

Issue: Group III Written Notice with Termination (absence in excess of 3 days without authorization); Hearing Date: 05/24/16; Decision Issued: 06/12/16; Agency: DOC; AHO: Jane E. Schroeder, Esq.; Case No. 10811; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF THE HEARING OFFICER

In the matter of Case # 10811

Case Heard: May 24, 2016

Decision Issued: June 12, 2016

PROCEDURAL HISTORY

The Grievant was employed by the Agency. On March 25, 2016, the Agency issued a Group III Written Notice to the Grievant for an absence in excess of three days without proper authorization or a satisfactory reason. The Grievant was terminated. The Grievant filed a Grievance on April 28, 2016. The relief requested by the Grievant was reinstatement to his job.

The case was heard on May 24, 2016, beginning at 9:00 a.m., and concluding at 11:40 a.m. The Grievant appeared and was unrepresented by an attorney or advocate. Counsel appeared for the Agency. Grievant's Exhibit 1 (pages 1-10) was entered into evidence without objection. Agency's Exhibits 1-15 were entered into evidence without objection. Four witnesses for the Agency and two witnesses for the Grievant testified. The hearing was recorded on a digital recorder and stored on a compact disk.

APPEARANCES

Grievant

Superintendent, Work Site

Attorney for the Agency

Witnesses for Agency:

Assistant Superintendent, Major, Work Site

Superintendent, Work Site

Human Resources Officer for Agency

Lieutenant, Work Site

Witnesses for Grievant:

Grievant's spouse

Grievant

ISSUE

Whether the Group III Written Notice Issued to the Grievant on March 25, 2016 and subsequent termination should be sustained, modified or revoked.

BURDEN OF PROOF

In disciplinary actions, the agency must present its evidence first and 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. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual). This case is a disciplinary action. In this case, the agency must prove that it is more likely than not that the Grievant absent in excess of three days without proper authorization or a satisfactory reason. The agency must prove that issuing a Group III Written Notice and termination of the Grievant was warranted and appropriate.

FINDINGS OF FACT

1. The Grievant was employed by the Agency for sixteen years. His last position was Senior Corrections Officer.
2. The work schedule for the correction officers at the Work Site was work seven days in a row and then be off for seven days in a row.
3. The work schedule for the Grievant for January, February and March of 2016 was as follows:

Jan. 4-10	work	Feb. 1-7	work	Feb. 29-Mar. 6	work
Jan. 11-17	break	Feb. 8-14	break	March 7-13	break
Jan. 18-24	work	Feb. 15-21	work	March 14-20	work
Jan. 25-31	break	Feb. 22-28	break	March 21-27	break
				Mar. 28-Apr. 3	work

In fact, the last day that the Grievant reported for work was December 27, 2015.¹

4. The Assistant Superintendent, Major, of the Work Site supervises the security officers. She testified that she received a call on Jan. 3, 2016 from the Lieutenant who was the direct supervisor of the Grievant. The Lieutenant relayed that the Grievant had called to say that his father had died and that the Grievant would not be at work for the week of Jan. 4-10.²
5. On January 18, 2016, when the Grievant was next scheduled to work, the Grievant called the Assistant Superintendent, Major, at approximately 10:56 a.m. and requested more time off to assist his mother, who had health issues. The Assistant Superintendent, Major, approved his leave for the week of January 18-24, 2016.³

¹ Testimony of Assistant Superintendent, Major

² Paragraphs 1-4: Testimony of Assistant Superintendent, Major; Paragraph 4: Agency Exhibit 7, p.1

