

Issue: Group III Written Notice with termination (unauthorized leave); Hearing
Date: 10/29/02; Decision Date: 11/04/02; Agency: DMHMRSAS; AHO:
David J. Latham, Esq.; Case No.: 5551



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5551

Hearing Date: October 29, 2002
Decision Issued: November 4, 2002

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Employee Relations Manager
Assistant Attorney General for Agency
Three witnesses for Agency

ISSUES

Was the grievant's absence of more than three days without notice to supervision subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely appeal from a Group III Written Notice issued for an absence in excess of three days without proper authorization.¹ The grievant's employment was terminated on the effective date of the Written Notice. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as "agency") has employed grievant as a recreation therapist for four years.

The facility's policy on occupational accidents requires the human resources representative to see employees after physician visits to review and discuss their status. With regard to communication, the policy further states that, "Employees: are responsible for keeping the HR Rep **and their immediate supervisor** updated on treatment and return-to-work status after each physician visit."³ (Emphasis added)

On April 8, 2002, grievant was conducting a group therapy session when a patient known to be disruptive and aggressive punched her on the upper arm. Prior to this incident grievant stuttered somewhat but it did not adversely affect her ability to perform her duties. She worked on light-duty from April 10-16, 2002. Subsequently, grievant's stuttering became severe when she is under stress. However, at other times her stuttering is mild and does not unduly interfere with communication. The workers' compensation physician referred grievant to a physician who specializes in behavioral and stress management. The new physician diagnosed grievant as having a Post-Traumatic Stress Disorder (PTSD). At this point, the workers' compensation plan stopped making payments. The Workers' Compensation Commission will decide in November 2002 whether grievant's treatment for PTSD is compensable.

Grievant is being seen weekly by a social worker who helps her to cope and deal with her feelings. The social worker relates that grievant is terrified of both the patients and the facility and is fearful for her life if she returns to work. Grievant has also advised that she wants to seek employment elsewhere.

When the workers' compensation payments ended, agency management⁴ met with grievant on May 16, 2002 to assist her in obtaining the maximum pay available. Prior to this date, grievant had been approved to use personal sick leave and annual leave to cover her absence. On May 16th, grievant was

¹ Exhibit 1. Written Notice, issued July 16, 2002.

² Exhibit 2. Grievance Form A, filed August 14, 2002.

³ Exhibit 17. Facility Policy HR-28b, *Occupational Accident/Illness*, effective February 8, 2002.

⁴ Participants in the meeting included grievant, her immediate supervisor, another supervisor, the Director of Rehabilitative Services, the workers' compensation manager, and for part of the time – the employee relations manager.

approved to utilize the remaining balance of her annual leave from May 16 - 30, 2002. She was also approved for compensatory leave on May 31, 2002. Because she had no remaining leave balances, she was placed on leave without pay from June 1 - 6, 2002.⁵ During this meeting, grievant stuttered somewhat but was able to communicate satisfactorily. Instructions were given to grievant during this meeting on the proper procedure for requesting additional leave once her leave authorization expired on June 6, 2002.

Grievant did not return to work on June 7, 2002 and did not contact her supervisor or anyone else to advise that she would not return to work. Grievant's supervisor attempted to call grievant but her telephone had been disconnected.⁶ By June 14, 2002, grievant had not contacted anyone in her supervisory chain of command. By this date, grievant had been absent in excess of three days without proper notice to anyone in her supervisory chain of command. However, grievant's supervisor decided not to terminate her employment at that time but to give her one more chance. He sent to grievant by regular mail, and by certified mail, a letter advising her of the requirement to notify her supervisor when she is unable to work. The letter was mailed to grievant's correct home address at which she still resides. Grievant refused to accept the certified letter but did receive the regular mail copy.⁷ The letter states, in pertinent part:

You must contact me within 24 hours from receipt of this letter by pager [pager number] or phone in order to discuss your continued absence. Failure to do so may jeopardize your employment status with the Hospital. Additionally, your failure to follow the proper procedures for requesting leave and maintaining an open line of communication with supervision has impacted your benefits; therefore, you must also contact the Benefit Coordinator at [phone number].⁸

Also on June 14, 2002, a human resource representative mailed a letter to grievant under separate cover. That letter advised grievant that her leave of absence had been extended to July 5, 2002 and that:

If you find that circumstances change and you need another extension to your Leave of Absence Without Pay, please **contact your supervisor five days prior to the expiration of your leave** ... It is important for you to understand that in accordance with,

⁵ Exhibit 19. Leave Request forms. NOTE: State agencies are required to account for the specific leave category when an employee uses any type of leave of absence, whether it be annual leave, sick leave, family or medical leave, compensatory leave, overtime leave, administrative leave, military leave, educational leave or leave without pay.

⁶ Grievant avers that she obtained a cellular telephone in June 2002 but she never notified her supervisor or anyone else in her chain of command of the cellular telephone number.

