COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11438

Hearing Date: February 27, 2020
Decision Issued: March 18, 2020

PROCEDURAL HISTORY

On September 6, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three days without authorization.

On October 4, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 16, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 27, 2020, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
University Party Designee
University's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the University'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 University 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:

George Mason University employed Grievant as a Commissioning Engineer. He began working for the University in March 2010. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was covered by the Virginia Sickness and Disability Program. Grievant stopped working and entered short-term disability status.

Grievant suffered from sleep apnea and depression. His depression "kicked in" in June 2018 and he was diagnosed with depression. Grievant used a machine to treat his sleep apnea.

Dr. C completed a Return to Work Certification on August 5, 2019 and sent it to the University. Dr. C wrote that Grievant was under his care from June 19, 2019 to July 23, 2019 and "will be able to return to work on 8/5/2019." Dr. C circled the answer "No" in response to the question, "Are there any job modifications required?"[1]

On August 6, 2019, the Employee Relations Consultant sent Grievant an email:

[1] Agency Exhibit 2.

> I understand that since filing a claim to evoke the LTD benefit, you have since obtained a return to work dated 8/5/19. We will need to meet with you in Human Resources prior to any return to work. I am available tomorrow anytime between 8 a.m. and 2 p.m.[2]

On August 7, 2019, the Employee Relations Consultant sent Grievant an email:

> This is to follow up on yesterday's email. You have been cleared to return to work however we have not heard from you. Please contact me regarding a time to meet and discuss your employment status.[3]

On August 8, 2019, Grievant replied to the Employee Relations Consultant that his primary care physician had not returned the long-term disability paperwork or the return to work information. He said he would not be available to meet for the rest of the week. He inquired about coverage under FMLA.

On August 8, 2019, the Employee Relations Consultant sent Grievant an email stating:

> As of now, you have exhausted your FMLA benefits and all are no longer in an approved leave status. Your FMLA expired in April 2019 and your VSDP leave benefit expired on July 30, 2019. As of August 5, 2019, you were cleared to return to work. Please see the attached documentation that was sent to [Third Party Administrator] and Human Resources on your behalf. Given the fact that you were cleared for full duty, the expectation was for you to return to work on August 6, 2019. Your failure to report to work as a violation of DHRM policy 1.60 Standards of Conduct "Absence in excess of three work days without authorization" and "Inability to meet working conditions". If you are interested in resuming your employment with GMU, please plan to return to work tomorrow August 9, 2019 and meet in Human Resource [location]. If you simply would like to discuss your current status, I am available to meet tomorrow for that as well.[4]

On August 9, 2019, Grievant's doctor, Dr. C, faxed[5] an Attending Physician's Statement Long Term Disability to the Third Party Administrator as part of Grievant's application for long-term disability. Dr. C wrote that Grievant was "feeling depressed, fatigued, lack of energy, inability to sleep, difficulty with

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[2] Agency Exhibit 4.

[3] Agency Exhibit 4.

[4] Agency Exhibit 6.

[5] The document was faxed again on August 19, 2019.

staying focused, short term memory, attentiveness, following direction." Dr. C concluded Grievant was totally disabled.

On August 19, 2019, Grievant sent the Employee Relations Consultant an email stating, I would like to return to work. I am able to meet in person today. I am available in the afternoon; or possibly this morning."[6] The Employee Relations Consultant replied at 8:03 a.m., "[Benefits Administrator] and I will be here awaiting your arrival to discuss your employment status."[7] The Employee Relations Consultant called Grievant at approximately 3 p.m. and left a voice mail. At 4:01 p.m. on August 19, 2019, the Employee Relations Consultant sent Grievant an email:

> This message is to follow up on a call and voicemail that I recently left you (approximately 3 p.m. today) and to also note that [Benefits Administrator] and I have anticipated your arrival since 8 a.m. this morning to no avail."[8]

On August 20, 2019, Grievant sent the Employee Relations Consultant an email stating, "Sorry, I was planning on coming in; but, I became very ill yesterday afternoon. *** Is there a time on Wednesday we can meet."[9]

On August 20, 2019, the Employee Relations Consultant sent Grievant an email:

