

Issue: Group III Written Notice with Termination (absence in excess of 3 days without authorization); Hearing Date: 09/23/13; Decision Issued: 09/24/13; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10168; 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: 10168**

Hearing Date: September 23, 2013

Decision Issued: September 24, 2013

#### **PROCEDURAL HISTORY**

On July 11, 2013, Grievant was issued a Group III Written Notice of disciplinary action for absence in excess of three days without authorization.

On August 9, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 29, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 23, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Agency Party 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 Virginia Department of Transportation employed Grievant as a Program Administration Specialist II. Grievant had prior active disciplinary action. On April 26, 2013, Grievant received a Group I Written Notice for violation of attendance and tardiness standards.

On May 9, 2013, Grievant was placed on leave without pay status because she had exhausted all of her leave balances.

Grievant was absent from work on June 24, 2013 due to illness. Grievant was approved by the Supervisor to be away from work from June 24, 2013 through June 28, 2013. The Supervisor asked Grievant to bring a doctor’s excuse when she returned to work. The Supervisor told Grievant that she could apply for short term disability if she qualified. Grievant did not file an application for short term disability. Grievant did not return to work. Grievant did not bring a doctor’s excuse to excuse her absences on those days.

Grievant was scheduled to work on July 1, 2012, July 2, 2013, July 3, 2013, July 5, 2013, July 8, 2013, and July 9, 2013. Grievant did not report for work on these days.

On July 9, 2013, Grievant sent the Supervisor stating that “I started my treatment program plan, my follow-up visit is to check my progress [in] about 2 weeks, my Physician will make sure all necessary paperwork is completed upon my return.” After Grievant was removed from employment, she submitted notes from her doctor asking that she be excused from employment from July 2, 2013 until July 16, 2013 and July 16, 2013 through August 5, 2013.

Grievant did not appear at the hearing scheduled to begin at 11 a.m. At 7:39 a.m. on the day of the hearing, Grievant sent an email to the Hearing Officer with a copy to the Agency's Representative seeking a continuance. Grievant requested a continuance because she had been appointed by one of her professors to work on a project of significance to her. The Hearing Officer denied Grievant's request because of the short notice and the fact that Grievant's absence would not be a matter beyond her control.

## 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>1</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 without authorization" is a Group III offense.<sup>2</sup> Grievant was absent from work for more than three days. She did not receive approval from the Supervisor to be absent from work. 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. Accordingly, the Agency's removal of Grievant must be upheld.

Grievant did not appear at the hearing. Although there is some indication that her absences may have been medically related, without an explanation from Grievant in person and subject to cross-examination or other more detailed evidence directly from her medical providers, Grievant has not presented sufficient evidence for the Hearing Officer to determine why she was absent during those days and if her absences related to a serious health condition under the DHRM Family Medical Leave Policy.

*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>3</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

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> *Va. Code § 2.2-3005.*

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.

Grievant alleged the disciplinary action represented a form of retaliation for engaging in a protected activity. No evidence was presented to support this allegation.

## 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.

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>4</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>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.