

Issue: Group III Written Notice with termination (absence for more than 3 days without proper authorization); Hearing Date: 07/12/02; Decision Date: 07/30/02; Agency: Norfolk State University; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5475



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5475**

Hearing Date: July 12, 2002  
Decision Issued: July 30, 2002

**PROCEDURAL HISTORY**

On March 20, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*[Grievant] called on March 14, 2002 at 5:10 p.m. to say she will not be in from 3/18 – 3/24/2002. She had been on unauthorized leave since 3/8/02. [Grievant] was denied requested leave from 3/8/02 through 3/18/02. [Grievant] has not submitted the written documentation (detailing the reasons for her absence), requested by the Residential Life/Housing office. Violation: Group III.a (Absence in excess of three days without proper authorization or satisfactory reason.)*

On May 9, 2002, Grievant filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 18, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 12, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
Special Assistant  
Office Manager  
APS II  
Office Assistant  
Assistant Director  
Administrative Program Specialist III  
Administrative Program Specialist I

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

## **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. 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 Administrative and Office Specialist I until her removal effective March 20, 2002. No evidence of prior disciplinary action against Grievant was presented.

Schedules are prepared by the Office Manager for staff in Grievant's unit. If an employee cannot work on a scheduled day, the employee must give the Director 24 hours notice in order to be excused from working. If an employee is excused from work, the Office Manager or a supervisor calls a temporary employment agency to have a temporary employee perform the duties of the absent employee.

On January 22, 2002, the Special Assistant informed all staff in Grievant's unit that employees would be required to attend mandatory training during the week of Spring break beginning March 11, 2002. Training was scheduled for Monday, March 11, 2002 and Tuesday, March 12, 2002.

On March 4, 2002, Grievant submitted to the Director a written request for sick leave from March 8, 2002 at 4 p.m. through March 18, 2002 at 4 p.m. The Director denied her request because of the mandatory training.<sup>1</sup> Later, Grievant had a heated conversation with the Office Manager and attempted to have her name removed from the work schedule. Grievant marked through her name for certain dates on her copy of the schedule, but did not remove her name from the unit's schedule.

Grievant was scheduled on March 7, 2002 for blood tests in Baltimore Maryland. She had obtained her airplane tickets for the trip. She was scheduled to work on March 8<sup>th</sup> and March 9<sup>th</sup>, but did not appear. She also missed the mandatory training on March 11<sup>th</sup> and 12<sup>th</sup>.

The Special Assistant discovered Grievant was absent when she reviewed a sizable bill from the temporary employment agency. She asked the Director why the bill was so large and he replied that Grievant was not at work thereby forcing the agency to use temporary employees.

On March 14, 2002, the Director asked the Office Manager to call Grievant regarding Grievant's being absent from work for more than three days. The Officer Manager needed to know why Grievant was out of the office in order to determine how to classify her leave. When the Office Manager spoke with Grievant, the Office Manager asked for documentation explaining Grievant's absence. Grievant responded that she was from the "old school"<sup>2</sup> and she did not have to provide any documentation to the Office Manager but would let the University know when she was returning to work. Grievant did not indicate that she was ill.<sup>3</sup> The Officer Manager reported Grievant's comments to the Director and asked about what was meant by "old school". The Director was not aware of any "old school" rule.

On March 26, 2002, Grievant presented the University with a doctor's note dated March 7, 2002 stating, "Please excuse [Grievant] from work for NIH visit; Recommend [patient] follow up with primary MD for [evaluation] of possible cardiac ectopy."<sup>4</sup>

On April 18, 2002, the Human Resource Director sent Grievant a letter stating in part:

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> By referring to "old school", Grievant meant that she was under the sick leave program in place prior to the Virginia Sickness and Disability Program.

<sup>3</sup> The Office Manager first learned that Grievant was ill on May 20, 2002 while preparing for the grievance.

<sup>4</sup> Agency Exhibit 6.

