

Issue: Group III Written Notice with termination (absence in excess of 3 days without proper authorization); Hearing Date: August 14, 2002; Decision Date: September 6, 2002; Agency: Department of Juvenile Justice; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5492



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5492

Hearing Date: August 14, 2002
Decision Issued: September 6, 2002

PROCEDURAL HISTORY

On January 29, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal¹ for:

Absence in excess of three days without proper authorization. In compliance with VSDP job modifications you were scheduled to report to [the Facility] on 1-14-02 to work 20 hours per week in an administrative assistant position. You failed to report on 1-14-02 and have not done so to date. You were sent a certified letter on 1-17-02 advising you to report to work and that failure to do so would result in disciplinary action. On 1-23-02 I advised you of the same by phone. On 1-28-02 you cancelled our scheduled meeting and stated that you did not know when you could meet with me.

On February 27, 2002, Grievant timely 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 July 18, 2002, the Department of

¹ The Written Notice does not specifically identify the removal date. This omission, however, is harmless error. Grievant was placed on notice of the Agency's actions to discipline her and she was aware of her removal before filing the grievance. See Grievant Exhibit 35.

Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 14, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Legal Assistant Advocate
Superintendent
Personnel Analyst
Assistant Superintendent
Lieutenant
Captain
Sergeant

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:

The Department of Juvenile Justice employed Grievant as a Corrections Sergeant at one of its juvenile facilities. She began working for the Agency in April 1999 and was removed from employment on January 29, 2002.

In November 1999, Grievant was attacked by three female inmates thereby causing physical injuries to Grievant.² In April 2001, a juvenile offender made a false

² Grievant Exhibit 1.

allegation that Grievant pulled a chair out from underneath the juvenile. Grievant had previously filed charges³ against the juvenile but the Agency somehow misplaced the charges. Had the charges been readily available, it would have been easier for Grievant to counter the false charges. She felt stress because she had to defend against a juvenile's accusation without the using the charges to show that the juvenile was merely retaliating against her. The Agency investigated the matter and ultimately found the allegation to be unfounded.

The November 1999 and April 2001 incidents created stress for Grievant and began a steady decrease in the quality of her mental health. She sought counseling for anxiety and depression.⁴ She became unable to work and applied for benefits under the Virginia Sickness and Disability Program. She was approved for short-term disability beginning October 30, 2001.⁵ Her diagnosis included severe Clinical Depression.⁶

On January 7, 2002, Grievant's medical doctor released her to return to work on a part-time basis at a different facility and in an administrative role rather than as a correctional officer.⁷ Her medical doctor sent Grievant an email⁸ on January 11, 2002 stating:

I have released you to work part-time in an administrative position. I recommend that you work part-time (4-6 hours/day) for 2 weeks, then try working full-time. I do not know if you will be able to work for the Senate without risking your current job. That will have to be worked out with your employer.

On January 11, 2002, the Facility Superintendent sent Grievant a letter⁹ stating:

This memorandum is a follow-up to our meeting on January 10, 2002 and my telephone conversation to you on January 1, 2002. Your job modification request has been approved. Your current modification is for 20 hours of work per week, an administrative assistant position, and a work site other than [former Facility].

³ Grievant charged the juvenile with (1) abusive language, (2) failure to comply, and (3) throwing objects. Grievant Exhibit 2.

⁴ Grievant Exhibit 4.

⁵ Grievant Exhibit 21.

⁶ Agency Exhibit 7.

⁷ Agency Exhibit 2.

⁸ Agency Exhibit 2.

⁹ Agency Exhibit 1.

You will be assigned to [new Facility] starting January 14, 2002 through February 10, 2002 in an administrative assistant position. Your work hours will be from 12 Noon to 4:00 p.m., Monday thru Friday. Upon your arrival, you are to report to the superintendent's office.

Your duties will consist of administrative support responsibilities. Your immediate supervisor will be [Assistant Superintendent for Programs.]

As we discussed, your work hours may be adjusted to accommodate medical appointments. You are to advise your immediate supervisor on any charges, which will affect your work schedule.

We look forward to working with you at [new Facility]. Should you have any questions, feel free to contact me.

On January 17, 2002, the Facility Superintendent sent Grievant a letter¹⁰ stating:

You were scheduled to report to work at 12 Noon on January 14, 2002 at the [new Facility]. You called my office and advised me that you would not be reporting and that you have accepted a position at the General Assembly.

Be advised that your job modification was approved for the [new Facility] and not for any other employer. You are out of compliance with the job modification agreement. You have been absent from the work site for more than three workdays. Being absent from the work site for more than three workdays is a violation of the Standards of Conduct.

I have enclosed a copy of my January 11, 2002 letter to you which documented the agreement by you and this agency to accept the conditions of your job modification.

You will have until January 24, 2002 to report to work at the [new Facility]. Failure to report to work as scheduled will result in disciplinary actions being taken with the possibility of termination.

Should you have any questions, I have enclosed a business card or you may contact [Personnel Analyst] at [telephone number].¹¹

¹⁰ Grievant Exhibit 32.