> As previously stated, please be advised that you are no longer in an approved leave status. Dating back to August 6, 2019 when you were cleared to return to work, I have made several attempts to meet with you to discuss your employment status however, you have not made arrangements to come in and do so. Your communications have been insufficient and have not provided any substantive information related to your return to work. Yes, I am available Wednesday at 11 a.m. to meet with you.[10]

On August 26, 2019, Grievant sent the Employee Relations Consultant an email:

> Sorry I missed this email when it came through. I have been addressing additional health issues and I am in my physician's office currently. I think that we should probably wait till after Labor Day to meet.[11]

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[6] Agency Exhibit 7.

[7] Agency Exhibit 8.

[8] Agency Exhibit 9.

[9] Agency Exhibit 10.

[10] Agency Exhibit 11.

[11] Agency Exhibit 12.

On August 30, 2019, the Employee Relations Consultant sent Grievant an email with a due process notification attached. The due process notification advised Grievant that he had been absent from work without authorization in excess of three workdays and that the University expected to issue him a Group III Written Notice with removal. Grievant was advised he could meet with the Employee Relations Consultant on September 4, 2019 to present "any reasons why you believe this action should not be taken."[12]

Grievant met with the Employee Relations Consultant on September 4, 2019. Grievant's Counsel participated in the meeting by telephone. She sent a letter to the Assistant Director with a copy to the Employee Relations Consultant stating Grievant, "would like to return to work, but would require a reasonable accommodation to perform the essential functions of his job."[13] During the meeting, Grievant indicated he had received and read the due process notification. Grievant spoke without interruption for approximately twenty minutes. He discussed his father and his love for the University. He did not discuss his depression. The Employee Relations Consultant concluded, "[d]uring this time, he did not share any reasons why he was unable to return to work since July 30, 2019 or any reasons for unauthorized absences since that time."[14]

On September 6, 2019, the University issued Grievant a Group III Written Notice with removal for absence in excess of three days without authorization.

Grievant's request for long-term disability was denied by the Third Party Administrator.

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."[15] 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.[16] The Employee Relations Consultant notified Grievant several times including

[12] Agency Exhibit 14.

[13] Grievant Exhibit 6.

[14] Agency Exhibit 16.

[15] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[16] See, Attachment A, DHRM Policy 1.60.

on August 8, 2019 that he had exhausted his leave balances and was expected to report to work. Grievant did not report to work as scheduled. He was absent for more than three workdays without authorization by the University. The University 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, Grievant's removal must be upheld.

Grievant argued that the Agency disciplined Grievant because of his disability. Grievant asserts that the University should have recognized his disability and engaged in an interactive process to address that disability.

The evidence showed that Grievant suffered from depression making him unable to work in August 2019.[17] The University, however, was entitled to rely on Grievant's August 5, 2019 doctor's note indicating he was able to return to work without restriction. The University had authority to require Grievant to report to work.

The Employee Relations Consultant was aware[18] that Grievant sought long-term disability by applying to the Third Party Administrator.[19] Long-term disability results in separation of employment. A request for long-term disability would not constitute notification to the University that Grievant was disabled and wanted to continue working with an accommodation. Indeed, it would indicate that Grievant did not expect to continue working for the University. Moreover, if the Employee Relations Consultant had reviewed Dr. C's statement likely would have confirmed to the Employee Relations Consultant that Grievant did not intend to continue his employment.

The Americans with Disabilities Act as interpreted by the US Equal Employment Commission permits an employer to discipline an employee who, because of a disability, violated a job-related conduct rule. The University was authorized to take disciplinary action even if Grievant failed to report to work as scheduled because of his disability.

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 …."[20] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any

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[17] In August 2019, Grievant felt depressed and fatigued. He was having difficulty sleeping and focusing.

[18] The Employee Relations Consultant wrote on August 6, 2019, "I understand that since filing a claim to evoke the LTD benefit, you have since obtained a return to work dated 8/5/19."

[19] Dr. C's Attending Physician Statement Long Term Disability was submitted to the Third Party Administrator but not shared with the Employee Relations Consultant.

[20] Va. Code § 2.2-3005.

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.

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.