



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

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11740**

Hearing Date: November 23, 2021  
Decision Issued: December 13, 2021

**PROCEDURAL HISTORY**

On August 16, 2021, Grievant was issued a Group III Written Notice of disciplinary action for missing three shifts without notifying anyone.

On August 31, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 20, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 23, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Agency Party 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 Behavioral Health and Developmental Services employed Grievant as a Direct Service Associate II at one of its facilities. She began working for the Agency on July 10, 2021 after having worked for another State agency.

The Facility operates on a 24-hour basis. The Agency considers all employees essential because all shifts must be adequately staffed.

Grievant was scheduled to work an eight hour shift on Saturday, August 7, 2021. Grievant did not report to work as scheduled.

Grievant was scheduled to work an eight hour shift on Sunday, August 8, 2021 and a second eight hour shift on Sunday, August 8, 2021. Grievant did not report to work as scheduled for either shift.

Grievant was scheduled to work on Monday August 9, 2021. Grievant did not report to work as scheduled.

On August 9, 2021, Grievant contacted the HR Analyst. Grievant told the HR Analyst that Grievant called the Facility over the weekend to let Facility managers know she would not be reporting to work as scheduled. Grievant claimed she "could not get the charge nurse on the line to make them aware." Grievant said she had a doctor's note

excusing her from work during that weekend. Grievant wrote in a text, “the doctor put me off work due to my blood pressure.”<sup>1</sup> Grievant said her return to work date was August 10, 2021. The HR Analyst told Grievant to provide the Agency with the doctor’s note and proof that she called the Facility over the weekend by the end of the day. As of August 13, 2021, Grievant had not provided the Agency with her doctor’s note or proof that she called the Facility.

Grievant was removed from employment effective August 16, 2021.

### **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>2</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.”

Facility policy 1323 governs Attendance. This policy defines “no call/no show” as unscheduled absences. The policy provides, “whenever an employee seeks medical care during an unscheduled absence, a physician’s statement must be turned in to Human Resources the day an employee returns to work.”<sup>3</sup>

Absence in excess of three workdays without authorization is a Group III offense. Grievant was absent from work on August 7, 2021. She did not call the Facility to obtain permission to be absent. She did not provide a doctor’s note excusing her absence on August 7, 2021. Grievant was absent from work for her first shift on August 8, 2021 and her second shift on August 8, 2021. Each shift is a separate workday. Grievant did not call the Facility to obtain permission to be absent. She did not provide a doctor’s note excusing her absence for both shifts on August 8, 2021. Grievant was absent from work on August 9, 2021. She contacted the Facility on August 9, 2021 but did not present a doctor’s note excusing her absence on that date. The Agency has presented sufficient evidence to show that Grievant was absent in excess of three workdays without authorization.

Grievant argued that she called the Facility during the weekend and no one answered. The evidence showed the Facility had staff available to answer telephone calls and that no voice mail messages were received from Grievant. Grievant was given the opportunity to show she called the Facility by sending the HR Analyst a picture of

---

<sup>1</sup> Agency Exhibit C-6.

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> Agency Exhibit C-3.

Grievant's cell phone log showing that Grievant had attempted to call the Facility. Grievant did not comply with the HR Analyst's request. Grievant claimed she could have the doctor's office fax a note to the Facility but did not do so. Grievant did not present a doctor's note and has not established that she was absent for a medically excused reason.

*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-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 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.

---

<sup>4</sup> Va. Code § 2.2-3005.

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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

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