

Issue: Group III Written Notice with Termination (absence in excess of 3 days without authorization); Hearing Date: 01/17/18; Decision Issued: 01/19/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11140; Outcome: Partial Relief;
Administrative Review: Ruling Request received 02/05/18; EEDR Ruling No. 2018-4678 issued 03/22/18; Outcome: Remanded to AHO; Remand Decision issued 03/30/18; Outcome: Group III with Termination reinstated;
Administrative Review: Ruling Request on 03/30/18 Remand Decision received 04/16/18; EEDR Ruling No 2018-4808 issued 05/08/18; Outcome: AHO's Remand Decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11140

Hearing Date: January 17, 2018

Decision Issued: January 19, 2018

PROCEDURAL HISTORY

On October 23, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for being absent from work for more than three days.

On November 21, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 11, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 17, 2018, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Virginia Department of Corrections employed Grievant as a Corrections Sergeant at one of its facilities. She had been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to work on August 17, 2017 and finished her shift. That was her last day of work. Grievant "called out sick" on August 18 through August 20, 2017. Her shift was on break from August 21, 2017 through August 25, 2017. She was scheduled to work on August 26, 2017 but failed to report to work that day and several days thereafter. She entered leave without pay status beginning September 16, 2017.

Agency staff were unable to contact Grievant because she failed to provide the Agency with her current telephone number. On September 25, 2017, Grievant contacted the Facility's human resource department and spoke with Ms. B. Grievant said she had filed a claim for short term disability with a company and asked when she would be paid. Grievant did not realize she had filed a claim with the former third party administrator, not the current third party administrator. Ms. B informed Grievant of the contact information for the correct third party administrator and told Grievant she should contact immediately the correct third party administrator. Ms. B provided Grievant with the telephone number to send faxes to the human resource office. Ms. B later sent

Grievant "FMLA paperwork". Grievant did not immediately file a claim with the correct third party administrator.

On September 28, 2017, the Personnel Analyst, Ms. H, sent Grievant a letter indicating that Grievant had not filed a claim with the Third Party Administrator and reminding her that the Facility had not received any doctor's notes or other documentation to support her continuing absence from work. She was reminded that absence in excess of three days without authorization or satisfactory reason was a violation of the Standards of Conduct. She was informed to report to work or provide proper medical documentation supporting her continued absence from work. She was instructed to provide a response by October 5, 2017.

Grievant did not timely send any excuses from her medical providers to the Facility's human resource office. Grievant did not respond to the Agency by October 5, 2017.

Grievant filed a claim with the Third Party Administrator on October 13, 2017. The Third Party Administrator approved Grievant's short term disability from September 30, 2017 through October 23, 2017.

During the hearing, Grievant presented documents from several medical providers. A note dated August 18, 2017 written by Doctor V indicated Grievant was not to work from August 18, 2017 to September 1, 2017. A note from an LCSW indicated Grievant required leave from September 1, 2017 to September 21, 2017 for medical reasons. The LCSW wrote another note indicating Grievant required leave from September 22, 2017 to October 27, 2017 for medical reasons.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

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

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁴ Grievant was instructed by Ms. H to provide the Agency with her doctors excuses by October 5, 2017. Grievant failed to do so thereby justifying the issuance of a Group II Written Notice.

Grievant asserted she faxed doctor’s notes to the Agency. Grievant did not testify and could not establish the date she may have attempted to fax notes to the Agency. The Agency did not receive Grievant’s medical excuses until she submitted them as part of the hearing process.

The Agency asserted that Grievant should receive a Group III Written Notice for being absent in excess of three days without authorization. Grievant presented sufficient justification for her absences after August 17, 2017 as part of the hearing process. Grievant must be reinstated to her position. The Hearing Officer will not award back pay or benefits because Grievant was at fault for failing to provide medical documentation sooner and it does not appear she would have been working had she not been removed by the Agency.

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 Human Resource Management”⁵ 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 further 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 same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility.

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

⁵ Va. Code § 2.2-3005.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Office of Equal Employment and Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In re:

Case No: 11140-R

Reconsideration Decision Issued: March 30, 2018

RECONSIDERATION DECISION

The Office of Equal Employment and Dispute Resolution issued Ruling 2018-4678 on March 22, 2018 remanding the grievance to the Hearing Officer. The OEEDR Director wrote:

The agency's determination that the grievant was on unauthorized leave in excess of three days is consistent with policy and can support a Group III and termination under applicable policy. Accordingly, the matter must be remanded to the hearing officer.

Now that the OEEDR Director has directed the outcome of this grievance, there is no additional deliberation for the Hearing Officer to make.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the

circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer