



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11400**

Hearing Date: October 24, 2019  
Decision Issued: November 13, 2019

#### **PROCEDURAL HISTORY**

On April 5, 2019, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On April 24, 2019, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 29, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 24, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
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. 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 employs Grievant as a Corrections Officer at one of its facilities. Grievant began working for the Agency in 2007. His work performance was otherwise satisfactory to the Agency.

Grievant's Conditions of Employment For All Employees stated:

Employees may be temporarily assigned to other institutions in the State should the need arise for their services at another state agency.<sup>1</sup>

The Agency experienced a staff shortage at Facility A. Agency managers decided to assign staff from Grievant's Facility to Facility A to work one week shifts. Grievant's Facility maintained a "draft list" from which Facility managers selected employees to be assigned to work at Facility A. Employees were placed at the top of the draft list on a rotating basis.

Grievant's father had a quarterly Cardiac pacemaker appointment at a Hospital. His appointment was scheduled for March 7, 2019. Grievant planned to take his father

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<sup>1</sup> Agency Exhibit 5. The Agency sometimes refers to institutions as separate state agencies even though they are part of the Department of Corrections.

to the Hospital as was his practice. Grievant was not scheduled to work on March 7, 2019.

While at the Facility, the Lieutenant called Grievant on the telephone. Grievant was also at the Facility. The Lieutenant told Grievant that his name was at the top of the draft list and that he had to go to Facility A for the week of March 4, 2019 through March 10, 2019. Grievant told the Lieutenant he could not go to Facility A. The Lieutenant spoke with his supervisor and after that conversation, the Lieutenant asked Grievant to write an email explaining why he could not go to Facility A.

On February 24, 2019, Grievant wrote an email to the Warden:

Sorry to bother you in this matter but I have tried to explain to my supervisors that I am not able to go to [Facility A] to work for a week. I am presently occupied with my DRs appointments which are many, my wife's appointments which are many .... I am the only person who can take my father to his appointment at [Hospital]. His assisted living [name] will only take him locally. He has fallen several times this year and has broken several bones. \*\*\* As you can hopefully see I have far too many things going on at home and therefore can't and won't go to [Facility A] if they persist in trying to threaten me with a group. I will gladly work over when I can but locally and help out any way I can but there is far too much going on in my life to add the stress of going out of town for a long period of time. I will gladly meet with whomever this concerns. Thank you.<sup>2</sup>

Grievant did not report to work at Facility A for the week of March 4, 2019 through March 10, 2019.

### **CONCLUSIONS OF POLICY**

Once an employee places an agency on notice of the need for Family Medical Leave, the agency may not take disciplinary action against that employee for exercising his or her right to request and take Family Medical Leave.

State employees are permitted to take Family Medical Leave as authorized by DHRM Policy 4.20, Family Medical Leave.<sup>3</sup> Under this policy, an employee may take leave:

To care for the spouse, son, daughter or parent with a serious health condition.

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<sup>2</sup> Agency Exhibit 1.

<sup>3</sup> The Agency did not present sufficient evidence to show that Grievant was not eligible for Family Medical Leave.

A serious health condition is defined as:

Serious Health Condition - An illness, injury, impairment or physical or mental condition that involves inpatient care or either:

1. A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:
  - Treatment two or more times within 30 days by or under the supervision of a health care provider the first of which must occur within seven days of the first day of incapacity; or
  - One treatment by a health care provider, within the first seven days of incapacity, with a continuing regimen of treatment; or

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3. Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visit to a health care provider at least twice a year, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or
4. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or
5. Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

Code of Federal Regulations § 825.303 provides:

*(a) Timing of notice.* When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. \*\*\*

*(b) Content of notice.* An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that ... the employee's family member is under the continuing care of a health care provider. \*\*\* that the requested leave is for one of the reasons listed in § 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities \*\*\* ; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA.

Code of Federal Regulations § 825.124 provides:

(a) The medical certification provision that an employee is needed to care for a family member ... encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport<sup>4</sup> himself or herself to the doctor. \*\*\*

(b) The term also includes situations where the employee may be needed ... to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member ....

Grievant provided the Agency with adequate notice of his need for Family Medical Leave on March 7, 2019. It appears that Grievant's father had a serious health condition. Grievant notified the Agency that he needed to transport his father to a hospital for a cardiac care appointment relating to a pacemaker. Grievant notified the Agency that his father was unable to transport himself to the appointment. It was not necessary for Grievant to show he was the only person who could transport his father to the Hospital. Covered Family Medical Leave includes transporting a parent to medical appointments to address a serious health condition. It was not necessary for Grievant to use the words "Family Medical Leave" in order for his request to be considered a request for Family Medical Leave. It was not necessary for Grievant to submit "FMLA paperwork" to notify the Agency of his request for leave. The Agency failed to make further review of Grievant's request to challenge the substance of his request.

By expecting Grievant to report to Facility A, the Agency, in essence, denied Grievant's request for Family Medical Leave without a basis to do so. The Agency was not authorized to take disciplinary action against Grievant after Grievant exercised his right to Family Medical Leave. The disciplinary action must be reversed.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

## APPEAL RIGHTS

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<sup>4</sup> "An employee may be needed to provide care to the family member, for example when the family member is unable to care for his or her own medical, safety or other needs, because of the serious health condition or needs help in being transported to the doctor." See Wage & Hour Div., U.S. Dep't of Labor, Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act, <https://www.dol.gov/whd/regs/compliance/whdfs28f.pdf> (July 2015).

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 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 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.

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