

Issue: Group III Written Notice with Termination (absence in excess of 3 days without authorization); Hearing Date: 09/14/12; Decision Issued: 09/26/12; Agency: DBHDS; AHO: Ternon Galloway Lee, Esq.; Case No. 9894; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 10/11/12; EDR Ruling No. 2013-3454 issued 10/31/12; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 10/11/12; DHRM Ruling issued 11/14/12; Outcome: AHO’s decision affirmed.**

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 9894**

**Hearing Date: September 14, 2012**

**Decision Issued: September 26, 2012**

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### **SUMMARY OF DECISION**

The Agency had found Grievant was absent in excess of three days without prior authorization or a satisfactory reason, notification and proper authorization. The Agency then issued Grievant a Group III Written Notice and terminated her employment. The Hearing Officer (“HO”) has found Grievant engaged in the conduct alleged and therefore upholds the Agency’s Group III Written Notice with termination.

### **HISTORY**

On June 27, 2012, the Agency terminated Grievant for the reason noted above. On July 26, 2012, Grievant timely filed a dismissal grievance to challenge the Agency’s action. On August 13, 2012, the office of Employment Dispute Resolution (“EDR”) assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference (“PHC”) was held on August 24, 2012, and subsequently a scheduling order was issued.

The Hearing Officer scheduled the hearing for September 14, 2012, the first date available between the parties. Prior to commencing the hearing, the parties were given an opportunity to present matters of concern to the Hearing Officer. The Agency objected to Grievant’s proposed Exhibit 1, pages 5 through 8, and Grievant’s proposed Exhibit 2. The Agency contended both exhibits were not relevant. After hearing arguments, I overruled the Agency’s objection, having found the exhibits relevant. Exhibits admitted were Grievant’s Exhibits 1 through 3; Agency Exhibits 1 through 6, and 8 through 16<sup>1</sup>; and Hearing Officer Exhibits 1 through 12.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party. Each party presented a rebuttal witness.

During, the proceeding, the Grievant represented herself and the Agency was represented by its advocate.

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<sup>1</sup> The Agency asked to withdraw from consideration of admission its proposed Exhibit 7. The Agency’s request was granted over Grievant’s objection.

## **APPEARANCES**

Advocate for Agency  
Agency representative  
Witnesses for the Agency (5 witnesses, excluding the Agency's representative)  
Grievant (1 witness, including Grievant)

## **ISSUE**

Was the termination warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

1. Grievant had been employed as a registered nurse at the Agency since 2003. (Testimony of Grievant).
2. Grievant was injured on the job March 14, 2012. (Stipulation of parties). Grievant was then approved for Short Term Disability ("STD") from March 15, 2012, to May 27, 2012. (Testimony of HR Analyst). Grievant was made aware of her approval for STD until May 27, 2012, by correspondence sent from Unum<sup>2</sup> to the Grievant on or about May 2, 2012. (Testimonies of HR Director and Grievant).
3. The Agency's human resource analyst handles disability and Workers Compensation claims. Grievant provided disability slips to HR Analyst on or about March 15, 2012, and March 21, 2012.<sup>3</sup> (Testimony of Grievant; G Exh. 2). Grievant also

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<sup>2</sup> Unum is the third-party administrator for the Agency; that is, the company designated by the Virginia retirement system (VRS) to administer the daily operation of the Virginia Sickness and Disability Program. (A Exh. 14, p.4; Testimony of HR Director).

<sup>3</sup> A disability statement dated April 13, 2012, has been entered as evidence. Grievant contends she provided this statement to the Agency. Having considered all the evidence, I find the evidence is insufficient to determine whether Grievant provided the

provided HR Analyst with an update on her status in April 2012.<sup>4</sup> (Testimony of Grievant; Testimony of HR Analyst).

5. Grievant did not return to work after May 27, 2012. (Testimony of Supervisor).

6. On June 8, 2012, the Agency's HR Analyst placed a telephone call to Grievant and left a voice mail message asking Grievant for an update regarding her disability claim. The Agency took this action because it had not heard from Grievant since April 2012, had no information that Grievant's STD had been approved beyond May 27, 2012, and had been notified that Grievant's Workers Compensation had been denied. (Testimony of HR Analyst).

7. By June 15, 2012, Grievant had not responded to the telephone message left by the HR Analyst. Neither had the Agency received any information from Grievant regarding her medical status nor when she would return to work. As a result, Grievant's immediate supervisor instructed one of her subordinates, Agency Witness 3, to telephone Grievant and inquire about her status. Agency Witness 3 followed her supervisor's instructions and placed a telephone call to Grievant on June 15, 2012. After receiving her voicemail service, Agency Witness 3 left a message for Grievant asking Grievant to return the telephone call. By June 19, 2012, Grievant had not responded to the Agency's June 8 and 15, 2012 telephone calls. (Testimony of Agency Witness 3 and Grievant's supervisor; A Exh. 12).

8. As of June 19, 2012, Grievant had not been approved for Short Term Disability Benefits ("STD")<sup>5</sup> beyond May 27, 2012. Unum informed Grievant and the Agency of this decision by letter dated June 19, 2012. (A Exhs. 8,9; Testimony of Human Resource Analyst ("HR Analyst"). During the period May 27, 2012, to June 27, 2012, Grievant had not been approved for Workers Compensation/Workers Compensation Leave. Grievant had also exhausted her Family Medical Leave. It was therefore the Agency's stance that Grievant had no reason to be absent from work. (Testimony of HR Analyst; A Exhs. 8, 13).

9. On June 21, 2012, Grievant was mailed a due process letter from Agency Director

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Agency with this statement. Further, it is noted that even if this statement was provided to the Agency, it was over six weeks old at the time the Agency contends Grievant should have returned to work. (See G Exh. 2, p. 10 of 12).

<sup>4</sup> The evidence is insufficient to determine if this update was verbal or written.

<sup>5</sup> Agency policy 4.57 defines STD as disability benefits beginning upon the expiration of a 7 calendar day waiting period, and providing replacement income for a maximum of 125 work days at 100%, 80%, or 60% for defined periods of time based on an employee's total months of state service. Also, under the policy if the disability/illness is deemed catastrophic, the employee would receive 100% or 80% income replacement without a waiting period. (A Exh. 14, p. 4).

informing Grievant of the Agency's intent to issue Grievant a Group III Written Notice with termination for continued absence without authorization. The letter gave Grievant until noon on June 25, 2012, to provide a written response. (A Exh. 1).

10. After receiving the due process letter, on June 25, 2012, Grievant left a voice mail message for HR Analyst indicating she could not return to work until after a Workers Compensation Appeal Hearing in July. (Testimony of HR Analyst; A Exh. 2).

11. HR Analyst is not involved in the provision of due process to an employee facing possible discipline. (Testimony of HR Analyst).

12. On June 27, 2012, Grievant was issued a Group III Written Notice with termination. The notice describes the nature of the offense as set forth below:

"Absence in excess of three days without prior authorization or a satisfactory reason, notification and proper authorization." Employee failed to maintain contact regarding her status during and after her short term disability approval date. [Grievant] did not obtain authorization for her continued absence after the short term disability expired. She did not contact her supervisor or the human resources disability representative as required. She did not return calls made to her until due process was served. In addition, she has not presented a satisfactory reason for her continued absence.

(A Exh. 3).

At the time the Group III Written Notice was issued, Grievant had an active Group I Notice for attendance/tardiness. (A Exh. 4).

13. Grievant had previously been out on STD nine times between 2005 and 2011. (A Exh. 10; Testimonies of HR Director and Grievant).

14. During 8 of those times Grievant was on STD leave, Supervisor had been Grievant's immediate supervisor and Grievant had maintained communication with her superior and kept Supervisor informed of Grievant's status. (Testimony of Supervisor).

15. The HR Director has held her position with the Agency since 2009. From 2009 to Grievant's termination, HR Director had not been informed Grievant had difficulty following the procedures required of employees under the VSDP and STD. (Testimony of HR Director).

16. Agency Policy 4.57 sets forth the Agency's procedures regarding the administration of the Virginia Sickness and Disability Program ("VSDP"). (A Exh. 14, p. 1). Short Term Disability ("STD") is one employee benefit under the VSDP. (A Exh.

14, p. 11).

17. Under Policy 4.57, the Third Party Administrator (“TPA”) is the company designated by the Virginia Retirement System (“VRS”) to administer the daily operation of the VSDP. As mentioned before, Unum is the third party administrator for the Agency. (A Exh. 14, p. 4; Human Resource Analyst).

18. Under Policy 4.57, employees are required to comply with the VSDP. Requirements include but are not limited to contacting the TPA regarding an illness or injury and complying with return to work arrangements. (A Exh. 14, p. 7).

19. If an employee fails to comply with the requirements of Policy 4.57, the employee may be disciplined. Such discipline may include termination. (A Exh. 14, p. 7).

