

Issue: Group III Written Notice with Termination (failure to report to work without notice); Hearing Date: 04/05/13; Decision Issued: 04/24/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10046; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10046**

Hearing Date: April 5, 2013  
Decision Issued: April 24, 2013

#### **PROCEDURAL HISTORY**

On January 21, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal effective January 10, 2013 for failure to report for work three or more consecutive days without notification or authorization.

On February 19, 2013, Grievant timely filed a grievance to challenge the Agency's action. The grievance proceeded to hearing. On March 11, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 5, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency's 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 Behavioral Health and Developmental Services employed Grievant as a Direct Support Professional at one of its facilities. He was removed from employment effective January 10, 2013.

On November 20, 2012, Grievant applied for Family Medical Leave to take care of his mother who had a serious health condition and resided in another country. He asked that the leave begin December 3, 2012 and expected it to end January 1, 2013.<sup>1</sup> The HR Generalist provided Grievant with the necessary form for his mother's doctor to complete and fax back to the Agency.

On December 3, 2012, Grievant signed a statement acknowledging:

This letter is to inform you that 8 working days has been approved for you to travel out of the country as requested. These days are to give you ample time to complete and submit all required FMLA documentation to human resources for your FMLA approval (ASAP). Human resources as at now cannot approve your FMLA until all appropriate documentations are submitted. Failure to submit all necessary documentation for FMLA approval within this time frame may lead to excessive unscheduled leave.<sup>2</sup>

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<sup>1</sup> Agency Exhibit G.

<sup>2</sup> Agency Exhibit H.

On December 12, 2012, the HR Generalist received a fax from the doctor of Grievant's mother. The doctor submitted the Certificate of Health Care Provider for Family Member's Serious Health Condition form. The doctor had not fully completed the form and significant information was omitted preventing the Agency from approving Grievant's request for family medical leave. Later in the day, Grievant called and spoke with the HR Generalist. The HR Generalist told Grievant that the form was incomplete and that Grievant had until December 19, 2012 to have the doctor provide the completed form. The Agency mailed the incomplete form to Grievant at his address in America.

On December 17, 2012, the doctor faxed another form that was incomplete. On December 19, 2012, the Agency denied Grievant's request for family medical leave due to insufficient paperwork to substantiate the claim.

On December 28, 2012, Grievant called and spoke with the HR Generalist. Grievant wanted to know the status of his claim for family medical leave. The HR Generalist told Grievant the claim had been denied because the paperwork was not sufficient. The HR Generalist told Grievant that he was expected to report to work on January 1, 2013. Grievant told the HR Generalist he did not know when he would return to America. Grievant had no further telephone contact with the Agency.

On December 29, 2012, Grievant became sick while in the other country. He went to a hospital on January 4, 2013. His illness worsened and he went to another hospital on January 7, 2013. He was treated on an outpatient basis.

The Agency posted leave for Grievant through January 9, 2013. The leave was not approved but was posted in anticipation that it might be approved and so that Grievant would not enter docked status. He did not have sufficient leave balances to post leave beyond January 9, 2013.

On January 16, 2013, the Agency sent Grievant a certified letter advising him of its intent to issue him a Group III Written Notice for absence in excess of three days. He was advised to contact the Agency by January 23, 2013. The letter later was returned to the Agency for being unclaimed. On January 24, 2013, the Agency sent Grievant a letter removing him from employment.

Grievant returned to the United States on February 18, 2013. He went to the Agency's facility and inquired regarding his employment status.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal

disciplinary action.”<sup>3</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Absence in excess of three workdays is a Group III offense.<sup>4</sup> Grievant’s request for family medical leave was denied. He was instructed to report to work on January 1, 2013. He failed to report to work and was absent in excess of three workdays thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal 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 Human Resource Management ....”<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 disciplinary action was free of improper motive.

Grievant argued that he became sick on December 29, 2012 and, thus, his absence should be excused. Insufficient evidence was presented to show the date when Grievant’s sickness ended. Although Grievant entered the hospital on two occasions, he was treated on an outpatient basis. Grievant did not contact the Agency to advise that he was sick and unable to return. No credible evidence was presented to show that Grievant was so sick that he was unable to telephone the Agency. Indeed, Grievant claimed he made numerous attempts to telephone the Agency but did not receive an answer. This argument is untenable. There is no reason to believe that Agency employees were unavailable to contact during work hours for several weeks.<sup>6</sup>

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>4</sup> See, Attachment A, DHRM Policy 1.60.

<sup>5</sup> *Va. Code § 2.2-3005.*

<sup>6</sup> Although the dates are unclear, Grievant spoke with his Supervisor only two times while he was in the other country. The first time he spoke with the Supervisor, Grievant said he had faxed documents to the human resource department but had not heard a response from the HR staff. The Supervisor provided Grievant with the telephone number of the HR department so that Grievant could speak with an employee there. The second time, Grievant called the Supervisor at home and said that his FMLA request had

In addition, Grievant had been provided with the Agency's fax number. He could have faxed a letter to the Agency advising the Agency of his status.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to 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 with removal 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 14<sup>th</sup> St., 12<sup>th</sup> 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  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

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been denied. The Supervisor asked Grievant when he was coming home and Grievant said he did not know.

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.<sup>7</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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.