

Issue: LWOP; Hearing Date: 07/24/13; Decision Issued: 08/09/13; Agency: DOC;
AHO: Carl Wilson Schmidt, Esq.; Case No.10125; 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: 10125

Hearing Date: July 24, 2013
Decision Issued: August 2, 2013

PROCEDURAL HISTORY

On March 1, 2013, Grievant filed a grievance to challenge the Agency's docking of eight hours of pay. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 2, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 24, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether the Agency properly applied policy to dock Grievant's pay for being absent on January 7, 2013.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. 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 employs Grievant as a Corrections Officer at one of its facilities. Grievant had a pattern of being absent on days for which he had not obtained prior approval to be absent. He was counseled several times beginning in June 2010 regarding being absent from work on days he was scheduled and expected to work.

On September 5, 2012, Sergeant T gave Grievant a written counseling document describing the reason for counseling as:

Our records indicate that you have used 34.5 of your sick time without a doctor’s note. You have 24.0 sick time remaining and therefore you will have to bring in a doctor’s note in accordance with Operating Procedure 135.1 Standards of Conduct.

When Sergeant T met with Grievant to discuss the written counseling, Sergeant T informed Grievant to bring in a doctor’s note when Grievant was not at work as scheduled due to sickness. Sergeant T told Grievant that if he failed to do so, he could be dealt with under the Standards of Conduct.

On December 17, 2012, Grievant was placed on pre-disciplinary leave. Agency managers told Grievant that Facility investigators hoped to finish the investigation within 15 days. On December 17, 2012, Grievant submitted a leave request for January 4, 2013 through January 10, 2013. The Agency failed to timely respond to Grievant’s request and he expected the request to be granted.

On January 3, 2013, Ms. W called Grievant and told him to report to work on January 4, 2013. Grievant told Ms. W he was unable to report to work on that day because he was in another state. Ms. W asked Grievant when he could report to work. Grievant said he could report to work on Monday January 7, 2013 at 8 a.m.

On January 7, 2013 at 4 a.m., Grievant called the Facility and spoke with Captain H. Grievant told Captain H that he would not be at work that day because he was ill. Grievant said he would use sick leave or annual leave if he did not have a sufficient balance of sick leave. Captain H was not aware of Grievant’s vacation leave request. At some point, Captain W had approved Grievant’s leave request only for January 4,

2013 and January 5, 2013 because Grievant lacked sufficient leave to cover all of the days he had requested.

Grievant reported to work on January 8, 2013. He still had a cold and was coughing a lot. One of his co-workers questioned why he came to work to spread his germs given his level of sickness.

Grievant did not obtain a doctor's note to excuse his absence on January 7, 2013. The Agency docked him a day of pay because he was scheduled to work on January 7, 2013, failed to report to work, and failed to bring a doctor's excuse.

CONCLUSIONS OF POLICY

DOC Operating Procedure 110.1(B)(4) provides:

Notification of absence, or request for use of leave, does not mean that leave will be approved. The Organizational Unit Head or designee, reserves the right to approve all leave as deemed appropriate. In instances where leave is not approved, subsequent failure by the employee to report as required will be considered an unauthorized absence or absence without leave, and will result in loss of pay (Double XX) and treated as a violation of the Operating Procedure 135.1 Standards of Conduct.

Section E of the policy provides:

1. As with other types of leave, use of sick leave ... is granted at the discretion of management/supervisor.
2. Use of sick leave may require verification, at the discretion of the Organizational Unit Head or designee, by a treating physician. This verification must include the health care provider assessment that the employee is unable to work during a specific period (period of absence) and indicate a projected return to work date. The verification must also include the nature of the illness or injury that prohibits the employee from working (the physician is not required to identify the injury or illness but only the indicator/limitations that prohibit work).

The Agency had discretion under Operating Procedure 110.1 to require Grievant to bring a doctor's note explaining his absence in order for Grievant to use leave to cover an unexpected absence. Grievant was notified on September 5, 2012 that he was expected to bring a doctor's note every time he was absent from work due to illness. Grievant was sick on January 7, 2013 and could not report to work. He failed to bring a doctor's note to excuse his absence and, thus, his absence was not excused.

The Agency had the authority under Operating Procedure 110.1 to refrain from paying (pay docking) Grievant on January 7, 2013 even though Grievant may have had leave balances available to cover his absence.

Grievant argued that he should not have been docked pay on January 7, 2013 because he was sick that day and unable to report to work. There is little doubt that Grievant was ill on January 7, 2013 and likely unable to report to work because he had a cold. His illness was not of the type that would necessarily require being treated by a doctor on the day of the illness. Even though it might not have made sense¹ for Grievant to visit the doctor and obtain a doctor's note, the Agency had the discretion to require him to do so. For example, Grievant could have visited the doctor after January 7, 2013, informed the doctor that he was ill on January 7, 2013, and asked the doctor to write a note to the Agency stating that Grievant claimed to be ill on January 7, 2013.

Grievant argued that when he notified Captain H that he would not be reporting to work, Captain H did not inform him of his obligation to obtain a doctor's note. Although the Agency was required to inform Grievant of his obligation to present a doctor's excuse, the Agency met that notice requirement on September 5, 2012 when Sergeant T told Grievant he was obligated to bring a doctor's excuse to justify any unplanned absences due to illness.

Grievant has not presented sufficient evidence to show that the Agency misapplied or unfairly applied any State or Agency policy.

DECISION

For the reasons stated herein, the Grievant's request for relief must be **denied**.

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

¹ Under the Rules for Conducting Grievance hearings, the reasonableness of an established policy or procedure itself is presumed, and the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective he believes it may be.

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
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.²

[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

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.