20. STD under the policy may cease when, among other reasons, an employee fails to cooperate or comply with the requirements of the VSDP. (A Exh. 14, p. 16).

21. Among other responsibilities, an employee is required to keep his/her supervisor informed regarding the disability claim and any changes that occur to the return to work date. As such, Grievant was required to keep her supervisor and the TPA informed of her disability claim and absences. She was also required to provide medical documentation to the TPA. (A Exh. 14, p. 26, bullet 9; Testimony of HR Director).

22. Under Standards of Conduct Policy 1.60, Grievant is required to report to work as scheduled and follow the Agency policies and procedures. (A Exh. 15, pp. 2, 3).

23. Absences in excess of three work days without authorization are a Group III offense. (A Exh. 15, pp. 9-10).

24. Grievant did not follow through on keeping her supervisor and Unum (the third party administrator) updated on her disability and return to work status. (Testimonies of HR Director, HR Analyst, Supervisor).

25. Grievant was issued a Group I Written Notice on March 21, 2012. The offense was described as “Attendance/Tardiness: Accumulation of unplanned leave (70.5 hours as of January 29, 2012).” (A Exh. 4). Grievant contends she grieved this written notice; however, she provided no documentation to support this assertion. I find the evidence is insufficient to show that Grievant grieved the referenced Group I Written Notice. Further, the Group I Written Notice is not before me for adjudication.

26. Grievant had medical insurance until June 30, 2012; that is, through the end of the month of her termination June 30, 2012. (Testimony of Grievant). Prior to Grievant’s insurance being terminated, she could have used it to obtain medical treatment/medical reports to support her claim for disability. (Testimony of HR Director).

27. After Grievant's termination she was found eligible for Workers Compensation. (G Exh. 2; A Exh. 9). Also after her termination Unum approved Grievant retroactively for STD through June 27, 2012. (Testimonies of Human Resource Analyst and Grievant).

### **DETERMINATIONS AND OPINION**

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance 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/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

*Va. Code* § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>6</sup>

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal 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.

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<sup>6</sup> Grievance Procedural Manual § 5.8

On June 27, 2012, Agency management issued Grievant a Group III Written Notice with termination for the reasons previously noted here. Accordingly, I examine the evidence to determine if the Agency has met its burden.

**I. Analysis of Issue before the Hearing Officer**

**Issue: Whether the discipline was warranted and appropriate under the circumstances?**

**A. Did the employee engage in the behavior described in the Group III Written Notice with removal and did that behavior constitute misconduct?**

In effect, the Written Notice asserts that Grievant was absent from work in excess of three days without prior authorization or notification/satisfactory reason. Under the VSDP, an employee is required to keep his/her supervisor informed regarding a STD claim and any changes that occur to the return to work date. So too must the employee provide medical documentation to the TPA to support a claim of disability. Further under the Standards of Conduct Policy 1.60, Grievant is required to report to work as scheduled and follow the Agency policies and procedures.

The evidence shows that Grievant knew or should have known that she had no reason to be absent from work after May 27, 2012. This is so because Grievant had received correspondence from the TPA on or about May 2, 2012, reflecting that her STD had only been approved through May 27, 2012. Further, the evidence reflects that from May 27, 2012, through some date after Grievant was terminated, neither Grievant nor the Agency had information indicating any extension of the STD. In addition, Grievant was aware that her Workers Compensation had been denied and she had exhausted any family medical leave.

What is more, the evidence demonstrates that even though Grievant failed to report to work after May 27, 2012, Grievant did not keep in contact with the Agency and provide the TPA documentation to support her disability claim. She also failed to obtain supervisory approval for her absences after May 27, 2012. I note, that despite the fact that Grievant was responsible for updating her supervisor/Agency on the status of her STD claim, it was the Agency that on two occasions tried to contact Grievant to be apprised about her disability claim and “return to work status.” This action was taken prior to the Agency contemplating disciplining Grievant. During these attempts, telephone messages inquiring about Grievant’s status/beckoning her to contact the Agency were left for Grievant. Grievant does not dispute she received these messages. Nor does she claim her situation/health precluded her from responding to the Agency. Further, the evidence shows Grievant has taken STD nine times before and was aware of her responsibilities. Yet, even though it was Grievant’s duty to communicate with the Agency, she ignored the calls.



Having considered the above, I find Grievant engaged in the conduct alleged, it violated agency policies, and constitutes misconduct.

