

Issue: Group III with Termination (absence in excess of 3 days without authorization);
Hearing Date: 10/21/10; Decision Issued: 11/02/10; Agency: Department of
Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No. 9433; Outcome: Partial
Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9433

Hearing Date: October 21, 2010
Decision Issued: November 2, 2010

PROCEDURAL HISTORY

On August 2, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for being absent from work for more than three days and failing to verify those absences with notes from medical providers.

On August 4, 2010, 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. On September 27, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 21, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Department of Corrections employed Grievant as a CIRC at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On June 14, 2010, June 15, 2010, June 16, 2010, June 17, 2010, and June 18, 2010, Grievant was scheduled to work. She called the Supervisor before her shift began each day and left a voice message stating that she was not feeling well and would not be in to work.

On June 21, 2010, Grievant entered leave without pay status because she had exhausted all of her available leave balances.

On July 6, 2010, the Human Resource Officer called Grievant and told Grievant she needed to provide notes from her medical providers to excuse her absences.

On July 7, 2010, the Human Resource Officer sent Grievant a letter stating, in part:

This letter is to notify you that effective June 21, 2010, you have exhausted all of your available leave balances. You will not receive a paycheck on July 16, 2010. We have requested on numerous occasions documentation to support your absence since June 14, 2010 however you

have only provided documentation for dentist appointments on Wednesday, June 16, 2010 and Saturday, June 19, 2010. For our conversation on July 6, 2010, I advised you failure to provide supporting documentation for your absence is a Violation of Standards of Conduct.¹

On July 13, 2010, the Assistant Warden sent Grievant a letter stating:

This is a follow-up to [the Human Resource Officer's] conversation with you today regarding your schedule telephone hearing on Friday, July 16, 2010 at 9 a.m. for possible disciplinary action due to absence in excess of 3 days without proper authorization or satisfactory reason. This will afford you ample time to respond to the charges against you. Be advised that under Operating Procedure 135.1, Standards of Conduct, this is a Group III offense that could result in termination.

This is as a result of your failure to provide adequate documentation from June 14, 2010 to present, even after receiving 3 phone calls from Human Resources requesting such documentation and as required by Operating Procedure 110.1, Hours of Work and Leave of Absence. You also failed to notify your immediate supervisor from June 18, 2010 to present.

You may fax any documentation in your defense to Human Resources at [fax number].²

Grievant submitted two notes prior to her removal of August 2, 2010. Grievant submitted a note from her Dentist dated June 16, 2010 excusing her absence from 9 a.m. to 1 p.m. Grievant submitted a note from her Dentist dated June 19, 2010 excusing her absence from work on June 19, 2010 at 9 a.m. Grievant did not work that day.

In the last two weeks of June 2010, Grievance submitted an application for disability with the Third Party Administrator. The Third Party Administrator obtained information from Grievant's medical provider. On July 9, 2010, Grievant's Doctor completed a Disability Claim Form and submitted it to the Third Party Administrator. Grievant's Doctor wrote, "[Grievant] will make some improvement but may not be able to return to work." On August 5, 2010, the Third Party Administrators sent Grievant's Doctor a letter asking for information regarding Grievant's restrictions. The Doctor wrote, "[Grievant] is under medical and psychiatric evaluation and may not be able to properly interact with coworkers or clients."

Grievant's claim for Short Term Disability was approved by the Third Party Administrator. On August 20, 2010, the Third Party Administrator sent Grievant a letter

¹ Agency Exhibit 3.

² Agency Exhibit 4.

stating that her last day at work was June 11, 2010 and "[w]e have determined your disability date to be June 16, 2010."

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."³ 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."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

The Agency contends that Grievant should receive a Group III Written Notice because she was absent "in excess of three days without proper authorization or a satisfactory reason." The Agency has established that Grievant was absent without proper authorization because Grievant did not submit Doctor's notes to the Agency to justify her absences. Grievant has established that she was absent for a satisfactory reason, namely, that she was disabled beginning on June 16, 2010. Accordingly, the Agency has not established a basis to issue Grievant a Group III Written Notice. Grievant's removal must be reversed.

Implicit in the Agency's allegation that Grievant was absent without proper authorization is the allegation that Grievant failed to comply with written policy. Grievant had sufficient notice that the Agency was alleging that she failed to comply with written policy. Accordingly, it is appropriate for the Hearing Officer to consider whether Grievant should receive a Group II Written Notice for failure to follow written policy.

Local Operating Procedure 287, Hours of Work and Leave of Absence, sets forth the Facility's procedures for documenting absences from work. Section IV(H)(3) provides:

Non-designated personnel who must be absent because of illness, should notify their supervisor no later than one-half hour before the beginning of the normal work shift. An employee who fails to notify the supervisor may be charged with unauthorized leave and may be subject to disciplinary action in accordance with the employee Standards of Conduct.

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

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

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

Grievant acted contrary to this policy because she failed to contact the Supervisor on days she was scheduled to work after June 18, 2010.

Section IV(J) provides:

All staff will be allowed three workdays of unverified/undocumented sick leave without a doctor's note in a calendar year. *** once an employee has used the three days of unverified sick leave, all sick leave must be verified by a doctor's note. *** simply put, you only get the call in sick three times, before being required to turn and documentation for future absences.

Grievant exhausted her three workdays of unverified sick leave on June 14, 2010. Grievant failed to comply with this section of the policy because she failed to submit Doctor's notes verifying all of the days she was absent from work prior to removal August 2, 2010.

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to follow policy.

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...."⁶ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to further reduce the disciplinary action.

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. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is not obligated to provide Grievant with back pay because she exhausted all of her leave balances and went on leave without pay status effective June 21, 2010.

⁶ Va. Code § 2.2-3005.

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
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.⁷

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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