³ Testimony of Assistant Superintendent, Major; Agency Exhibit 7, p. 3

6. On January 29, 2016, Human Resources (HR) sent the Grievant a letter to inform him that the Human Resource Officer had been notified of the Grievant's need to absent from work due to the serious health condition of a family member. The letter informed the Grievant of his rights under the Family and Medical Leave Act (FMLA) and included the required form for Certification HealthCare Provider for Family Member's Serious Health Condition. The Grievant never submitted the form.⁴
7. On February 1, 2016, the Grievant did not return to work as scheduled. He called work that morning and spoke with the Superintendent. The Superintendent informed that, if he did not come to work, he would be on unapproved leave. The Grievant informed the Superintendent that he had contacted the [] Group, a company processes long term disability for the Agency. The Grievant did not call again or come to work that week. Immediately after the call, the Superintendent called the Human Resource Officer for the Agency to inquire whether the Grievant had initiated a claim under the [] Group. HR said that the Grievant had not initiated a claim.⁵
8. The next week that the Grievant was scheduled to work was February 15-21. On February 15, the Grievant called work and reported that he would not be back until February 17. On February 17, the work site received a faxed doctor's note from the Grievant's family physician stating as follows: [The Grievant] was seen in our [] office and has been under my care from 02/16/2016 to 02/18/2016 and is able to return to work on 2/19/2016. Restrictions are none."⁶
9. On February 18, the work site received a faxed doctor's note from the Grievant's orthopedic doctor stating as follows: "Please excuse patient from work for the next two weeks." Both faxed doctors' notes were not specific enough for the Agency's standards for medical leave.⁷
10. On Friday, February 19, the Grievant called the Superintendent and left a voice message. That same day the Superintendent attempted to call the Grievant back, but he did not answer and his voice mail box was full. The Grievant did not call again.⁸
11. On March 1, one month after the Grievant had said he initiated a claim to [] Group on February 1, the [] Group sent a letter to HR stating that the Grievant had initiated a claim on March 1.⁹
12. On March 3, 2016, HR sent the Grievant a letter stating that the Human Resource Officer

⁴ Agency Exhibit 11, pages 1-6; Testimony of Human Resource Officer

⁵ Testimony of Superintendent and Human Resource Officer

⁶ Agency Exhibit 8

⁷ Agency Exhibit 9 and Grievant Exhibit 1, p. 6.

⁸ Testimony of Superintendent

⁹ Agency Exhibit 11, p. 1

had received notification by [] Group that the Grievant needed to be absent from work due to a serious health condition that made the Grievant unable to perform the essential functions of his job. The letter outlined his options and responsibilities including the completion of a STD Repayment Agreement to completed and returned to HR.¹⁰

13. On March 10, 2016, the Human Resource Officer sent the Grievant a letter stating that the Grievant been absent from work for more than 14 work days without proper authorization; that his pay has been discontinued; that the Agency was providing the Grievant with due process for violation of the Standards of Conduct in that he failed to follow supervisor instructions and was absent in excess of three days without proper authorization; and that it was imperative that the Grievant respond to the letter by contacting the Superintendent no later than March 18, 2016. The letter further stated that, if no response was received, his employment could be terminated. The Grievant did not respond to the letter.¹¹
14. On March 16, 2016, the [] Group staff sent an email to HR stating that the [] Group had not been able to reach the Grievant. On March 21, 2016, the [] Group sent a letter to HR stating that the [] Group had not received the form required to determine the Grievant's request for long-term disability. The letter stated that a new form had been mailed to the Grievant and that the claim may be denied if the form was not returned. Finally, on April 28, 2016, the [] Group notified HR that the Grievant had been notified that his request for leave was denied because the form was not submitted.¹²
15. The Grievant's wife testified when her husband got the termination letter that it threw her and her husband into turmoil. She and her husband thought everything was fine once he contacted the [] Group for short-term disability. However, she admitted that she and her husband had not followed up on the paperwork. She testified that, starting in January, the mail at their home was stacking up into 4 stacks of mail and remained unopened for months until approximately April 22. In fact, the utilities were cut off at their home because the bills had not been paid. After her husband got the termination letter, he did not contact his job. He contacted the [] Group. She also testified that her husband's voice mail was full and he did not clear the voice mail box until April.¹³
16. The Grievant testified that, when his father died unexpectedly in January, the Grievant became overwhelmed with what he was faced with. His mother had serious medical problems. His brother had died several years ago, and now the Grievant was an only child left to deal with the funeral home, his mother's care and his own two children graduating from high school. Also, he was having continuing trouble with a swollen hand and needs surgery. He admitted he did not open the mail or follow up with all the paperwork. He did

¹⁰ Agency Exhibit 12, pages 7-11

¹¹ Agency Exhibit 10

¹² Agency Exhibit 11

¹³ Agency Exhibit 11

not see the March 10 letter to him from HR until he opened the March 25, 2016 Written Notice in April.¹⁴