⁷ Exhibit 2. Second Step Expedited Response, wherein grievant admitted to the Facility Director on August 26, 2002 that she had received the correspondence.

⁸ Exhibit 3. Letter from supervisor to grievant, June 14, 2002.

Leave Without Pay, of the Rules for the Administration of the Virginia Personnel Act, if you fail to return at the end of the period for which the leave was granted (unless extension has been approved), you shall be treated as having resigned from State service.⁹ (Emphasis added)

On June 26, 2002, grievant's supervisor emailed her a message advising her to report to the Human Resources office on June 27, 2002. He also gave her an alternative date of June 28, 2002 if June 27th was inconvenient. Grievant did not report to Human Resources on either date and did not call anyone to advise why she did not report. She sent an email to her supervisor stating that she had an appointment with her social worker on June 27th. She did not advise why she did not report for the meeting on June 28th.

Grievant's supervisor sent her another letter, by both certified and regular mail, on July 9, 2002. The letter summarizes the attempts made to contact grievant and to meet with her, and advises that she is in a state of unauthorized absence from work. Grievant received the letter sent by regular mail. In pertinent part, it states:

You must contact me by noon Tuesday, July 16, 2002 by phone [number] or pager [number] in order to discuss your continued absence. DO NOT USE EMAIL. ... Failure to comply with these instructions may result in disciplinary action.¹⁰

On the same date, July 9, 2002, a representative of the payroll department sent a letter to grievant under separate cover notifying her that her health insurance would be cancelled if she did not submit the premium by July 16, 2002.¹¹ Grievant promptly responded to this correspondence by coming to the facility's payroll department on July 16th to pay her health insurance premium.

The grievant did not contact her supervisor, or submit a written request to extend her leave without pay. Grievant's supervisor, in consultation with his supervisor and human resources representatives, concluded that grievant had abandoned her job. Her supervisor issued a Group III Written Notice and terminated her employment on July 16, 2002.

A physician's disability certificate purportedly covering the period of July 5 to August 12, 2002 was not faxed to the agency until July 31, 2002 – two weeks after grievant had been discharged.¹²

⁹ Exhibit 5. Letter from human resources representative to grievant, June 14, 2002.

¹⁰ Exhibit 4. Letter from supervisor to grievant, July 9, 2002.

¹¹ Exhibit 6. Letter from payroll department to grievant, July 9, 2002.

¹² Exhibit 8. Disability Certificate and fax cover sheet showing transmittal date of July 31, 2002.

During the past four years, ten employees at the facility have been absent for periods in excess of three days without proper notice to supervision; all have been removed from employment.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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 § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns 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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹³

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹⁴ 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 personal conduct 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

¹³ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

¹⁴ Now known as the Department of Human Resource Management (DHRM).

corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and 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 occurrence normally should warrant removal from employment.¹⁵ One example of a Group III offense is an absence in excess of three days without proper authorization or a satisfactory reason.

Grievant was in an authorized leave status (without pay) until June 6, 2002. When she did not return to work on June 7, 2002, her leave had expired and she did not have proper authorization to be absent from work. Attempts to contact grievant by telephone were unsuccessful. Finally, the agency sent a letter to grievant telling her that she must make contact within 24 hours or possibly be discharged. Another letter sent to grievant the same day on a different topic also admonished her to contact her supervisor. Although grievant received the two letters, she did not contact her supervisor or anyone else. At about this same time, the agency received a statement from grievant's physician indicating continuing disability until July 5, 2002. The agency decided not to discharge grievant at that time.

Nonetheless, the agency continued to attempt contact with grievant by emailing her and requesting that she meet with human resources on either June 27 or 28, 2002. Grievant was unavailable on June 27th but provided no excuse for failing to come in on June 28th. By July 9, 2002, it had become apparent that grievant was being deliberately uncommunicative. The agency again attempted to get grievant to understand the seriousness of her situation by sending a letter notifying that she must call her supervisor not later than July 16, 2002. When grievant failed to call or respond in any way, the agency concluded that grievant was not interested in retaining her employment and it terminated her employment. It is concluded that grievant was absent substantially in excess of three days without authorization.

Grievant argues that her contacts with the workers' compensation manager should have been sufficient notification to the agency because she assumed that person would have contacted both grievant's supervisor and the human resources department. Unrebutted testimony of the workers' compensation manager established that she maintains confidentiality on all workers' compensation matters, and that she did not discuss matters relating to the grievant either with the employee relations manager or with grievant's supervisor. In any case, the compensation manager knew only that grievant was seeing a social worker each week. The workers' compensation manager is not responsible for approving unpaid leave to an employee; grievant's supervisor (or someone in his chain of command) is responsible for approving leaves of absence.

