

Issue: Separation from State after transitioning into LTD; Hearing Date: 11/03/11;
Decision Issued: 11/04/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9705; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9705

Hearing Date: November 3, 2011
Decision Issued: November 4, 2011

PROCEDURAL HISTORY

On May 5, 2011, the Agency sent Grievant a letter removing her from employment. On May 19, 2011, 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 6, 2011, the EDR Director issued Ruling Number 2012-3072 qualifying the matter for hearing. On October 12, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 3, 2011, a hearing was held at the Agency's 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 action 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 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 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. She began working for the Agency in November 2003. The purpose of her position was to: “provide security over of adult offenders at the institution and while in transport; supervises the daily activities of offenders while observing and recording their behavior and movement to ensure their safe and secure confinement.”¹ No evidence of prior active disciplinary action was introduced during the hearing.

Grievant experienced health problems. She applied for Short Term Disability under the Virginia Sickness and Disability Program. The Third Party Administrator reviewed Grievant’s application and medical documentation and concluded the Grievant should begin receiving Short Term Disability. Grievant was approved for Short Term Disability through February 15, 2011. Under State Policy, Grievant used Family Medical Leave concurrently with her Short Term Disability.

The Warden observed Grievant at a local hospital. Grievant was at the hospital performing duties relating to her nursing studies. The Warden instructed the Human Resource Officer to notify the Third Party Administrator of what he had observed. The Third Party Administrator verified that Grievant was involved in a nursing program through the local hospital.

On March 4, 2011, the Human Resource Officer sent Grievant a letter stating:

It has been brought to my attention that you have not reported for duty as scheduled since your case was closed by [Third Party Administrator] on February 15, 2011 nor have you provided documentation to substantiate your absence. As you are aware, an absence in excess of three days

¹ Agency Exhibit 4.

without prior authorization or satisfactory reason is a violation of the Standards of Conduct; and Group III offense. ***²

By April 2, 2011, Grievant had used all of her available Family Medical Leave for the year.

On April 11, 2011, the Human Resource Officer sent Grievant a letter stating:

According to our records, the Virginia Sickness and Disability Program closed your claim on February 15, 2011 and you have not returned to work. If your VSDP claim is not approved by [the Third Party Administrator], you will be required to provide medical certification to the agency. If medical certification is not provided to the agency within 14 days of the date your leave begins, you will be considered absent without proper authorization, which may affect your employment status.

Please be advised that you have exhausted all of your leave balances (annual, sick, and compensatory) as of March 18, 2011. As a result of insufficient leave balances to cover you while you are out, you will be placed on leave without pay. If you are still unable to return to work, you must submit a request for leave without pay in the form of a letter addressed to [Chief Warden] no later than April 15, 2011. While you are on leave without pay, the State will make no contribution to the Virginia Retirement System for you. Your Group Life Insurance will remain in effect for 2 years with the State making full contributions.³

On April 13, 2011, Grievant sent the Chief Warden a letter stating:

Dear [Chief Warden], I [Grievant] [am] asking for leave without pay until I am able to return to work. This decision was made based on my not being approved for sick disability. I am currently out under doctor's care since January 5, 2011 but the decision of my benefits not being approved began on February 15, 2011. Therefore this letter was written. Thanking you in advance.⁴

The Chief Warden denied Grievant's request to be on leave without pay status. The Human Resource Officer called Grievant and notified her of the Warden's decision.

On April 19, 2011, the Third Party Administrator sent Grievant a letter stating:

² Agency Exhibit 2.

³ Agency Exhibit 2.

⁴ Agency Exhibit 2.

Thank you for sending additional information about your Short Term Disability claim. We have reviewed this information and it does not change our original decision.

We received information from [Doctor] indicating that you have significant cognitive impairment and that you are unable to complete your daily activities. However, we have also confirmed that you are attending classes at [Community College]. We also tried to contact [Doctor] to discuss if he was aware that you were attending classes, but we were not able to speak with him. Therefore, given that the reported symptoms are not consistent with your ability to attend class at [Community College] we are unable to support your Short Term Disability Benefits beyond February 15, 2011.⁵

On May 5, 2011, the Chief Warden sent Grievant a letter stating:

On February 15, 2011, [Third Party Administrator] closed your short-term disability case. Your absence was covered by Family and Medical Leave Act which was exhausted on April 2, 2011. Since you have not return to work, you will be separated from State service for "failure to return after approved leave."⁶

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."⁷ 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."⁸ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁹

"Absence in excess of three days without proper authorization or a satisfactory reason" is a Group III offense.¹⁰ Grievant's Short Term Disability ended on February

⁵ Agency Exhibit 1.

⁶ Agency Exhibit 2.

⁷ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁸ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁹ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

¹⁰ Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(1).

15, 2011. Her Family Medical Leave ended on April 2, 2011.¹¹ Grievant's absence from work was no longer protected by Family Medical Leave.¹² On or about April 13, 2011, the Agency notified Grievant that her request for leave without pay was denied by the Chief Warden.¹³ She knew or should have known that she was obligated to return to work. Grievant did not return to work. After more than three workdays, Grievant was removed from employment effective May 5, 2011. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Although the Agency did not issue a Written Notice in this case, the Agency's action is the same as a removal for violating the Standards of Conduct. Accordingly, the Agency's removal of Grievant 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..."¹⁴ 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 reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's removal of Grievant effective May 5, 2011 is **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:

¹¹ Eligible employees have access to 12 weeks of FMLA leave each calendar year (January 10 – January 9). See, DHRM Policy 4.20, Family and Medical Leave.

¹² To the extent the Americans with Disabilities Act might be applicable, that Act would not prohibit the Agency from taking disciplinary action against Grievant for failing to report to work as scheduled.

¹³ The Chief Warden had discretion as to whether to grant Grievant's request for leave without pay status.

¹⁴ Va. Code § 2.2-3005.

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.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.