17. The Grievant included five doctor's notes in his exhibit. Only two were submitted to the agency. He testified that some of them may have been submitted to the [] Group.¹⁵
18. On March 25, 2016, the Superintendent issued a Group III Written Notice to the Grievant for Offense Code 4: 3 days absent without authorization. Under Section 2—Offense, the nature of the offense was stated as follows: “Violation of OP135.1, Standards of Conduct, for an absence in excess of three days without proper authorization or a satisfactory reason. [The Grievant] has not followed proper call-in procedures, received approval for the use of leave, and given adequate notice, for his continued absences from work between 02/19/16 – 03/22/16. Several unsuccessful attempts were made by management and Human Resources to contact [Grievant], who did not return these calls.” Under Section 3—Disciplinary Action taken, the disciplinary action taken was Termination, effective 3/25/16.¹⁶
19. Under Section 4—Circumstances considered, the Superintendent stated, “Due process notification was send by mail to [Grievant] on 03/10/2016. He did not respond to this due process notification as instructed; the only response received was a faxed doctor's note that did not include the necessary information as outlined in OP 110.1 to adequately verify his continued absence from work. According to OP 135.1, an absence in excess of three days without proper authorization or a satisfactory reason is a Group III offense that normally warrants removal/termination. Due to [Grievant's] ongoing absences and in violation of procedure, mitigation is not appropriate.”¹⁷
20. The Agency issued a Security Post Order that outlines procedures for the employees. Rule 4 on page 1 states: “Report any illness, injury, or other condition which would prevent you from reporting to duty at least two (2) hours prior to start of your assigned shift. Speak to the Shift Commander or OIC on duty. Contact your supervisor during the hours of your shift as a follow-up.” Each employee had to sign the last page of the Security Post Order, certifying that they had read, discussed with their supervisor, and understand the post order. The Grievant signed on December 25, 2015.¹⁸
21. Grievant had three previous Written Notices that were still active. The first was Group II Written Notice issued 4/1/14 for failure to follow policy.¹⁹ The second was a Group I Written Notice issued 5/27/14 for abuse of state time.²⁰ The third was a Group II Written Notice issued

¹⁴ Testimony of Grievant, Agency Exhibit 10

¹⁵ Testimony of Grievant, Grievant Exhibit 1, p. 5-9

¹⁶ Agency Exhibit 1 and Grievant Exhibit 1, p. 3

¹⁷ Agency Exhibit 1 and Grievant Exhibit 1, p.3

¹⁸ Agency Exhibit 5, pages 1 and 11

¹⁹ Agency Exhibit 15

²⁰ Agency Exhibit 14

12/18/15 for failure to comply with policy.²¹

22. This third previous Written Notice, issued one week before the last day the Grievant reported for work, alleged that the Grievant did not notify supervision that he was going to be absent, nor did he have a working phone number on file. The superintendent that issued that Written Notice testified that she met with the Grievant the day it was issued and reviewed with the Grievant the proper procedures to follow when he will be absent, including the requirement to call the supervisor at least two hours in advance; the requirement to contact the supervisor during the shift as a follow, and the requirement to leave a working phone number.²²

23. The Superintendent testified that she considered these previous written notices when determining the disciplinary action for the March 25, 2016 Written Notice.²³

24. On April 22, 2016, the Grievant filed Dismissal Grievance Form A, and a hearing was scheduled and conducted on May 24, 2016 to determine whether the Group III Written Notice and the termination should be sustained, modified or revoked.²⁴

25. APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance 2-1201 and §53.1-102.procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee=s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653,656 (1989).

The Agency has produced two Operating Procedures which are relevant in this case: “*Hours of Work and Leave of Absence*” and “*Standards of Conduct*.”

The Operating Procedure “*Hours of Work and Leave of Absence*”, under Code of Virginia §2.2-2900 et. seq., sets forth the terms of, and conditions for, working hours and leaves of absence for employees of the Agency. Paragraph 3 includes the following statements. “All leave should be requested as far in advance as possible. In the event of illness, injury, or other emergency, an employee shall be required to provide adequate notice to the supervisor and request use of leave....Security employee and other shift workers are required to notify the officer in charge, or the...shift commander, at least two hours prior to the beginning of their shift if they must be absent....Employees who fail to notify their supervisor, or the supervisor’s

²¹ Agency Exhibit 13

²² Testimony of Supervisor

²³ Testimony of Superintendent

²⁴ Agency Exhibit 2

designee should be considered “absent without leave.”...This will result in a loss of pay and be treated as a violation of Operating Procedure 135.1 *Standards of Conduct*.

