Issue: Removal from employment (job abandonment); Hearing Date: October 17, 2001; Decision Date: October 24, 2001; Agency: Norfolk State University; AHO: David J . Latham, Esquire; Case Number 5302

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5302

Hearing Date: October 17, 2001
Decision Issued: October 24, 2001

APPEARANCES

Grievant
Attorney for Grievant
Executive Director, Planning & Budget
Legal Representative for Agency
Four witnesses for Agency

ISSUE

Did the grievant abandon her employment when she failed to appear for work on August 1, 2001? Was the notice of termination attributable to retaliation by the grievant's supervisor?

FINDINGS OF FACT

The grievant filed a timely appeal from her discharge from employment effective August 9, 2001 because she failed to appear for work on August 1, 2001. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. Norfolk State University (hereinafter referred to as agency) has employed the grievant as a budget analyst senior for seven years.

The grievant underwent surgery in January 1999 and was absent for six weeks as a result of the surgery and postoperative period. She received short-term disability benefits for this absence pursuant to the Virginia Sickness & Disability Program (VSDP). During the next 12 months, grievant experienced recurrent physical problems related to the medical problem that had precipitated surgery. On March 20, 2000, grievant felt that her physical problems were such that she could not continue to work and she submitted a resignation to her supervisor. After the supervisor spoke with her own supervisor (Associate Budget Director), she advised grievant that she should contact Human Resources to evaluate the possibility of applying for benefits under the VSDP program. The employment manager in Human Resources gave grievant information about VSDP. Grievant did not work during the rest of that week. On March 27, 2000, grievant sent a fax to her supervisor advising that she would be going out on disability. Thereafter, grievant never again spoke with her supervisor.

At some point, grievant spoke with the Associate Budget Director and told her to inform all other employees that she did not want to talk with anyone and further requested that no employees call her. By mid-May 2000, grievant had failed to contact her supervisor to advise of her status or expected return-to-work date. The Human Resources Director then advised grievant in writing that:

> This letter is to inform you that it is your responsibility to keep your supervisor informed of all changes in your status when you are out of work due to illness. You should inform her of the dates you are expected to return as well as any changes in the expected date of return. This is not the responsibility of CORE[1], and often times you

[1] VSDP benefits are administered by the Virginia Retirement System in conjunction with CORE, INC., a third party administrator. See Exhibit 6, p.2. CORE provides periodic reports to the agency's human resource department as certification of continuing disability. Such reports are

know of the changes much earlier than CORE. The failure to inform your supervisor of your status may result in disciplinary action for violation of the Standards of Conduct.[2]

The VSDP Handbook advises employees that, "You are responsible for notifying your agency of absences according to your agency's policies and procedures."[3] Despite the letter from Human Resources, grievant failed to contact her supervisor or anyone else at the agency to advise of her status or expected return-to-work date. Grievant contends that in June 2000 she called and left a message for her supervisor advising that she would return to work on August 1, 2000. Grievant does not recall with whom she spoke; no one at the agency received such a message. CORE had notified grievant on May 19, 2000 that her return-to-work date was May 31, 2000. CORE later granted additional extensions but its first notice to grievant that August 1 was the return-to-work date was mailed to her on July 21, 2000.[4]

During late June 2000, grievant's physician became aware that grievant was depressed and referred her to a clinical social worker. She first saw the social worker on July 6, 2000; grievant was subsequently referred to a psychiatrist who began treatment for severe recurrent major depression. An aspect of grievant's depression was "a phobic avoidance of situations that required interaction with others. During this time, she had difficulty leaving her house. She had a very difficult time dealing with requirements of her employer to maintain her temporary disability…"[5]

On July 27, 2000, CORE sent to the agency a periodic update form (Action Report) stating that grievant's estimated return-to-work date was August 15, 2000. On August 1, 2000, CORE send another Action Report showing a return-to-work date of August 1, 2000.[6] The Human Resource Director contacted CORE about the conflicting information on these two reports and was advised that the latest report (i.e., August 1st) was the correct report and that it superseded the July 27th report. The Human Resources Director prepared a letter dated August 7, 2000 notifying grievant that if she did not return to work by August 11, 2000, her employment would be terminated. A campus police officer was assigned to hand deliver the letter to grievant at her home. He made two attempts, on August 7th & 8th, but no one was at home on either occasion; he did not leave the letter at the residence. The agency then mailed the letter to

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used primarily as a basis for continuing payments to the employee according to the VSDP payment scheme.

[2] Exhibit 7. Letter from Human Resources Director to grievant, May 18, 2000.

[3] Exhibit 6, p.21. VSDP Handbook, 2000 edition. Grievant avers that she never received this Handbook and never received training about VSDP.

[4] Exhibit 11. Letters from CORE to grievant, June-August 2000.

