

Issue: Group III Written Notice with Termination (failure to report to work without notice); Hearing Date: 10/17/16; Decision Issued: 11/02/16; Agency: DARS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10872; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 11/15/16; EDR Ruling No. 2017-4448 issued 12/15/16; Outcome: AHO’s decision affirmed;** **Administrative Review: DHRM Ruling Request received 11/15/16; DHRM Ruling issued 12/21/16; Outcome: AHO’s decision affirmed;** **Judicial Review: Appealed to Henrico County Circuit Court (01/03/17); Outcome pending.**



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 10872**

Hearing Date: October 17, 2016  
Decision Issued: November 2, 2016

**PROCEDURAL HISTORY**

Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report to work without notice.

On September 1, 2016, Grievant filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 19, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 17, 2016, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency 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 Aging and Rehabilitative Services employed Grievant as an Adjudicator. She had been employed by the Agency for approximately 15 years prior to her removal. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's husband required surgery in June 2016 and Grievant was unsure how long it would take for him to recover.

On May 5, 2016, Grievant asked the Regional Director for an extended leave of absence. On May 6, 2016, the Regional Director approved Grievant's request for leave from June 6, 2016 to June 10, 2016, but denied Grievant's request for June 13, 2016 to August 31, 2016. The Regional Director met with Grievant to tell her of his decision.

On May 10, 2016, Grievant sent an email to Benefits Manager, Ms. T, stating:

I have been denied LWOP by my agency administration for 6/10/16-8/31/16, however, I also qualify for FMLA. Please provide me w/ information regarding FMLA, to cover my upcoming leave while I submit a grievance for denial of LWOP.

On May 11, 2016, Ms. T responded with an email explaining the FMLA eligibility and added:

If the request is related to a family member, the Attached Request for Family or Medical Leave and the Certification of Health Care Provider for Family Member's Serious Health Condition must be completed. You may return these forms to me for review. Once the documentation is reviewed, you will be sent a letter regarding the approval status of the request.

In addition to the above forms, I am attaching the FMLA Policy and FMLA Fact Sheet to this email. Both of which can provide additional information for you.

On May 11, 2016, Grievant replied:

Thanks for the information. I am requesting the leave for care of my spouse. I will submit the required docs to you asap.<sup>1</sup>

Grievant did not have the forms completed and did not submit any documents to the Agency regarding care of her spouse.

On May 13, 2016, Grievant filed a grievance challenging the Agency's denial of her request for leave without pay.

On June 3, 2016, Ms. J sent Grievant an email stating:

I just wanted to give you status of your leave request before you leave today. To date, I approved annual leave from June 6 – June 10, 2016. After June 10, 2016, you will be on unapproved LWOP pending your grievance. A few weeks ago, [Regional Director] sent you an email regarding taking FMLA but you decided to take LWOP instead however, I have not received anything regarding approved LWOP. As your supervisor, I'm just a little concern[ed] if you do not return to work after your annual leave the possible consequences of being out on unapproved leave.<sup>2</sup>

On June 14, 2016, the Supervisor called Grievant's personal telephone number and left a message asking about Grievant's work status. The Supervisor told Grievant that Grievant's leave was not approved and asked when Grievant was coming back to work. Grievant called the Supervisor on June 15, 2016. Grievant left a message saying she was in another city taking care of her mother. Grievant did not say she would be reporting for work.

On June 22, 2016, the Office of Employment Dispute Resolution issued Ruling 2016-4370. This Ruling declined to assign a hearing officer to review the grievance and

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

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

concluded, “the agency’s decision to deny her request for LWOP was wholly within management’s discretion and does not appear to be a misapplication or unfair application of policy.” The Office of Employment Dispute Resolution sent the Ruling to Grievant’s correct home address.

Grievant was scheduled to work on June 13, 2016 and thereafter. Grievant did not report to work.

On or about August 22, 2016, the Supervisor spoke with Grievant and told Grievant she had been terminated and could come to get her personal belongings. Grievant did not know she had been removed from employment. The Supervisor told Grievant to contact the Human Resource division. Grievant did so.

On August 22, 2016, Grievant signed a Certification of Health Care Provider for Family Member’s Serious Health Condition form and submitted to a Medical Doctor. Grievant wrote that she would be providing care for her mother. On August 23, 2016, the Medical Doctor completed the Form. On August 24, 2016, the forms were faxed to the Agency. Grievant called the Supervisor to confirm her receipt of the documents. On September 1, 2016, the Agency received the completed Form by mail.

Grievant reported to work on September 1, 2016. She was referred to the Agency’s Human Resource Department. Grievant was not reinstated.

### **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 days without authorization” is a Group III Offense. Once Grievant’s grievance concluded, she knew or should have known that she was obligated to report to work. Grievant did not report to work after June 22, 2016 when the ruling was issued and, thus, was absent in excess of three days without authorization. The Agency’s issuance to the Grievant of a Group III Written Notice must be upheld. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

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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.

Grievant argued that the Agency should have granted her request for unconditional leave without pay status. Under the Agency's Policy 17, Leave Without Pay:

may be granted only with the prior approval of the appropriate Division Director. Non-emergency requests for leave without pay should be in memo form and state the reason for the request and the supervisor's support of this leave. A copy of the Division Director's approval of non-emergency leave without pay should be attached to the Leave Activity Report.

The Agency had discretion as to whether to grant unconditional leave without pay. The Agency refused to grant Grievant's request because of the Agency's business and staffing needs. The fact that the Agency may have granted Grievant's prior requests does not bind the Agency to grant subsequent requests.

Grievant asserted her absences were protected under Family Medical Leave policy. DHRM Policy 4.20, Family Medical Leave provides:

An employee should submit a written request for family and medical leave at least 30 calendar days prior to the anticipated leave begin date or as soon as practicable in unforeseen circumstances. If an employee is not able to provide notice because of an illness or injury, notice may be given by a family member or a spokesperson as soon as practicable. Note: An employee must comply with agency leave request procedures, absent unusual circumstances. Failure to do so may be grounds for delaying or denying an employee's request of FMLA qualifying leave.

Grievant was advised of her right to request Family Medical Leave benefits for her spouse. Grievant did not attempt to have a medical professional complete the forms and did not submit any forms to the Agency regarding receiving FMLA for her spouse. At the time Grievant submitted her FMLA paperwork in August 2016, she already had been absent in excess of four days and informed that she had been removed by the Agency. She was not protected by Family Medical Leave status.

*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>4</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-

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<sup>4</sup> Va. Code § 2.2-3005.

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.

The Agency initially denied Grievant procedural due process to remove her. The Agency sent the Due Process Notice of Failure to Report to Work to the wrong address. Grievant did not reply because she did not receive the document. The Agency drafted a Written Notice and placed it in its files without any attempt to send the Written Notice to Grievant. The Agency's failure to issue the Written Notice was cured when the Agency informed Grievant on August 22, 2016 that she had been removed from employment. The Agency's failure to provide Grievant with pre-termination due process is cured by the hearing process. Grievant could present to the Hearing Officer any defenses she would have raised with the Agency prior to her removal.

## 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>5</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>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.