

Issue: Administrative Review of Hearing Officer's Decision in Case No. 11140; Ruling
Date: March 22, 2018; Ruling No. 2018-4678; Agency: Department of Corrections;
Outcome: Remanded to AHO.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Department of Corrections
Ruling Number 2018-4678
March 22, 2018

The Department of Corrections (the “agency”) has requested that the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing officer’s reconsidered decision in Case Number 11140. For the reasons set forth below, EEDR remands the case to the hearing officer.

FACTS

The relevant facts in Case Number 11140, as found by the hearing officer, are as follows:¹

The Virginia Department of Corrections employed Grievant as a Corrections Sergeant at one of its facilities. She had been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to work on August 17, 2017 and finished her shift. That was her last day of work. Grievant “called out sick” on August 18 through August 20, 2017. Her shift was on break from August 21, 2017 through August 25, 2017. She was scheduled to work on August 26, 2017 but failed to report to work that day and several days thereafter. She entered leave without pay status beginning September 16, 2017.

Agency staff were unable to contact Grievant because she failed to provide the Agency with her current telephone number. On September 25, 2017, Grievant contacted the Facility’s human resource department and spoke with Ms. B. Grievant said she had filed a claim for short term disability with a company and asked when she would be paid. Grievant did not realize she had filed a claim with the former third party administrator, not the current third party administrator. Ms. B informed Grievant of the contact information for the correct third party administrator and told Grievant she should contact immediately the correct third party administrator. Ms. B provided Grievant with the telephone number to send faxes to the human resource office. Ms. B later sent Grievant “FMLA

¹ Decision of Hearing Officer, Case No. 11140 (“Hearing Decision”), January 19, 2018, at 2-3.

paperwork”. Grievant did not immediately file a claim with the correct third party administrator.

On September 28, 2017, the Personnel Analyst, Ms. H, sent Grievant a letter indicating that Grievant had not filed a claim with the Third Party Administrator and reminding her that the Facility had not received any doctor’s notes or other documentation to support her continuing absence from work. She was reminded that absence in excess of three days without authorization or satisfactory reason was a violation of the Standards of Conduct. She was informed to report to work or provide proper medical documentation supporting her continued absence from work. She was instructed to provide a response by October 5, 2017.

Grievant did not timely send any excuses from her medical providers to the Facility’s human resource office. Grievant did not respond to the Agency by October 5, 2017.

Grievant filed a claim with the Third Party Administrator on October 13, 2017. The Third Party Administrator approved Grievant’s short term disability from September 30, 2017 through October 23, 2017.

During the hearing, Grievant presented documents from several medical providers. A note dated August 18, 2017 written by Doctor V indicated Grievant was not to work from August 18, 2017 to September 1, 2017. A note from an LCSW indicated Grievant required leave from September 1, 2017 to September 21, 2017 for medical reasons. The LCSW wrote another note indicating Grievant required leave from September 22, 2017 to October 27, 2017 for medical reasons.

On October 23, 2017, the grievant was issued a Group III Written Notice with termination for being absent from work for more than three days without authorization.² The grievant timely grieved the disciplinary action and a hearing was held on January 17, 2018.³ In a decision dated January 19, 2018, the hearing officer concluded that the agency had not presented sufficient evidence to demonstrate the grievant’s absences were unauthorized because the grievant had “presented sufficient justification for her absence after August 17, 2017 as part of the hearing process.”⁴ The hearing officer did, however, determine that the grievant failed to follow instructions because she did not provide doctor’s notes to the agency by October 5, 2017, as directed by Ms. H.⁵ As a result, the hearing officer reduced the Group III Written Notice to a Group II Written Notice and ordered the grievant reinstated to her former position or an equivalent position.⁶ The hearing officer did “not award back pay or benefits because Grievant was at fault for failing to provide medical documentation sooner” and the evidence did not establish when, or whether, the grievant would have returned to work if the Group III Written Notice had not been issued.⁷ The agency now appeals the hearing decision to EEDR.

² *Id.* at 1.

³ *See id.*

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

DISCUSSION

By statute, EEDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure.”⁸ If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EEDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.⁹ The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.¹⁰ The DHRM Director has directed that EEDR conduct this administrative review for appropriate application of policy.

Hearing Officer’s Consideration of the Evidence

In its request for administrative review, the agency argues that the hearing officer improperly considered unsworn statements made by the grievant at the hearing. In support of its position, the agency points to instances in the decision where the hearing officer stated that grievant “said” she had filed a claim for short term disability and “asserted” she had faxed doctor’s notes to the agency.¹¹ The agency contends that the hearing officer relied on allegedly unsworn statements by the grievant as support for these factual conclusions. EEDR has previously held that verbal statements made by a grievant during a grievance hearing that are not sworn testimony cannot be considered as evidence by the hearing officer.¹² This principle is consistent with the requirement of the *Grievance Procedure Manual* that a hearing officer may only consider testimony by testifying witnesses, as well documents introduced into evidence by both parties, in reaching a decision.¹³

Having reviewed the context of the specific findings challenged by the agency, as well as the decision generally, EEDR finds no indication that the hearing officer improperly relied upon unsworn testimony offered by the grievant. In his decision, the hearing officer stated unequivocally that the grievant did not testify at the hearing.¹⁴ With regard to the first statement cited by the agency, the relevant portion of the decision reads as follows: “On September 25, 2017, Grievant contacted the Facility’s human resource department and spoke with Ms. B. Grievant said she had filed a claim for short term disability with a company and asked when she would be paid.”¹⁵ Ms. B testified at the hearing and confirmed that the grievant called her on September 25, said she had filed a short term disability claim, and asked about payment.¹⁶ It appears the hearing officer did not rely on the grievant as support for this finding, but rather Ms. B.

Similarly, the hearing officer noted that the “Grievant asserted she faxed doctor’s notes to the Agency,” but went on to find that the grievant “could not establish the date she may have

⁸ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁹ See *Grievance Procedure Manual* § 6.4(3).

¹⁰ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹¹ Hearing Decision at 2, 4.

¹² EDR Ruling No. 2016-4344.

¹³ See generally *Grievance Procedure Manual* § 5.9.

¹⁴ Hearing Decision at 4.

¹⁵ *Id.* at 2.

¹⁶ Hearing Recording at 23:51-24:24 (testimony of Ms. B).

attempted to fax notes to the Agency” because she did not testify.¹⁷ There is nothing to suggest that the hearing officer considered unsworn testimony by the grievant on this issue; to the contrary, the hearing officer explicitly stated that the grievant did not testify immediately following his recitation of the grievant’s assertion. There is nothing improper about a hearing officer’s discussion of arguments presented by the parties that are not offered in the form of sworn testimony. For example, a party may, as appears to have happened here, make arguments during opening or closing statements that the hearing officer determines are not supported by the actual evidence in the record. There is no error when a hearing officer merely notes that such arguments were made in connection with a discussion of the actual evidence in the record on the issue. Accordingly, EEDR declines to disturb the hearing decision on this basis.¹⁸

Inconsistency with State Policy

In the remainder of its request for administrative review, the agency essentially argues that the hearing officer improperly applied state policy in determining that the grievant had presented sufficient justification for her absence and erred in reducing the Group III Written Notice on that basis. More specifically, the agency contends that the evidence shows it properly determined the grievant was absent from work without authorization, and thus the issuance of the Written Notice was warranted and appropriate under the circumstances.¹⁹

DHRM Policy 4.57, *Virginia Sickness and Disability Program* (the “VSDP Policy”), provides relevant guidance on the use of sick leave and the disability claims process. Under the VSDP Policy, employees who use sick leave “must comply with management’s request for verification of the appropriateness of using [sick leave].”²⁰ If an employee fails to do so, the policy permits an agency to deny approval of the leave request.²¹ When an employee is absent without approved leave, the absence is considered unauthorized and the agency may take disciplinary action.²² DHRM Policy 1.60, *Standards of Conduct*, specifically provides that “[a]bsence in excess of three workdays without authorization” is classified as a Group III offense.²³

In this case, the grievant was absent from work beginning August 18, 2017 until she was terminated on October 23, 2017.²⁴ She submitted a claim for short term disability benefits to the

¹⁷ Hearing Decision at 4.

¹⁸ The agency further disputes the hearing officer’s characterization of some of the evidence in the record, but does not actually dispute the accuracy of those factual findings. These arguments are not a basis for remand in this case. In addition, the agency alleges that the doctor’s notes offered by the grievant were “altered,” apparently as a means of insinuating that the notes were forged. At the hearing, the grievant confirmed for the hearing officer that she had removed diagnosis information from the notes to protect her privacy. Hearing Recording at 1:09:46-1:10:25. There is no evidence in the record to show that the grievant’s medical documentation was falsified.

¹⁹ In its request for administrative review, the agency repeatedly claims that the hearing officer mitigated the disciplinary action. This assertion is incorrect. The hearing officer found that the agency had not shown the grievant was absent from work without authorization—that she had not engaged in the misconduct charged on the Written Notice. Hearing Decision at 4. The hearing officer reduced the discipline to a Group II Written Notice on the basis that the grievant had failed to follow instructions by not providing medical documentation as directed. *Id.*

²⁰ DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

²¹ *Id.*

²² DHRM Policy 4.30, *Leave Policies - General Provisions*, at § III(E); see also DOC Operating Procedure 110.1, *Hours of Work and Leaves of Absence*, at § IV(C)(4).

²³ DHRM Policy 1.60, *Standards of Conduct*, Attachment A.

²⁴ See Hearing Decision at 1-3.

designated Third Party Administrator (“TPA”) on October 13, 2017.²⁵ The VSDP Policy states that the TPA may approve disability benefits “retroactively for only 14 calendar days from the date a claim is initiated by an employee.”²⁶ In this case, the TPA approved the grievant’s claim retroactively to September 30, 2017 (i.e., 14 calendar days before the date she submitted the claim on October 13, 2017).²⁷

When the TPA approves an employee’s disability claim, the employee’s absence from work during the period of approved disability is appropriately considered as excused. In this case, however, the grievant’s delay in submitting her claim to the TPA meant that no disability benefits could be approved for the period between August 18 and September 29, 2017. When an employee is not eligible for disability benefits because of a delay in the filing of a claim, and when she has also not provided her agency with medical documentation justifying the need for sick leave, an agency may appropriately consider such an absence unauthorized.

Applying the relevant provisions of the state leave policies and *Standards of Conduct* described above demonstrates that the agency determined that the grievant was absent from work without authorization between August 17 and September 29, 2017, far more than three days (properly considered as a Group III offense). The grievant was instructed to submit medical documentation to the agency by October 5, 2017, or her leave would be considered unauthorized.²⁸ After that date, having received no documentation supporting the absences, it was appropriate for the agency to consider the grievant absent from work without authorization for any period during which her short-term disability claim had not been approved by the TPA.

In the hearing decision, the hearing officer assessed the evidence and found that the grievant had “presented sufficient justification for her absences after August 17, 2017 as part of the hearing process.”²⁹ However, that analysis does not address the proper question in this case. The hearing officer is required to address whether the agency’s disciplinary action was warranted and appropriate when it was issued. The hearing officer relies on medical notes submitted by the grievant during the hearing, essentially providing the grievant another opportunity to present documentation supporting an absence that should have been submitted to the agency months earlier.³⁰ However, the hearing decision describes no basis or authority for why that is warranted. Perhaps if the grievant had presented evidence of some impediment preventing her from providing the medical documentation timely, there would be cause to consider the late submission of this documentation as appropriate. There is no discussion in the hearing decision

²⁵ See *id.* at 2.

²⁶ DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

²⁷ Hearing Decision at 3.

²⁸ *Id.*; see also Hearing Recording at 8:05-8:33 (testimony of Ms. H); Agency Exhibit 5.

²⁹ Hearing Decision at 4.

³⁰ The hearing record contains notable testimony in which at least one witness states that had the grievant submitted the medical documentation in a timely manner, the absence would have been approved. Rather than demonstrating a basis for reduction of the disciplinary action, this testimony further supports the agency’s case. The primary reason for the agency’s action was that the grievant failed to submit documentation to support her need for leave. As described above, state policy allows an agency to determine that such an absence is unauthorized, which appropriately subjects the grievant to the disciplinary action, and termination, at issue in this case for being absent on unapproved leave for more than three days.

as to any record evidence demonstrating why the grievant did not or could not submit the notes to the agency any earlier or when specifically requested.³¹

EEDR is unable to locate record evidence that supports a determination that the agency improperly determined that the grievant's absence between August 7 and September 29, 2017 was unauthorized. In finding otherwise and reducing the discipline to a Group II Written Notice on that basis, the hearing officer did not properly apply state policy. The agency's determination that the grievant was on unauthorized leave in excess of three days is consistent with policy and can support a Group III and termination under applicable policy. Accordingly, the matter must be remanded to the hearing officer. The hearing officer is directed to uphold the Group III Written Notice with termination as the proper application of policy in this case.

CONCLUSION AND APPEAL RIGHTS

For the reasons discussed above, this case is remanded to the hearing officer for revisions consistent with this ruling. Once the hearing officer issues his reconsidered decision, both parties will have the opportunity to request administrative review of the hearing officer's second reconsidered decision on any other *new matter* addressed in the remand decision (i.e., any matters not previously part of the original or first reconsidered decision).³² Any such requests must be **received** by EEDR **within 15 calendar days** of the date of the issuance of the remand decision.³³

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.³⁴ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.³⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁶



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³¹ There may be situations that could excuse untimely submission of such documentation, which should be appropriately considered by a hearing officer in a given case. However, EEDR has reviewed no evidence in the record that demonstrates such a basis in this case.

³² See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056.

³³ See *Grievance Procedure Manual* § 7.2.

³⁴ *Id.* § 7.2(d).

³⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

³⁶ *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).