[5] Exhibit 5, p.8. Letter from social worker to Director of Department of Employment Dispute Resolution, May 8, 2001.

[6] Exhibit 1. Action Reports, April 7, 2000- August 1, 2000.

grievant by certified mail on August 9, 2000.[7] Grievant's husband received the letter on August 12, 2000. On August 14, 2000, the Human Resource Director sent a letter to grievant advising that her employment had been terminated effective August 9, 2000 because she had abandoned her position and failed to contact her supervisor.[8]

The grievant had gone to her mother's home in another state on July 29, 2000 and was still there on August 12, 2000.[9] Grievant's husband called grievant on August 12th and read the Human Resource Director's letter to her. On Tuesday, August 15, 2000, grievant called the agency and left a message for her supervisor stating that the physician had extended her return-to-work date until September 15, 2000. Grievant's husband told grievant he had sent an e-mail to the agency on July 30th notifying it that grievant's return-to-work date had been extended to September 15, 2000; there is no record of such an e-mail being sent or being received by the agency.

On August 21 & 22, 2000, CORE sent to the agency two action reports, both of which extended grievant's disability date through September 7, 2000.[10] The August 21st action report also notes that the grievant would begin long-term disability on September 18, 2000.

Grievant maintains that her long-term disability ended in March 2001.[11] Subsequently she has worked as a substitute teacher in the public school system and performed other part-time employment.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

[7] Exhibit 13. Certified Mail envelope.
[8] Exhibit 10. Letter from Human Resource Director to grievant, August 14, 2000.
[9] Grievant stayed with her mother from July 29 through August 23, 2000. See Exhibit 12.
[10] Exhibits 2 & 4. Action Reports, August 22, 2000 and August 21, 2000, respectively.
[11] However, the letter from her social worker infers that grievant was still under the psychiatrist's care on May 8, 2001.

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that suchTdoncerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In disciplinary actions and dismissals for unsatisfactory performance, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[12]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training[13] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personalTdonduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of PersonnelTand Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first offense normally should warrant removal [from employment].[14] One example of a Group III offense is an absence in excess of three days without proper authorization or a satisfactory reason.

The evidence in this case establishes that grievant was absent from work substantially in excess of three days and that she failed to keep her supervisor informed of her status or expected return-to-work date. However, there are several factors that deserve consideration in this case. First, the third party administrator provided conflicting and incorrect information to the agency in late July and early August 2000. CORE first provided a return-to-work date of August 14th but subsequently changed the date to August 1st. Then it reversed itself a second time and certified the grievant's disability through September 7th. Moreover, CORE further certified that grievant would be eligible for long-term disability benefits beginning on September 18, 2000. Based on all available evidence, it is quite clear that grievant was continuously disabled from March 22, 2000 until March 2001.

[12] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.
[13] Now known as the Department of Human Resource Management (DHRM).
[14] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Second, the agency's August 7, 2000 ultimatum letter was sent as a direct result of the incorrect notification from CORE that grievant was to return to work on August 1, 2000. It is clear that, as long as CORE certified grievant as disabled, the agency took no action to end the employment relationship. It was only after receiving the incorrect action report that the agency acted to terminate employment. Thus, but for the misinformation from CORE, the agency would not have sent an ultimatum letter to grievant.

Third, the agency's ultimatum letter was mailed via certified mail on August 9th, advising grievant to return to work by August 11th or be discharged. The agency knew, or reasonably should have known, that grievant would have had to receive that letter on August 10th if she were to return on August 11, 2000. Thus, the agency apparently expected one-day mail delivery on a certified letter. The hearing officer takes administrative notice that, given mail delivery service in recent years, this is a highly unrealistic expectation. Moreover, even when the agency learned that grievant did not receive the letter until August 12, 2000, it did not extend the deadline in order to give grievant reasonable notice before terminating her employment. Extending the deadline by an additional week or two would have demonstrated the agency's good faith and would not have been unduly detrimental to the agency. Had the agency done so, it would have learned that grievant's disability had, in fact, been continuous during July through August and into September.

Fourth, the uncontroverted medical evidence establishes that the very nature of grievant's disability was the major, if not sole, contributing factor that explains grievant's failure to properly notify her supervisor of her status and return-to-work date. Grievant suffered from "severe, recurrent, major depression" which manifested itself in "phobic avoidance" of contact with other people. The agency is correct in asserting that an absent employee should keep her supervisor apprised of her status, particularly after receiving a written reminder from the Human Resource Director. The agency also correctly observes that common sense and courtesy would dictate keeping in contact, even in the absence of specific direction to do so.

However, when the absent employee is experiencing major depression that results in phobic avoidance of contact with other people, one cannot ignore the fact that the illness may override one's normal sense of responsibility. In effect, the grievant's situation is similar to that of a person who is in a prolonged coma – i.e., the person in a coma is incapable of fulfilling the obligation to contact her supervisor. Here, while grievant was physically capable of calling her supervisor, she was apparently emotionally incapable of such contact.

