



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11745

Hearing Date: February 14, 2022

Decision Issued: February 18, 2022

PROCEDURAL HISTORY

On September 15, 2021, Grievant was issued a Group III Written Notice of disciplinary action for being absent in excess of three days without authorization.

On October 4, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 18, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 14, 2022, a hearing was held by remote conference.

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 employed Grievant as a Corrections Officer at one of its facilities. She began working for the Agency on March 23, 2020. No evidence of prior active disciplinary action was introduced during the hearing.

A condition of Grievant's employment was that she be able to work any shift and post.

Grievant developed a pattern of failing to report to work as scheduled or reporting to work tardy. Grievant informed Agency managers that she had problems obtaining child care that resulted in her poor attendance. For approximately two weeks, facility shift commanders attempted to assist Grievant by allowing her to report to work late or leave early. Grievant's poor attendance continued. She exhausted her leave balances. Grievant met with the Chief of Security who asked Grievant if moving her to night shift would resolve her child care issues. Grievant said that working the night shift would resolve her child care problems but that she would not work the night shift.

The Chief of Security assigned Grievant to the night shift effective June 22, 2021. Grievant was scheduled to work on June 26, 2021 for a shift lasting 11.5 hours. Grievant reported to work on June 26, 2021 and worked 5.7 hours. She left the Facility without

completing her entire shift. Grievant was scheduled to work 11.5 hour shifts on June 27, 2021, June 28, 2021, July 1, 2021, and July 2, 2021. She did not report to work on any of those days. Her last day of work was June 26, 2021.

On July 12, 2021, Grievant filed with the Third Party Administrator a claim for Short-term Disability. On September 15, 2021, the Third Party Administrator denied Grievant's claim.

Grievant presented the Agency with a note dated April 21, 2021 indicating she was seen in the doctor's office for illness. Grievant presented the Agency with a note dated May 21, 2021 from a medical doctor saying Grievant was under the doctor's care and that Grievant should keep her work hours the same day to day without extra hours being added. Grievant presented a note dated June 15, 2021 regarding treatment to her foot and indicating she could return to work on June 17, 2021. Grievant presented a note dated June 16, 2021 from a medical provider. The comments cannot be deciphered. Grievant presented a note dated June 22, 2021 from a nurse practitioner indicating Grievant could return to work on June 24, 2021 without restrictions. Grievant presented a note dated June 28, 2021 from an FNP-C indicating FMLA paperwork had been completed and that Grievant was to work day shift¹ and not more than eight hours per day. She could return to work July 5, 2021. Grievant presented the Agency with a note dated July 6, 2021 from a nurse practitioner indicating Grievant was under the nurse practitioner's care and could return to work on July 14, 2021. Grievant presented the Agency with a note dated July 20, 2021 from that nurse practitioner indicating Grievant was under the nurse practitioner's care and could return to work on July 26, 2021. Grievant presented another note dated August 9, 2021 from that nurse practitioner indicating Grievant had an office visit on August 9, 2021.

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 removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."²

Absence in excess of three days without authorization is a Group III offense.³ Grievant was scheduled to work on June 27, 2021, June 28, 2021, July 1, 2021, and July

¹ An Agency witness explained that Grievant was obligated to work any shift and a doctor's note in itself would not be sufficient to change that condition of employment.

² See, Virginia Department of Corrections Operating Procedure 135.1.

³ See, DOC Operating Procedure 135.1.

2, 2021. She failed to report to work on those days. She was not authorized to be absent. 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 presented the Agency with evidence of doctor's notes showing she received medical treatment. Grievant did not present evidence showing she had available leave balances to use for any medically related absence. Grievant informed Agency managers that her absences related to problems finding child care rather than health related concerns. Grievant applied for short-term disability but her request was denied. Grievant did not present evidence showing she had a disability or was entitled to leave that would otherwise justify her absence on June 27, 2021, June 28, 2021, July 1, 2021, and July 2, 2021. The Hearing Officer concludes that Grievant's absences on those dates were not excused.

Grievant argued the Agency retaliated against her for filing a prior grievance and complaining about how the Agency treated her. Although Grievant engaged in protected activity by filing a grievance, she did not establish a connection between the Agency's issuance of a Group III Written Notice and her protected activity. The Hearing Officer believes the Agency took disciplinary action against Grievant because she was absent in excess of three days.

Grievant did not testify but presented exhibits suggesting she had requested documents from the Agency. It is unclear when she requested the documents. She requested a continuance by email at 5:33 p.m. on Friday February 11, 2022 but did not orally request the continuance when the hearing began on February 14, 2022 at 9 a.m. There was no basis to delay the hearing given Grievant's untimely submission and request.

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"⁴ 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.

⁴ Va. Code § 2.2-3005.

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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer