



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11929

Hearing Date: April 3, 2023
Decision Issued: April 19, 2023

PROCEDURAL HISTORY

On January 24, 2023, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence of three or more consecutive work days without approval.

On January 25, 2023, Grievant timely filed a grievance to challenge the University's action. The matter advanced to hearing. On February 2, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 3, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
University Representative
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:

Norfolk State University employed Grievant as an Office Manager. Her duties included greeting visitors to the office. When she was absent others would have to assume her duties.

As of November 24, 2022, Grievant had a zero balance of vacation leave.

Grievant applied for short-term disability. Her claim was reviewed by the Third Party Administrator (TPA). Grievant was approved by the TPA to be on short-term disability from June 13, 2022 to December 2, 2022.¹ Her long-term disability effective date was December 3, 2022.

On December 1, 2022, the TPA sent the HR Manager an email stating, "[a]ccording to our records, [Grievant] is expected to return to work on 12/1/2022."

On December 5, 2022, Grievant went to the HR office and met with Ms. C. Grievant sent the Director an email:

¹ The documents refer to the return to work date as December 1, 2022, December 2, 2022, or December 3, 2022. The precise date is not significant.

I understand my return to work date is listed as December 1. Due to my disability still being in pending status I am not sure what has been approved or not approved at this moment. Once I have received an update from them I can follow up with you on returning to the office.

Grievant was scheduled to work on December 5, 2022, December 6, 2022, December 7, 2022, December 8, 2022, December 9, 2022, December 12, 2022, December 13, 2022, December 14, 2022, December 15, 2022, and December 16, 2022. Grievant was also scheduled to work on January 5, 2023 and January 6, 2023. She did not report to work on those days except that she met with Ms. C on December 5, 2022.

Grievant obtained a Return to Work Form completed by Medical Provider L on December 14, 2022. Medical Provider L authorized Grievant to return to work on December 19, 2022 with restrictions. Grievant was authorized to work "3 days a week, breaks as needed."

Grievant sent an email to Ms. C in HR informing Ms. C that Grievant had been released to work with restrictions.

Grievant reported to work on December 19, 2022 and worked eight hours. Grievant sent the Director an email, "It is Monday 12/19/2022 and I have returned to the office. I sent an email to HR Friday stating that on Thursday evening I received a return-to-work notice." The Director sent Grievant an email, "I was not aware you received a 'Return to Work' notice. Neither did I know you were planning on being here today."

Grievant reported to work on December 20, 2022 and worked eight hours.

On December 20, 2022, the HR Manager sent Grievant an email saying:

Human Resources is in receipt of your return to work note which requires an accommodation due to ... a condition. You must seek an accommodation by contacting [Ms. W] in the Office of Institutional Equity.

Seven minutes later, Grievant sent Ms. W an email:

I was informed that I needed to contact you to have my medical accommodations reviewed and approved. Please let me know what is needed from me so that I can get it to you as quickly as possible.

The University was on Holiday break from December 21, 2022 through January 2, 2023.

On January 3, 2023, Ms. W replied to Grievant and provided Grievant with a Accommodation Request form.

On Tuesday, January 3, 2023, Grievant reported to work and performed work duties for eight hours.

On Wednesday, January 4, 2023, Grievant reported to work and performed work duties. She completed work and told the Associate Director that she would complete the work on the following Monday. Grievant did not seek or obtain permission to be absent on January 5, 2023 or January 6, 2023. Grievant later explained that, “[o]n January 5 and 6th I was not here due to my medical documents stating that I needed to be part time.”

On January 5, 2023, Grievant went to the University’s HR office and gave the HR Manager a document written by Dr. M on December 8, 2022. The medical note showed Grievant’s last appointment was November 23, 2022. Dr. M concluded Grievant had no limitation on functional capacity and was able to function in most stress situations and engage in most interpersonal relations. Dr. M concluded that Grievant was not totally or permanently disabled. Dr. M suggested “part-time” employment for Grievant.

On January 6, 2023, Grievant did not report to work as scheduled.

On January 9, 2023, Grievant reported to work and worked eight hours.

On January 10, 2023, Grievant reported to work and worked 5.5 hours. She left early to attend a doctor’s appointment. She informed the Director before leaving the workplace.

On January 10, 2023, Grievant sent Ms. W an email:

My PCP is out of the office until the 25th of January. Once she returns I will turn in her paperwork. As soon as my therapist completes her paperwork I will get that to you as well. I hope that can be completed by the end of the week so that my accommodations can possibly be met. My long-term disability is still pending so I will update everyone on that once a decision has been made.

On January 20, 2023, the TPA sent Grievant a letter stating:

Your request for long-term disability benefits has been denied based on the following:

Virginia Sickness and Disability Program (LTD): 12/3/2022 - 5/31/2023

As of the date of this letter, [the TPA] has not received objective medical evidence to support that you are or were disabled as defined by the Virginia Sickness and Disabilities Program (VSDP plan) from 12/3/2022 through return to work.

Grievant's "PCP" was out of the office from Christmas until January 23, 2023. This limited Grievant's ability to obtain updated information about her medical status.

CONCLUSIONS OF POLICY

The University alleged Grievant should receive a Group III Written Notice for "[a]bsence of three or more consecutive work days without approval."

DHRM Policy 4.57 requires the University to, "[c]ommunicate with employee during absence if employee is physically able."

The University has not established a basis for disciplinary action for several reasons. First, Grievant could not return to work until she obtained a return-to-work authorization from a medical provider. The TPA informed Grievant of this requirement and Grievant knew she could not work without the authorization. DHRM Policy 4.57 governs the Virginia Sickness and Disability Program and provides:

Agencies may allow employees to RTW full-time/full-duty, no restrictions, if they present a doctor's note with full RTW indicated. The agency should fax the note to the TPA and call the TPA to confirm release. Agencies do not have to wait until receipt of the Determination Notice to allow the employee to RTW.

The University should not have expected Grievant to return to work until it had received a return-to-work authorization.

Second, once Grievant received a return-to-work authorization, she began reporting to work in accordance with her medical provider's restriction of part-time work.

Third, Grievant placed the University on notice that she claimed to be disabled. The University did not engage in and complete an interactive process required by the Americans with Disabilities Act to determine if Grievant's disability could be accommodated to enable her to perform the essential functions of her position and be capable of returning to work. In particular, the University did not notify Grievant that she could not work part-time as an accommodation and then allow Grievant the opportunity to obtain medical authorization to work full time.

The University argued that Grievant did not contact her supervisor or other University managers to obtain approval to be absent from work. Although Grievant could have done a better job of notifying University staff of her expected absences and obtaining approval, Grievant was attempting to maneuver between the expectations of the TPA and the University. It was not always clear to Grievant what her reporting obligations were to the University while she was seeking disability approval from the TPA. The University had the opportunity and obligation to inform Grievant of the date she was expected to report to work on a full-time basis. It did not do so.

DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The University is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The University is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal. The University is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

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]

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

[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