In summary, the totality of the evidence supports a conclusion that grievant's discharge was precipitated by misinformation provided by the third party administrator. While grievant was remiss in fulfilling her obligation to keep the agency notified of her status, the available medical evidence demonstrates

that grievant's emotional problems severely inhibited her ability to comply with this requirement. Moreover, grievant was, in fact, continuously disabled from working from March 2000 until March 2001. The third party administrator has corrected its records to reflect that grievant did have proper authorization for the absence. The grievant has provided medical documentation that constitutes a satisfactory reason for her failure to keep the agency adequately informed of her status. Therefore, grievant did not abandon her employment. Given the unique circumstances herein, the disciplinary action must be reversed.

Retaliation

Grievant alleged that her dismissal was retaliation by her supervisor, however, she presented no evidence to support her allegation. Grievant's supervisor denied any retaliatory motive, as did all those who were involved in the decision to terminate grievant's employment. In fact, it appears from the testimony that the decision to discharge was made primarily by the Human Resources department, not by grievant's supervisor. Therefore, the Hearing Officer finds no basis for the allegation of retaliation.

Reinstatement

A hearing officer may reinstate an employee to their former position or, if occupied, to an objectively similar position. In this case, grievant has been absent from work more than 1½ years. Section 2.1-116.06.B of the Code of Virginia states, "Management reserves the exclusive right to manage the affairs and operations of state government." Thus, the determination of proper placement of the grievant is a matter that falls solely within management's right to manage the operations of the agency. The agency will have to determine whether grievant's former position is still available, or whether it would be more appropriate to place grievant in an objectively similar position.

Because the grievant has provided no medical evidence indicating that she is fully recovered, the agency may legitimately have some concern as to whether grievant is currently able to work. Therefore, grievant should promptly ask her treating physician(s) to provide CORE with a detailed statement as to her current medical and emotional status, as well as the date on which she was certified to return to work. Grievant should also be aware that VSDP might, at its option, require an independent medical examination to resolve any question of whether disability has ended.[15] When CORE is satisfied that grievant is able to fully perform the functions of her position, the grievant should be promptly reinstated.

A hearing officer may also award full, partial, or no back pay, from which interim earnings must be deducted.[16] This case presents a unique situation

[15] Exhibit 6, p.23. VSDP Handbook.
[16] § 5.9(a) Grievance Procedure Manual, effective July 1, 2001.

because more than one year has passed since discharge, and because grievant was under the aegis of the disability program at the time of discharge. In order to determine an appropriate award, it would be necessary to consider several factors, including the length of grievant's disability, what benefits she would have been entitled to under the disability program, the amount of her interim earnings from multiple employers, and her available leave balances.

In the instant case, had grievant not been discharged in August 2000, the preponderance of evidence establishes that she would have remained on short-term disability until September 18, 2000, and thereafter would have been on long-term disability until March 2001. Grievant states that she was released to return to work in March 2001, has been able to work since that time, and has, in fact, been working in other employment. The amount of grievant's interim earnings from multiple employers is unknown. For all of these factors to be properly evaluated, it would be necessary to conduct another protracted evidentiary hearing. Such a hearing would require medical evidence from grievant's psychiatrist, detailed earnings records from multiple employers and records from the grievant's personnel file. It is entirely possible that the agency might contest medical evidence.

The grievant has not worked for more than 18 months. It is the judgement of the hearing officer that this matter should be brought to a prompt and administratively clean resolution. Having a lengthy, potentially contentious hearing regarding the amount of back pay will not serve the interest of either party. Therefore, the hearing officer has carefully evaluated all available evidence and concluded that grievant should receive partial back pay. Since the best available evidence indicates that grievant would have received long-term disability benefits (60% of pre-disability income[17]) for six months, it is held that a fair and equitable partial back pay award shall be 60% of grievant's pre-disability income from August 10, 2000 (date of separation) through March 21, 2001 (approximate date disability ended according to grievant). Grievant became employed elsewhere subsequent to March 2001 and had earnings from multiple employers. Since grievant was capable of, and did obtain, other employment, no back pay is awarded between March 2001 and the date of reinstatement. Grievant's other benefits and seniority will be determined pursuant to VSDP rules[18] and any other applicable agency policies.

DECISION

The decision of the agency is hereby reversed.

[17] Exhibit 6, p.10. VSDP Handbook, *Amount of Income Replacement*.
[18] Exhibit 6, pp. 16-17. Ibid.

The discharge of the grievant effective August 9, 2001 is RESCINDED. The grievant is reinstated to her position as soon as practicable pursuant to the stipulations above. Partial back pay is awarded as set forth above.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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David J. Latham, Esq.
Hearing Officer