]. I spoke with her earlier today and she indicated to me that you had released her to return to work on November 3, 2009. However, she expressed concerns to me about taking her medication while at work and the possible side effects of that medication specifically with respect to driving, drowsiness and dizziness. \*\*\*

Enclosed is a copy of the essential job functions for Security Services employees. As [Grievant's] primary medical provider, please provide

comments on her ability to perform these essential functions, what limitations she may currently have and whether these limitations are temporary or permanent. Against, this information needs to be provided prior to her return to work.

On November 2, 2009, Grievant's Doctor sent the HR Manager a letter by fax stating:

I have released [Grievant] to return to duty full time as of November 3, 2009. I have advised her to take Mobic daily for neck pain, it is non-sedating and should not interfere with her job duties. She is not to take Lortab or Robaxin prior to work, but may take them if needed when she returns home. She has an appointment with [Dr. V] (ortho) on 11/5/09; she should discuss her physical job requirements with him and he will make any further recommendations on her disability claim.

Grievant did not report for work November 3, 2009 or anytime there after.

Grievant submitted a request to the Warden to remain on leave without pay status. On November 13, 2009, the Warden denied that request.

On November 17, 2009, the Lead Appeals Specialist notified Grievant that the Third Party Administrator had received Grievant's letter requesting an appeal of her Short Term Disability claim.

On December 11, 2009, the Senior Disability Benefits Specialist wrote Grievant a letter stating, in part, "We are please to inform you that based on the current information in your claim file, you benefits have been approved through November 2, 2009."

On January 5, 2010, the Senior Disability Benefits Specialist wrote Grievant a letter stating, in part, "After completing its review of your disability claim, [the Third Party Administrator] regrets that it is unable to approve your request for benefits beyond November 1, 2009.

The Third Party Administrator closed Grievant's claim without extending benefits beyond November 1, 2009.

## **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."<sup>1</sup> 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

---

<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

warrant removal.”<sup>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

Absence in excess of three days without proper authorization or a satisfactory reason is a Group III offense.<sup>4</sup> Grievant knew that she was released by her doctor to return to full duty on November 3, 2009. She did not report to work. More than three workdays passed without Grievant reporting to work. Grievant sought authorization to be on leave without status, but that request was denied thereby making Grievant’s absences unauthorized. Grievant did not have a satisfactory reason for her absences. She has not presented any satisfactory reason for her failure to return to work. Grievant’s general concerns about her ability to perform her job without medical opinions to document her concerns are not sufficient as a satisfactory reason to be absent from work. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. When an employee engages in behavior justifying the issuance of a Group III Written Notice, that employee may be removed from employment. The Agency’s decision to remove Grievant from employment must be upheld.

Grievant argued that the HR Manager told her she did not have to report to work as scheduled. The HR Manager denied making that statement and her denial was credible. The HR Manager did not have the authority to determine that Grievant could not report to work as scheduled.

Grievant argued that she was removed from employment prior to completing medical appointments with all of her medical providers. Grievant did not present any notes from any doctor indicating she could not work after November 2, 2009.

*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>5</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

---

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

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1 (XII)(B)(1).

<sup>5</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 the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's has established that Grievant engaged in behavior constituting a Group III offense and, thus, her removal from employment must be **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 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>6</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.