In this case the last day the Grievant worked was December 27, 2015. The Agency authorized leave under the FML for the month of January because of the death of the father and the need to assist his ailing mother. In February and March, the Grievant called in sporadically to the Agency to say he would not be at work. He rarely did call two hours before the shift started. He did not follow procedure which required him to call and talk to his supervisor later in the day. The Grievant was notified that he was on unapproved leave in February.

Paragraph F.3. : “Use of sick leave may require verification, at the discretion of the Organizational Unit Head or designee, by a treating physician.

- a. This verification must include the health care provider assessment that the employee is unable to work during a specified period (period of absence) and indicate a projected return date.
- b. The verification must also include the nature of the illness or injury that prohibits the employee from working...”

The Grievant provided two notes to the agency. The first included the information for part a. above, but not part b. The second note did not follow what was needed for part a. or b. So the verification needed for sick leave was not provided by the Grievant. Without the proper verification, the absence is unapproved leave, which is subject to violation of OP135.1, *Standards of Conduct*.

The Operating Procedure, “*Standards of Conduct*,” under Code of Virginia §2.2-1201 and §53.1, sets forth the *Standards of Conduct* and disciplinary process that the Agency must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace or outside the workplace when the conduct impacts an employee’s ability to do their job, or influences the agency’s overall effectiveness.²⁵

Standards of Conduct provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Unacceptable behavior is divided into three groups, according to the severity of the behavior, with Group I being the least severe and Group III being the most severe.

Section D.1. provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. Section D.2.a. provides that the Group III offenses includes absence in excess of three days without proper authorization or a satisfactory reason.²⁶

In the present case, the Grievant was issued a Group III Written Notice for an absence in excess of three days without proper authorization or a satisfactory reason. The Grievant was terminated.

²⁵ Agency Exhibit 3, p. 1, Agency Exhibit 4, p.1

²⁶ Agency Exhibit 4, p. 9

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section A Framework for Determining Whether Discipline was Warranted and Appropriate states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).²⁷

Using this framework, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

The employee was absent from work from December 27, 2015 until termination. He was given authorized leave for the month of January. In mid February, he provided to the Agency two doctor's notes, neither of which was satisfactory. He did not consistently make phone calls to inform the Agency that he would be absent or to talk to his supervisor later in the shift. He was informed mid-February that he was on unapproved leave. He was sent several letters from the Agency, in which he was told to contact the Agency. He did not respond. The Agency's attempts to contact him by phone were unsuccessful due to his voice mail being full. He also told the Agency that he was under the [] Group for long-term disability on February 1. This was not true. He did not submit the application to [] Group until March 1. When submitted, the application was denied. The employee engaged in the behavior described in the Written Notice.

(ii) Whether the behavior constituted misconduct

Based on the policies outlined in **Operating Procedures Hours of Work and Leaves of Absence**, and **Standards of Conduct**, the Grievant's unapproved leave was a violation of the Standards of Conduct. The Grievant did not open his mail or have his phone available for calls. He did not present doctor's notes that acceptable for leave. His behavior constituted misconduct.

(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy

The Standards of conduct for the Agency lists absence in excess of three days without proper authorization or a satisfactory reason as a Group III offense. A Group III offense normally should warrant termination. The disciplinary action taken by the agency was termination. This is consistent with the law and policy.

²⁷Rules for Conducting Grievance Hearings, VI.B1. Effective Date 7/1/2012.

Mitigating Circumstances

According to the Rules for Conducting Grievance Hearings, AA hearing officer must give deference to the agency=s consideration and assessment of any mitigating and aggravating circumstances. A hearing officer may mitigate the agency=s discipline only if, under the record evidence, the agency=s discipline exceeds the limits of reasonableness.²⁸ The Grievant in this case missed many days of work without following the Agency’s policies for reporting absences. He had been counseled by the Superintendent in December, 2015. He had three active Written Notices. The Grievant was given a Group III Written Notice and was terminated. This Hearing Officer finds that the agency’s discipline of imposing a Group III Written Notice and termination did not exceed the limits of reasonableness.

DECISION

The Group III Written Notice issued to the Grievant on March 25, 2016 is upheld. The disciplinary action of termination 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:

1. 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution

²⁸ Rules for Conducting Grievance Hearings, p. 17

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.²⁹

[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].

June 12, 2016

Jane E. Schroeder
Jane E. Schroeder, Hearing Officer

²⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.