**B. Was the discipline consistent with policy and law?**

As noted previously here, absence in excess of three work days without authorization is a Group III offense. Group III offenses, unless mitigated, normally result in termination. Although Grievant has worked for the Agency for over nine years, the Agency determined that the seriousness of the offense coupled with an active Group 1 Offense for attendance misconduct warranted removing Grievant. Considering the above, I find the Agency's discipline was consistent with policy and law.

**II. Mitigation.**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”<sup>7</sup> EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>8</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>9</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

I have found that Grievant engaged in the behavior described in the Written

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<sup>7</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>8</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>9</sup> *Rules for Conducting Grievance Hearings* VI(B)

Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy. Next a focus on whether the discipline was reasonable is undertaken.

Grievant in effect contends she was unable to provide documentation of her condition to the TPA, Unum. She contends this prohibition existed because she was denied Workers Compensation. Thus, the Workers Compensation physician would not provide services to her. Grievant contends she did not have the alternative of receiving medical services by using her own health insurance. Also, Grievant asserts the job related injury she incurred on March 14, 2012, was due to poor management. Further, Grievant notes that she has had two bouts with cancer, has incurred other injuries on the job during her employment term with the Agency, and was discriminated against.<sup>10</sup> Grievant also argues that because she was eventually approved for Workers Compensation and approved retroactively for STD through June 27, 2012, her discipline should be reversed.

I have considered Grievant's arguments and all evidence submitted to support them, as well as all other evidence. Having done so, I am not convinced the Agency acted unreasonably. Of note, Grievant engaged in a Group III Offense. Further, Grievant had an active Group I Offense which also involved absences from work.

I also recognize that, the Agency has a valid basis for requiring employees to keep it informed about the status of a disability claim and return to work date. The Agency has to be able to project what employees it needs to accomplish its work. Without knowing if an employee will report to work, the Agency is hampered from adequately staffing to meet its needs, to include the need to care for the mentally ill, a vulnerable population. Grievant was on notice that her STD leave expired on May 27, 2012, and she was expected to return to work. For a month she failed to report for work. But for a telephone message left with HR Analyst on June 25, 2012, stating Grievant could/would not come back to work until after her Workers Compensation hearing in July, the Grievant did not communicate with her employer. Although Grievant knew what was required of her with respect to her STD claim from her past conduct, she elected to not keep the Agency informed and failed to report to work for practically a month.

### **DECISION**

Hence for reasons noted here, the Agency's discipline is upheld.

### **APPEAL RIGHTS**

You may file an **administrative review** requests within **15 calendar days** from the date the decision was issued, if any of the following apply:

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<sup>10</sup> I find no discrimination.

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  
Departmental of Human Resource Management  
101 N. 14th 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 N. 14th 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>11</sup>

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<sup>11</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

Entered this 26<sup>th</sup> day of September, 2012

\_\_\_\_\_  
Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate  
Agency Representative  
Grievant  
Senior Consultant, Office of EDR



# COMMONWEALTH of VIRGINIA

SARA REDDING WILSON  
DIRECTOR

## *Department of Human Resource Management*

101 N. 14<sup>TH</sup> STREET  
JAMES MONROE BUILDING, 12<sup>TH</sup> FLOOR  
RICHMOND, VIRGINIA 23219  
(804) 225-2131  
(TTY) 711

### POLICY RULING OF THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT

In the Matter of  
The Department of Behavioral Health and  
Developmental Services

November 14, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9894. For the reasons stated below, the Department of Human Resource Management (DHRM) will not interfere with the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed the following as a summary of the decision in this case:

The Agency had found Grievant was absent in excess of three days without prior authorization or a satisfactory reason, notification and proper authorization. The Agency then issued Grievant a Group III Written Notice and terminated her employment. The Hearing Officer ("HO") has found Grievant engaged in the conduct alleged and therefore upholds the Agency's Group III Written Notice with termination.

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The relevant facts of this case are as follows:

After reviewing all the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

1. Grievant had been employed as a registered nurse at the Agency since 2003. (Testimony of Grievant).
2. Grievant was injured on the job March 14, 2012. (Stipulation of parties). Grievant was then approved for Short Term Disability ("STD") from March 15, 2012, to May 27, 2012. (Testimony of HR Analyst). Grievant was made aware of her approval for STD until May 27, 2012, by correspondence sent from Unum to the Grievant on or about May 2, 2012. (Testimonies of HR Director and Grievant).

