

Issue: Group III Written Notice with termination (abandonment of job); Hearing Date: 04/19/04; Decision Issued: 04/20/04; Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 676



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 676

Hearing Date: April 19, 2004
Decision Issued: April 20, 2004

PROCEDURAL HISTORY

On February 10, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Abandonment of job. Employee failed to return to work after release by third party provider on [January] 13, under the Virginia Sick[ness] and Disability Program and then her physician on January 20, 2004. Employee failed to make contact with me during the time she was out (Dec. 2003 through Feb. 2004). Employee called on February [2] asking if she could return. I tried to return her call and all I got was a busy signal.

On March 5, 2004, Grievant timely filed a grievance to challenge the University's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 30, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 19, 2004, a hearing was held at the University's regional office.

APPEARANCES

Grievant

Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses.

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for abandonment of her job.

BURDEN OF PROOF

The burden of proof is on the University 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 Virginia State University employed Grievant as an Administrative and Office Specialist III until her removal on February 10, 2004. Her 2002 evaluation rated her overall job performance as "Contributor." Of the seven core responsibilities, she received three ratings of "Extraordinary Contributor."¹ Her 2003 evaluation rated her job performance as "Contributor." She received a rating of "Extraordinary Contributor" in four of eight core responsibilities.² Grievant had not received any prior disciplinary action.

Grievant required medical treatment in December 2003. Her doctor excused her from work on December 16, 2003 for a period of four weeks until she was to be re-evaluated.³ She visited her doctor on January 13, 2004 and he released her to return to work on January 20, 2004. Grievant did not feel well⁴ on January 20, 2004 and did not

¹ Grievant Exhibit 1.

² Grievant Exhibit 2.

³ Grievant Exhibit 3.

⁴ She received treatment on January 16, 2004 from another physician regarding another medical problem unrelated to the medical concern causing her short term disability. Grievant Exhibit 7. Doctor's note dated February 4, 2004.

return to work. She did not contact her supervisor to notify him that she would be absent from work. She received short term disability benefits from December 16, 2003 to January 13, 2004.

When Grievant expected to be out of work beginning in December 2003, she spoke with the Personnel Assistant working in the University's Human Resource Department. The Personnel Assistant told Grievant to call CORE, the State's third party administrator under the Virginia Sickness and Disability Program. Grievant did so. CORE and the employee's doctor determine when an employee may be released to return to work.

On January 21, 2004, Grievant called the Personnel Assistant and told the Personnel Assistant that she was ready to come back to work. The Personnel Assistant said that Grievant needed a release from her doctor. Grievant mistakenly understood the Personnel Assistant to be requiring Grievant to obtain a doctor's release before Grievant would be permitted to return to work.⁵ On January 21, 2004, Grievant called her doctor's office staff and stated "she need[ed] a letter releasing her back to work."⁶ Staff in the doctor's office⁷ told Grievant that the doctor could not give her a release to return to work until her next office visit which was scheduled for February 24, 2004.⁸

On February 2, 2004, Grievant's Supervisor attempted to call Grievant at home but received repeated busy signals. Grievant called the Personnel Assistant who told Grievant that her time off was unauthorized.⁹ Grievant called the Supervisor in the afternoon and left a message on his voice mail asking the Supervisor to call Grievant. The Supervisor attempted to call Grievant and again got a busy signal.

In the morning of February 3, 2004, the Supervisor mailed Grievant a letter notifying her of his intent to remove her from employment. Grievant came to the Facility at noon. The Supervisor handed her a copy of the letter he had mailed earlier in the morning.

⁵ The University would have permitted Grievant to return immediately and permit her to submit the doctor's note at a later date. The University does not have a specific leave policy outlining this procedure.

⁶ Agency Exhibit 1. Letter from Grievant's doctor dated February 2, 2004 and received by the University by fax on February 3, 2004 at 4:57 p.m.

⁷ Grievant also called the doctor's office on January 23, 2004.

⁸ Grievant testified that she called her Supervisor on January 21, 2004 to tell him of the doctor's staff comments. The Supervisor was away at the time. He testified he had no message from Grievant on his voice mail or from a secretary who may have received Grievant's call.

⁹ No evidence was presented suggesting that Grievant knew the Supervisor was attempting to call her at home on February 2, 2004.

CONCLUSIONS OF 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).¹⁰ 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).

“Absence in excess of three days without proper authorization or a satisfactory reason” is a Group III offense.¹¹ Grievant was absent from work without authorization on January 20, 21, 22, 23, 28, 29, 30, and February 2, 2004.¹² The University has met its burden of proof to support issuance of a Group III Written Notice.

Corrective action may be reduced based on mitigating circumstances. Grievant did not express an intent to abandon her job. After speaking with Personnel Assistant, Grievant understood that she could not return to work until she had obtained a release from a doctor permitting her return. She immediately contacted her doctor and asked for a release permitting her to return to work. Grievant genuinely believed she was complying with the University’s and her doctor’s requirements. Her interpretation of the Personnel Assistant’s instruction was one of several reasonable interpretations. Some State agencies require an employee to present a doctor’s note authorizing the employee to return to work before permitting the employee to work. The reason for this is to avoid any potential liability arising from working an employee who is physically unfit for work. Grievant has presented sufficient evidence to justify mitigation the disciplinary action from a Group III Written Notice with removal to a Group III Written Notice with 30 workday suspension.

DECISION

For the reasons stated herein, the University’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group III Written Notice with a 30 workday suspension. The University is directed to **reinstate** the Grievant to her former position or, if occupied, to an objectively similar position.¹³ The University is directed to provide the Grievant with **back pay** for the period of termination less any

¹⁰ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

¹¹ DHRM Policy 1.60(V)(B)(3)(a).

¹² The University was closed due to snow on January 26th and 27th, 2004.

¹³ GPM § 5.9(a)(1).

interim earnings that the employee received during the period of termination and credit for annual and sick leave that the employee did not otherwise accrue.¹⁴ The University is directed to impose the 30 workday suspension from the date of removal.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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

¹⁴ GPM § 5.9(a)(3). DHRM Policy 1.60(IX)(B)(2).

in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁵

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.