I was told that you were approved only to use annual leave for March 7, 2002. I understand that you were scheduled to work on March 8 and 9 but did not report to work, nor did you notify your supervisor of your inability to report to work. I have also been told that you have not produced any medical documentation or information of any type to justify or explain why you have been absent from work for the past month and ½.

On May 17, 2002, Grievant obtained a note dated May 17, 2002 from her doctor indicating, “[Patient] has been under my care from 3/13/02 until 5/17/02. [Patient] able to return to work.”<sup>5</sup>

### **CONCLUSIONS OF LAW AND POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” P&PM § 1.60(V)(B).<sup>6</sup> Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” P&PM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” P&PM § 1.60(V)(B)(3).

Group III offenses include, “Absence in excess of three days without proper authorization or a satisfactory reason.”<sup>7</sup> Grievant was absent for more than three days without proper authorization and without a satisfactory reason.

Grievant does not participate in the Virginia Sickness and Disability Program under DHRM Policy 4.57. Thus, she is subject only to DHRM Policy 4.55 regarding sick leave. Section III(A)(1) of that policy states, “An employee who wishes to use sick leave must comply with a management request for verification of the need to use sick leave.” Grievant did not comply with the University’s request for verification.

Grievant’s last day at work was March 5, 2002. Her sick leave request was denied for March 8<sup>th</sup> to 18<sup>th</sup>, yet she failed to appear at work. She first presented documentation of her illness to the University on March 26, 2002 and that documentation was only for March 7, 2002, a day for which leave had been authorized. It was only on May 17, 2002 that Grievant obtained a note from her local doctor indicating that she had been under the doctor’s care from March 13 to May 17 and could return to work.

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<sup>5</sup> Agency Exhibit 7.

<sup>6</sup> The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM”) setting forth Standards of Conduct for State employees.

<sup>7</sup> P&PM § 1.60(V)(B)(3)(a).

Grievant offered evidence suggesting she presented the University with timely documentation of her illness and that she attempted to notify the Director of her illness. Most of that evidence lacked credibility or was illogical. For example, Grievant contends she timely submitted to the University copies of her prescriptions written by her physician on March 13, 2002. Yet when the Office Manager called Grievant on March 14, 2002 asking for documentation, Grievant replied that she did not have to bring in documentation until she returned to work. If Grievant intended to submit the March 13, 2002 prescriptions on a timely basis, she would have informed the Office Manager that she would be sending in copies of the prescriptions.<sup>8</sup> In addition, several witnesses testified that Grievant called them to say she would be out due to illness and asked them to inform the Director. They supposedly informed the Director of Grievant's illness, yet the Director informed University managers that no one had informed him that Grievant was out due to illness. Either the witness's testimony is incorrect or the Director intentionally tried to harm Grievant. No evidence was presented the Director had any motive or had taken any actions against Grievant such that he would misrepresent his knowledge of Grievant's status to University managers.

This case is unfortunate. Grievant was undoubtedly experiencing discomfort and distress relating to her physical condition. None of her difficulties, however, would have prevented her from regularly contacting the Director and informing him of her medical status or from asking for doctor's excuses and forwarding them to the Director. The University cannot properly plan for its staffing needs without knowing whether an employee will be out for an extended period of time. By failing to fully inform the University, Grievant adversely affected the University's planning and operations. The University has met its burden of proof to remove Grievant from employment.

## **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **upheld**.

## **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.

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<sup>8</sup> Grievant's testimony is also inconsistent in another respect. Grievant testified that on March 7, 2002, she called the Director and informed him that she would be out sick. Grievant contends the Director said she did not have to bring in any doctor's statements until she returned to work. If this had been the case, then Grievant would have repeated the Director's comments to the Officer Manager when the Office Manager called Grievant on March 14, 2002 asking for documentation of absences.

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 Resource 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 DHRM, 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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Carl Wilson Schmidt, Esq.  
Hearing Officer