3. The Agency's human resource analyst handles disability and Worker's Compensation claims. Grievant provided disability slips to HR Analyst on or about March 15, 2012, and March 21, 2012. (Testimony of Grievant; G Exh. 2). Grievant also provided HR Analyst with an update on her status in April 2012. (Testimony of Grievant; Testimony of HR Analyst).
5. Grievant did not return to work after May 27, 2012. (Testimony of Supervisor).
6. On June 8, 2012, the Agency's HR Analyst placed a telephone call to Grievant and left a voice mail message asking Grievant for an update regarding her disability claim. The Agency took this action because it had not heard from Grievant since April 2012, had no information that Grievant's STD had been approved beyond May 27, 2012, and had been notified that Grievant's Workers Compensation had been denied. (Testimony of HR Analyst).
7. By June 15, 2012, Grievant had not responded to the telephone message left by the HR Analyst. Neither had the Agency received any information from Grievant regarding her medical status nor when she would return to work. As a result, Grievant's immediate supervisor instructed one of her subordinates, Agency Witness 3, to telephone Grievant and inquire about her status. Agency Witness 3 followed her supervisor's instructions and placed a telephone call to Grievant on June 15, 2012. After receiving her voicemail service, Agency Witness 3 left a message for Grievant asking Grievant to return the telephone call. By June 19, 2012, Grievant had not responded to the Agency's June 8 and 15, 2012 telephone calls. (Testimony of Agency Witness 3 and Grievant's supervisor; A Exh. 12).
8. As of June 19, 2012, Grievant had not been approved for Short Term Disability Benefits ("STD") beyond May 27, 2012. Unum informed Grievant and the Agency of this decision by letter dated June 19, 2012. (A Exhs. 8, 9; Testimony of Human Resource Analyst ("HR Analyst"). During the period May 27, 2012, to June 27, 2012, Grievant had not been approved for Worker's Compensation/Worker's Compensation Leave. Grievant had also exhausted her Family Medical Leave. It was therefore the Agency's stance that Grievant had no reason to be absent from work. (Testimony of HR Analyst; A Exhs. 8, 13).
9. On June 21, 2012, Grievant was mailed a due process letter from Agency Director informing Grievant of the Agency's intent to issue Grievant a Group III Written Notice with termination for continued absence without authorization. The letter gave Grievant until noon on June 25, 2012, to provide a written response. (A Exh. 1).
10. After receiving the due process letter, on June 25, 2012, Grievant left a voice mail message for HR Analyst indicating she could not return to work until after a Workers Compensation Appeal Hearing in July. (Testimony of HR Analyst; A Exh. 2).
11. HR Analyst is not involved in the provision of due process to an employee facing possible discipline. (Testimony of HR Analyst).

12. On June 27, 2012, Grievant was issued a Group III Written Notice with termination. The notice describes the nature of the offense as set forth below:

“Absence in excess of three days without prior authorization or a satisfactory reason, notification and proper authorization.” Employee failed to maintain contact regarding her status during and after her short term disability approval date. [Grievant] did not obtain authorization for her continued absence after the short term disability expired. She did not contact her supervisor or the human resources disability representative as required. She did not return calls made to her until due process was served. In addition, she has not presented a satisfactory reason for her continued absence. (A Exh. 3).

At the time the Group III Written Notice was issued, Grievant had an active Group I Notice for attendance/tardiness. (A Exh. 4).

13. Grievant had previously been out on STD nine times between 2005 and 2011. (A Exh. 10; Testimonies of HR Director and Grievant).

14. During 8 of those times Grievant was on STD leave, Supervisor had been Grievant’s immediate supervisor and Grievant had maintained communication with her superior and kept Supervisor informed of Grievant’s status. (Testimony of Supervisor).

15. The HR Director has held her position with the Agency since 2009. From 2009 to Grievant’s termination, HR Director had not been informed Grievant had difficulty following the procedures required of employees under the VSDP and STD. (Testimony of HR Director).

16. Agency Policy 4.57 sets forth the Agency’s procedures regarding the administration of the Virginia Sickness and Disability Program (“VSDP”). (A Exh. 14, p. 1). Short Term Disability (“STD”) is one employee benefit under the VSDP. (A Exh. 14, p. 11).

17. Under Policy 4.57, the Third Party Administrator (“TPA”) is the company designated by the Virginia Retirement System (“VRS”) to administer the daily operation of the VSDP. As mentioned before, Unum is the third party administrator for the Agency. (A Exh. 14, p. 4; Human Resource Analyst).