¹⁵ Exhibit 15. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Moreover, a reading of Sections N. and O. of the agency's policy on occupational accident/illness makes clear that the burden of communication is on the employee.¹⁶ The workers' compensation manager is required to see employees after physician visits and to keep the supervisor notified about the status of the workers' compensation claim. However, the employee is responsible to update her immediate supervisor about her treatment and return-to-work status after each physician visit. Grievant did not comply with this requirement.

Grievant contends that she "regularly" emailed her supervisor regarding her condition on "at least 5 or 6 occasions." However, when asked to produce copies of the emails, grievant submitted only one email that discusses her physician's care, stating that he had extended her disability until July 7, 2002.¹⁷ The supervisor promptly responded to grievant via email seeking clarification of her message, and asking her to provide two specific items immediately.¹⁸ Interestingly, grievant was exchanging emails with the workers' compensation manager. On June 24, 2002, the manager reiterated to grievant that she must call her supervisor or his supervisor not later than June 25, 2002.¹⁹ Grievant did not comply with this instruction.

Grievant contends that signing a leave request form for leave without pay would in some way jeopardize her claim for workers' compensation benefits. However, grievant presented no statute, regulation or any other source to support this contention. The completion of a leave request form has absolutely no connection to a workers' compensation claim. If the Workers' Compensation Commission determines that grievant is entitled to benefits, she would be entitled to those benefits whether or not she is employed, and irrespective of whether she had signed a leave request form.

Here, the agency's workers' compensation carrier, while paying the immediate medical expenses connected with the physical injury, has denied payment for PTSD. It is not within the purview of this grievance to resolve whether grievant should be entitled to benefits for PTSD; the Workers' Compensation Commission will decide that issue. Regardless of the outcome of grievant's workers' compensation claim, the issue before this tribunal is whether grievant should be discharged from employment.

While grievant has made excuses (discussed above) for her failure to respond to the agency's multiple requests, her reasons are not persuasive. If grievant was truly interested in retaining her employment, the agency's first letter of June 14, 2002 should have immediately alerted her concerned about the precariousness of her employment situation. The language used therein (You

¹⁶ Exhibit 17. *Ibid.*

¹⁷ Exhibit 7A. Email from grievant to supervisor and others, June 27, 2002.

¹⁸ Exhibit 7A. Email from supervisor to grievant, June 28, 2002.

¹⁹ Exhibit 7A. Email from workers' compensation manager to grievant, June 24, 2002.

must contact..., may jeopardize your employment status) would alert anyone that their job was in danger. That letter was followed by equally urgent requests for contact in two other letters and an email message – all of which grievant received. The reaction of most people who want to retain their job would be to immediately contact the agency, clarify any misunderstandings or comply with agency requirements.

Grievant's failure to comply with any of these four requests suggests that she had no real interest in retaining her employment. This conclusion is bolstered by the fact that grievant had indicated for some time that she was not happy in her position, that she wanted to be transferred elsewhere, and that she was interested in seeking other employment. Given the agency's knowledge of grievant's desires, it was not unreasonable for the agency to conclude that her failure to respond to unambiguous instructions constituted an abandonment of her job.

Grievant now maintains that she was afraid to contact her supervisor and that he didn't like her. However, she has not offered any reason to be fearful of her supervisor, and the supervisor denies harboring any ill will towards grievant. For the sake of argument, even if grievant's fears had been founded, there is no reason that grievant could not have contacted the supervisor's manager, or the employee relations manager, or the human resource director, or the facility director. By failing to contact anyone in her chain of command or in human resources, grievant failed to exhaust reasonable alternatives available to her.

Grievant has not demonstrated that the injury sustained on April 8, 2002 prevented her from responding to the agency's reasonable requests. Even if it is determined that grievant's increased frequency of stuttering is attributable to that event, that did not prevent grievant from responding to the agency. By visiting the payroll department on July 16, 2002, grievant demonstrated that she could respond to requests and even come to the facility, when it suited her purpose. Therefore, it must be concluded that grievant's refusal to comply with the agency's other requests was willful and deliberate. Her failure to comply resulted in an unauthorized absence in excess of three days – a Group III offense. The uncontraverted evidence establishes that in all previous cases involving unauthorized absences in excess of three days, the agency has terminated the employment of offenders.

Grievant argues that the agency did not consider mitigating circumstances in disciplining her. The facility director outlined in the second step response the factors he examined in considering whether to reduce discipline.²⁰ The grievant does not have long service with the state, and her most recent performance evaluation was only marginally satisfactory with two significant areas of

²⁰ Exhibit 2. *Ibid.*

deficiency noted.²¹ Therefore, there are no factors that to mitigate the discipline normally given for a Group III offense.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice and removal from employment issued on July 16, 2002 is UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.²²

²¹ Exhibit 13. Grievant's performance evaluation, signed October 17, 2001.

²² Agencies must request and receive prior approval from the Director of 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]

David J. Latham, Esq.
Hearing Officer