COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11546

Hearing Date: August 28, 2020
Decision Issued: September 17, 2020

PROCEDURAL HISTORY

On May 8, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three days without notification or documentation.

On June 3, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On June 15, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 2020, a hearing was held by audio conference.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. She had been employed by the Agency since January 2018. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was absent from work after February 8, 2020. On March 9, 2020, Grievant applied to the Third Party Administrator (TPA) for Short-Term Disability benefits (STD) from January 16, 2020 through April 15, 2020. The Third Party Administrator granted Grievant's request for Short-Term Disability and approved Grievant's absence through March 12, 2020. Grievant's claim for March 13, 2020 through April 15, 2020 was denied by the TPA because it lacked sufficient documents to justify the claim.

On April 8, 2020, the Personnel Analyst sent Grievant a letter advising her that the TPA informed the Agency that Grievant's STD claim was denied from March 13, 2020 through April 15, 2020. She asked Grievant to provide certification from a health provider of Grievant's need to be absent from work. She advised Grievant that Grievant met the eligibility requirement for FMLA leave and enclosed a Certificate of Health Care Provider form to be completed and returned to the Agency in 15 days. Grievant was advised that her absence would be considered unapproved if Grievant did not return the form or obtain approval for STD from the TPA. Grievant was advised her unapproved absences could result in removal from employment.

Grievant did not return the FMLA Certificate of Health Care form.

On April 9, 2020, Grievant sent the Personnel Assistant an email indicating her medical provider had informed the TPA that the medical provider was “keeping me out of work until June 1. I will be appealing the FMLA denial.”[1]

On April 9, 2020, Grievant’s medical provider drafted a note addressed to the TPA indicating, “I would like to keep [Grievant] out of work until June 1, 2020.”[2]

On May 4, 2020, Grievant sent the Human Resource Officer an email indicating Grievant was told by her medical provider that her absence would be extended to June 1. Grievant wrote that she had missed three calls from Facility staff[3] and that she did not have voicemail set up on her cell phone. She asked for advice on how to continue with her employment.

On May 6, 2020, the Personnel Analyst sent Grievant an email indicating the Agency would go forward with disciplinary action since Grievant had not provided sufficient documentation to justify her absences after March 12, 2020.

Grievant was removed from employment effective May 8, 2020. As of May 8, 2020, the TPA had not gotten an appeal request from Grievant.

On May 11, 2020, the TPA received Grievant’s request for appeal of its claim denial.

On May 13, 2020, the TPA notified the Agency it had received an appeal request from Grievant for the denial of benefits through April 15, 2020.

On June 2, 2020, the TPA approved Grievant’s claim for benefits from March 13, 2020 through May 7, 2020. The TPA did not approve Grievant’s claim beyond May 7, 2020 because Grievant was removed from employment on May 8, 2020.

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.” 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

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[1] Agency Exhibit p. 20.

[2] It is unclear if or when the note was given to the TPA.

[3] An Agency employee called Grievant on April 9, 2020, April 23, 2020, and April 27, 2020.

removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[4]

DHRM Policy 4.57 governs Virginia Sickness and Disability. The policy provides:

> Employees who fail to comply with VSDP program requirements such as contacting the TPA regarding an illness or injury, compliance with return to work arrangements, or completing and returning LTD information to the TPA may have their benefit reduced or terminated and/or may be subject to disciplinary action up to and including termination of employment.

"Absence in excess of three days without proper authorization or a satisfactory reason" is a Group III offense.[5] As of May 8, 2020, Grievant had been absent from work in excess of three days from March 13, 2020. 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 decision to remove Grievant must be upheld.

Grievant argued she should not have been disciplined because she filed an appeal of the TPA's denial. Grievant did not present any witness testimony to support her arguments. Her exhibits standing alone were not sufficient to support her arguments. Grievant did not present adequate evidence to explain her failure to timely respond to the TPA's denial. She had not appealed the TPA decision prior to her removal.

Grievant argued that the Agency took disciplinary action against her as a form of retaliation. She did not present sufficient evidence to support this assertion. It appears the Agency took disciplinary action against Grievant because Grievant was absent from work in excess of three workdays.

If the evidence of this case is measured at the point in time of the August 28, 2020 hearing, there is sufficient evidence to justify Grievant's absence through May 7, 2020. After Grievant's removal, the TPA extended Grievant's STD benefits. In a previous EDR ruling, EDR concluded the relevant evidence is the evidence that existed at the time of the Agency's disciplinary action and not subsequent evidence. When considering the evidence as it existed on May 8, 2020, the Agency has presented sufficient evidence to support its issuance of a Group III Written Notice with removal.

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

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[4] See, Virginia Department of Corrections Operating Procedure 135.1.

[5] See DOC Operating Procedure 135.1(E)(2)(a).

Management ….”[6] 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 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 request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 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.

[6] Va. Code § 2.2-3005.

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 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

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