¹¹ On January 23, 2002, a friend of Grievant may have accepted the letter on Grievant's behalf. Even if Grievant did not see the letter before January 24, 2002, the outcome of this case does not change. The January 11, 2002 letter is adequate notice that Grievant had to return to work. Grievant received this letter and called the Superintendent to inform her that Grievant had accepted a position with the General Assembly and would not be returning to work. Grievant further contacted a Superintendent on January

On March 15, 2002, Grievant's medical doctor sent her a letter¹² informing Grievant that her diagnoses were Major Depression and Panic Disorder. The doctor excluded Post Traumatic Stress Disorder as one of her diagnoses.

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." DHRM § 1.60(V)(B).¹³ 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." DHRM § 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." DHRM § 1.60(V)(B)(3).

State employees are required to "report to work as scheduled."¹⁴ Group III offenses include, "[a]bsence in excess of three days without proper authorization or a satisfactory reason."¹⁵ Grievant was absent from work for more than three days without proper authorization or a satisfactory reason. The Agency has met its burden of proof to show issuance of a Group III Written Notice with removal was appropriate in this case.¹⁶

The Agency made an extraordinary effort to inform Grievant that she should return to work and that she may be terminated if she failed to return to work. The

23, 2002 and that Superintendent called her on January 24th and 25th, 2002. Grievant had an adequate opportunity to inform the Agency that she had changed her mind and would be returning to employment.

¹² Agency Exhibit 2.

¹³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

¹⁴ DHRM § 1.60(III)(A)(1).

¹⁵ DHRM § 1.60(III)(E)(3)(a).

¹⁶ The Agency also has a Return-To-Work policy addressing employees who are absent from work under VSDP. Section V(E) states:

An employee who has been notified of the approval of a transitional work assignment shall return to work on the date specified. Failure to return to work in a physician-approved transitional work assignment may result in immediate loss of worker's compensation or VSDP benefits. In addition, failure to report to work without proper authorization or otherwise to comply with the requirements of this policy may result in disciplinary action under the Standards of Conduct and Performance.

Grievant's failure to report to work jeopardized her VSDP benefits.

Agency also took measures to find a position Grievant could perform and that was acceptable to her. Grievant was given several chances to return to work, yet she knowingly failed to do so. There is no basis to grant Grievant's request for reinstatement.

Grievant asks the Hearing Officer to grant her relief including (1) suitable job placement¹⁷, (2) the Agency to facilitate her permanent disability claim, (3) the Agency to pay for her retraining, and (4) the Agency to provide her with a letter of recommendation. The Hearing Officer only has the authority granted as part of the Grievance Procedure Manual. None of the relief Grievant request falls within the Hearing Officer's authority. Grievant request must be denied.

Grievant seeks reasonable accommodation for her disability. Assuming for the sake of argument that Grievant was a qualified employee with a disability, the Agency reasonably accommodated her by offering her an administrative position.¹⁸ Grievant's failure to accept the position does not give rise to an Agency obligation to reinstate her.

Grievant contends the Agency failed to inform her that if she began working at the General Assembly, she would not be able to return to work at the Agency and would lose her VSDP benefits. The Agency had no obligation to inform her of the consequences of her decision once it had instructed her to report to work at the Agency's Facility. Grievant did not ask the Agency staff what the consequences would be if she took the General Assembly position. Grievant's medical doctor cautioned Grievant on January 11, 2002, "I do not know if you will be able to work for the Senate without risking your current job. That will have to be worked out with your employer."¹⁹

It is unfortunate that Grievant has had to experience less than perfect mental health. When an individual breaks a limb or suffers a physical injury, the illness is obvious and recovery time often predictable. When an individual suffers from depression, however, the illness is not obvious to others and the recovery period can be lengthy and unpredictable. Grievant's depression explains why she may have made

¹⁷ The Hearing Officer has the authority to reinstate an employee to the employee's former position or, if occupied, to an objectively similar position. Grievant does not desire to return to her former position as a Corrections Sergeant.

¹⁸ Grievant contends the administrative position was not reasonable accommodation because it remained in a corrections setting where there were large doors opening and closing that reminded her of the corrections portion of the Agency's Facility. The Hearing Officer finds that the Agency offered Grievant reasonable accommodation even if the sounds in the administrative office reminded her of the corrections setting. It would be unreasonable to expect the Agency whose purpose is juvenile corrections to find Grievant a position that has no reminders of a corrections setting.

¹⁹ Grievant contends that staff at VSDP advised her seeking employment with the General Assembly would not jeopardize her status with the Agency. No one from VSDP testified to support Grievant's contention. Even if a VSDP employee mistakenly advised Grievant, a statement of a VSDP employee outside that employee's authority does not bind the Agency. VSDP is a independently operated program without the authority to make decisions regarding Agency operations.

poor judgments regarding returning to the Agency; however, it is not a sufficient basis to reverse the Agency's action.

DECISION

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

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.

Carl Wilson Schmidt, Esq.
Hearing Officer