



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11893

Hearing Date: February 15, 2023
Decision Issued: March 9, 2023

PROCEDURAL HISTORY

On September 1, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence of three or more consecutive workdays without approval.

On September 28, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 17, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 15, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Representative
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 Social Services employed Grievant as a Licensed Inspector at one of its locations. Grievant presented persuasive evidence that she was a productive and well-liked employee. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant contracted COVID19 in 2020. She was vaccinated two times yet contracted COVID19 again in November 2021. At one point, Grievant was so ill from long COVID19 that she could not talk. She stopped being able to do simple things like writing a check.

On February 10, 2022, Grievant was approved to receive Family Medical Leave. Grievant took Family Medical Leave until March 11, 2022. She was on Family Medical Leave again from April 1, 2022 to May 9, 2022.

On May 17, 2022, Grievant experienced a medical emergency due to her health condition.

On May 18, 2022, Grievant initiated a Short-term Disability (STD) claim with the Third Party Administrator (TPA). She was approved for STD.

On June 9, 2022, the Supervisor sent Grievant a Notice of Intent (NOI) that the Agency was considering issuing her a Group III Written Notice and ending her employment with the Agency for absences of three days or more without approval.

Grievant's STD was approved through June 30, 2022.

Grievant sought an extension of the STD benefit through November 30, 2022. The TPA approved Grievant's request but only through July 30, 2022. The Agency withdrew the June 9, 2022 NOI.

Although the Grievant's STD ended on July 30, 2022, the Agency extended Grievant's leave until August 18, 2022.

Because of her level of frustration, depression, and anxiety, Grievant decided to seek treatments from chiropractors, acupuncturists, and nutritionists. On August 3, 2022, Grievant met with a Doctor in Greece to consider additional treatment options for COVID19.

Grievant received a call from the TPA case manager. He told Grievant, "Don't tell me you are in Greece." Grievant replied, "Yes I am." Grievant believed that the case manager incorrectly no longer considered her to be ill because she was in Greece.

On August 10, 2022, Grievant exhausted all of her available Family Medical Leave.

On August 15, 2022, the TPA notified Grievant that her request to extend STD from July 31, 2022 to November 16, 2022 was denied. The TPA indicated:

[TPA] discussed paperwork requirements with you on 05/18/2022, 06/07/2022, 6/28/2022, 08/01/2022, and 08/03/2022.

[TPA] advised your paperwork was due by 08/12/2022. ***

Reason for Denial:

Medical documentation received is insufficient to determine disability benefits from 07/31/2022 through your return to work. ***

If you disagree with [TPA's] decision regarding your STD/LTD benefit, you may appeal this benefit denial (in whole or in part) by filing an appeal. You must file your appeal within 180 days from your receipt of the denial letter.

*** To appeal this denial of a claim, write to: [address] Attention: Appeals Department. *** We will review your claim, taking into account all comments, documents, records and other information you submit relevant to your claim.

*** The review on appeal will not consider the initial denial and it will be

conducted by an individual who is neither the individual who initially denied the claim nor the subordinate of such individual.¹

On August 18, 2022, Grievant sent the HR Department and the Supervisor an email stating:

I received a call on 8/17/2022 at 12:05 p.m., from the case manager at [TPA] that he determined that my current case for disability ended effective 7/30/2022. As I remain under extensive medical care, I will appeal this decision as instructed. In the meantime as I await the decision, I am ready to take whatever action is needed to maintain by employment at VDSS. Please keep me advised if actions are required during this appeal process. Thank you.²

Grievant did not file an appeal with the TPA to appeal the TPA's decision.

On August 22, 2022, Grievant sent a text message to the Supervisor stating:

I hope you are well. I sent an email last week to you and HR and have not heard anything back. Did you receive my email? Also could you forward to me the name of the actual person who I should be communicating with at HR since that may be easier to get a response and guidance. Thank you.

The Supervisor did not reply to Grievant's text message.

On August 29, 2022, the Supervisor emailed Grievant a Notice of Intent indicating that the Agency intended to issue her a Group III Written notice with removal.

On September 1, 2022, Grievant had not returned to work. The Agency issued the Group III Written Notice with removal.

Once Grievant was removed from employment, she mistakenly thought she had to go through the grievance process to reverse the STD denial decision. She did not file an appeal with the TPA as previously directed.

Grievant sought treatment from many different medical professionals without significant improvement. Grievant began receiving telehealth treatment from Dr. T in August 2022. Dr. T focused on treating patients with long COVID19. Dr. T's treatment was to focus on priming one's immune system so it could fix itself. Grievant visited Dr. T's clinic in October 2022. When Dr. T first met Grievant, Grievant had limited ability to complete mundane tasks. She could not manage any tasks of significance. Grievant had a chronic cough. She experienced forgetfulness. Grievant's blood pressure had been high

¹ Agency Exhibit p. 36 through 44.

² Agency Exhibit p. 11.

for over a year. After one treatment from Dr. T, it dropped to a normal level. She began to regain her sense of smell and her cough subsided. Grievant has not yet fully improved.

Dr. T testified that at the time of the hearing, Grievant was unable to work at full capacity.

CONCLUSIONS OF POLICY

Grievant must be reinstated to the position she was in prior to her removal. The Agency's disciplinary action must be reversed for several reasons.

First, Grievant argued that she remained disabled and the TPA incorrectly denied her STD benefits. DHRM Policy 4.57 governs the Virginia Sickness and Disability Program. It defines disability as:

An illness or injury or other medical condition, including pregnancy, that prevents an employee from performing the duties of his or her job. A disability can be total or partial.

The Hearing Officer believes that Grievant suffered from long COVID19 that rendered her disabled from the time she began STD at least through the time of the hearing. Grievant has established that she was disabled at the time the TPA denied her request to extend STD. The Hearing Officer believes the TPA likely mistakenly failed to extend Grievant's STD benefits. The actions of the TPA are attributable to the Agency.

Second, it is not clear that the Agency instructed Grievant to report to work on a specific date. She would not be absent without authorization until the Agency notified her of her obligation to report on a specific date.

Third, 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 TPA notified Grievant she could submit a Return-to-Work Certification but Grievant did not submit one. Without a completed form, the Agency should not have expected Grievant to return to work on her own initiative and the Agency had not notified her of her obligation to return to work.

Fourth, Grievant placed the Agency on notice that she claimed to be disabled. The Agency did not engage in 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.

Fifth, on August 18, 2022, Grievant sent the Agency an email stating, "I am ready to take whatever action is needed to maintain by employment at VDSS. Please keep me advised if actions are required during this appeal process." The Agency did not respond or provide Grievant guidance. DHRM Policy 4.57 requires the Agency to, "[c]ommunicate with employee during absence if employee is physically able."

Sixth, the Agency did not take action to remove Grievant based on her inability to meet working conditions. DHRM Policy 1.60 provides:

An employee unable to meet the working conditions of their employment due to circumstances such as those listed below may be removed under this section. Reasons include but are not limited to: ***

Inability to perform the essential functions of the job after reasonable accommodation (if required) has been discussed, applied and alternative accommodations will result in undue hardship.

Prior to such removal, the appointing authority and/or Human Resource Office shall gather full documentation supporting such action and issue a notice of intent to the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond.

Final notification of removal should be via memorandum or letter, not by a Written Notice form.

The essence of disciplinary action is fault. Grievant was not at fault for becoming disabled. The Agency should have considered removing Grievant for her inability to meet working conditions rather than issuing disciplinary action.

Grievant should be restored to the position she was in prior to her removal. This means Grievant should be allowed to appeal the TPA's denial with the TPA. Grievant is entitled to receive back benefits including health insurance but not back pay because Grievant was not working. If the Grievant's appeal of the denial of her STD is successful she would be entitled to receive STD.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency 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]

[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.