18. Under Policy 4.57, employees are required to comply with the VSDP. Requirements include but are not limited to contacting the TP A regarding an illness or injury and complying with return to work arrangements. (A Exh. 14, p.7).

19. If an employee fails to comply with the requirements of Policy 4.57, the employee may be disciplined. Such discipline may include termination. (A Exh. 14, p. 7).

20. STD under the policy may cease when, among other reasons, an employee fails to cooperate or comply with the requirements of the VSDP. (A Exh. 14, p. 16).

21. Among other responsibilities, an employee is required to keep his/her supervisor informed regarding the disability claim and any changes that occur to the return to work date. As such, Grievant was required to keep her supervisor and the TPA informed of her disability claim and absences. She was also required to provide medical documentation to the TPA. (A Exh. 14, p. 26, bullet 9; Testimony of HR Director).

22. Under Standards of Conduct Policy 1.60, Grievant is required to report to work as scheduled and follow the Agency policies and procedures. (A Exh. 15, pp. 2, 3).

23. Absences in excess of three work days without authorization are a Group III offense. (A Exh. 15, pp. 9-10).

24. Grievant did not follow through on keeping her supervisor and Unum (the third party administrator) updated on her disability and return to work status. (Testimonies of HR Director, HR Analyst, Supervisor).

25. Grievant was issued a Group I Written Notice on March 21, 2012. The offense was described as "Attendance/Tardiness: Accumulation of unplanned leave (70.5 hours as of January 29, 2012)." (A Exh. 4). Grievant contends she grieved this written notice; however, she provided no documentation to support this assertion. I find the evidence is insufficient to show that Grievant grieved the referenced Group I Written Notice. Further, the Group I Written Notice is not before me for adjudication.

26. Grievant had medical insurance until June 30, 2012; that is, through the end of the month of her termination June 30, 2012. (Testimony of Grievant). Prior to Grievant's insurance being terminated, she could have used it to obtain medical treatment/medical reports to support her claim for disability. (Testimony of HR Director).

27. After Grievant's termination, she was found eligible for Worker's Compensation. (A Exh. 2; A Exh. 9). Also after her termination, Unum approved Grievant retroactively for STD through June 27, 2012. (Testimonies of Human Resource Analyst and Grievant).

Based on his assessment of the evidence, the hearing officer upheld the agency's disciplinary action, including the termination.

## **DISCUSSION**

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, as related to policy, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority regarding policy issues, however, is limited to directing the hearing officer to revise the decision to conform



to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal 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.

In her appeal to this Agency, the grievant listed the following to support her request to have the written notices reversed and her reinstatement:

1. Termination was based on grievant's failure to return to work on May 27, 2012.
2. Grievant was not released to return to work by her workmen's compensation physician.
3. Grievant was unable to receive release to return to work because treatment was not provided.
4. Grievant was not able to receive approval from her insurance company for physical therapy because the injury was work related.
5. Grievant was refused any medical care following May 1<sup>st</sup> by workmen's compensation physician due to pending hearing and payment by workmen's compensation company (MCI).
6. Grievant was denied STD from Unum and MCI due to refusal of MCI to provide orthopedic referral approval and physical therapy ordered.
7. Grievant was approved for STD by Unum and Workmen's Compensation following the hearing by Workmen's Compensation Commission on July 17<sup>th</sup>.
8. Grievant was terminated on June 27, 2012 under a protected act.
9. Policy requires medical clearance to return to work.
10. Grievant maintained contact with Unum, MCI, Kerrie Cleaver at ESH, and Tidewater Orthopedic.
11. Grievant was constructively discharged under a protected act and grouped on March 21, 2012 following her injury on March 14<sup>th</sup> when she was removed from work by her Physician, and again on June 27<sup>th</sup> for her inability to return to ESH on May 27<sup>th</sup> without work release.
12. Grievant continues to receive medical care from approved workmen's compensation orthopedic physician with pending surgery as a result of this work related injury.

In the instant case, it appears that, while she may have had legitimate reasons to be absent from work, the grievant was absent for more than three consecutive days without either contacting or providing a reason to her employer regarding her absence. Moreover, the evidence supports that her agency made several attempts to contact her by telephone during her absence but she failed to return the calls. According to DHRM Policy No. 1.60, absence in excess of three

days without authorization may be punishable by issuance of a Group III Written Notice with dismissal. It appears the agency exercised that option and there was no misinterpretation of policy by the hearing officer in making his decision. Therefore, this Agency will not disturb this hearing decision.

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