Issue: Disciplinary Removal; Hearing Date: 08/02/10; Decision Issued: 08/10/10; Agency: NSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9371; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 08/25/10; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9371

Hearing Date: August 2, 2010
Decision Issued: August 10, 2010

PROCEDURAL HISTORY

On April 9, 2010, the Agency removed Grievant from employment because she did not report to work. On April 11, 2010, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On July 6, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 2, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant abandoned her position?

2. Whether Grievant engaged in behavior constituting misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 a Security Officer III. The purpose of her position was to "secure and protect University property, enhance physical and environmental security through modern methods of security technologies."[1] Grievant's work performance was satisfactory to the Agency.

Grievant stopped reporting to work on July 8, 2009. She presented a medical provider's note to the Agency excusing her absence and indicating that she was able to return to work on July 20, 2009. Grievant presented another note from her medical provider indicating that she was able to return to work on July 27, 2009.

In July 2009, Grievant applied for Short Term Disability benefits through the Third Party Administrator. She had her medical providers submit the necessary information to the Third Party Administrator for a disability determination to be made. On August 20, 2009, the Third Party Administrator sent Grievant a letter stating, "Your disability date has been determined to be July 9, 2009, the date of your surgery."[2] Grievant was approved to receive Short Term Disability benefits. On November 2, 2009, the Third Party Administrator sent Grievant a letter informing her that:

> We are pleased to inform you that based on the current information in our claim file, your benefits had been approved through November 30, 2009. If you are able to return to work in any capacity before December 1, 2009, please contact us immediately. Because Short Term Disability benefits

[1] Agency Exhibit C.

[2] Agency Exhibit A.

> are not payable after you have returned to work, you will be required to reimburse your employer for any overpayment of benefits.
>
> If you could not return to full-time full-duty on December 1, 2009 for medical reasons, your attending physicians must provide us with the medical information below to support your continued disability.[3]

On December 16, 2009, the Third Party Administrator sent Grievant a letter stating, "after completing its review of your just disability claim, [the Third Party Administrator] regrets that it is unable to approve your request for benefits beyond November 30, 2009."[4] The letter also advised Grievant that if she disagreed with that determination, she could file a written appeal.

On December 18, 2009, the Third Party Administrator's Benefits Specialist sent Grievant a letter stating:

> In a letter dated December 17, 2009, you were advised that Short Term Disability benefits were not approved beyond November 30, 2009 because your claim is not medically supported beyond that date. The letter explains your next steps if you have additional information or if you disagree with the decision.
>
> During today's telephone call, I explained that since you did not receive Short Term Disability benefits for the maximum benefit period, Long Term Disability benefits are not available and your claim is being closed without further review.[5]

The letter also advised Grievant that if she disagreed with that determination, she could file a written appeal.

Grievant submitted to the Agency a medical provider's note dated January 7, 2010 stating that Grievant should remain out of work until March 31, 2010 due to severe migraine headaches.

On January 21, 2010, the Human Resource Analyst II talked to Grievant regarding her status. She reminded Grievant that her Short Term Disability benefits had ended. She told Grievant that Grievant should return to work immediately and bring a doctor's note releasing her to full-time work in accordance with the Agency's return to work policy.

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[3] Agency Exhibit A.

[4] Agency Exhibit A.

[5] Agency Exhibit A.

Grievant submitted to the Agency a medical provider's note dated February 11, 2010 stating:

> [Grievant] is a longtime patient of mine. She has severe migraine and daily headaches. She works as a security guard, cannot work at all due to the daily frequent nature of her migraines. She is out of work since July 1, 2009. I will keep her out of work until June 1, 2010, due to severe and frequent nature of her headaches. Certainly, cannot go to work due to her headaches being on a daily severe basis. Her job as a security guard has actually kept her out of work as well. They do not want her to come back unless her headaches are under better control.[6]

On February 15, 2010, the Third Party Administrator sent Grievant a letter stating, "Thank you for sending additional information about your Short Term Disability claim. We have reviewed this information and it does not change our original decision."[7]

On March 8, 2010, the Human Resource Analyst II met with Grievant regarding Grievant's status. The Human Resource Analyst II reminded Grievant that her Short Term Disability benefits had ended and that Grievant was obligated to report to work with a note from her doctor's releasing Grievant to full-time work. Grievant did not report to work.

The Human Resources Director sent Grievant a letter dated April 1, 2010 stating, "The University can only assume that you have abandoned your Security Officer's position with the University. Your termination will be effective April 9, 2010."[8]

Grievant's Family Medical Leave benefits were available concurrently with Grievant's Short Term Disability benefits. At the time of her removal, Grievant's Family Medical Leave benefits already had ended.

CONCLUSIONS OF POLICY

State policy does not authorize an agency to remove an employee by assuming that the employee has abandoned his or her job. In this case, the Agency took disciplinary action against Grievant by removing her from employment as a penalty for failure to report to work. The Agency did not issue a Group III Written Notice of disciplinary action even though it could have done so. Rather than placing the burden of proof on the Grievant to show that the Agency's removal was not correct, the Hearing Officer will treat this case as a disciplinary action by the Agency against Grievant and

[6] Agency Exhibit A.

[7] Agency Exhibit A.

[8] Agency Exhibit D.

place the burden of proof on the Agency to prove that the disciplinary action was appropriate.

"Absence in excess of three workdays without authorization" is a Group III offense.[9] Grievant was notified that her Short Term Disability benefits had ended and that she was obligated to return to work. She did not report to work as directed and remained absent from work in excess of three workdays. Her absence was not authorized by the Agency. The Agency has presented sufficient evidence to show a Group III offense occurred. DHRM Policy 1.60 authorizes removal of an employee who engages in the Group III offense. Accordingly, Grievant's removal is upheld.

Grievant argued that she was unable to return to work because of migraine headaches that she continues to suffer. She did not present any evidence showing that she was capable of returning to work at the time of the hearing or at any time prior to the hearing. Grievant presented the Agency with the February 11, 2010 medical provider's note excusing her absence until June 1, 2010. The Agency argued that the Third Party Administrator had reviewed Grievant's medical records and concluded that Grievant was no longer eligible for Short Term Disability and had denied Grievant's request for Long Term Disability benefits. The Agency confirmed that the Third Party Administrator had received the medical provider's February 11, 2010 note and concluded that there was no basis for the Third Party Administrator to change its conclusion that Grievant should report to work without restriction. Neither Grievant nor her medical provider testified during the hearing. There is insufficient evidence to counter the Third Party Administrator's conclusion that Grievant was no longer disabled and was able to return to work without restriction. Accordingly, there is no basis to consider Grievant's absence from work to be authorized or justified.

Grievant argued that her supervisor, the Chief, told her not to return to work until she got her headaches under control. The Chief denied this statement. His denial was credible. Grievant did not present any evidence to contradict the Chief's statement.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[10] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has

[9] See Attachment A, DHRM Policy 1.60.

[10] *Va. Code § 2.2-3005.*

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's decision to remove Grievant from employment is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 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
   600 East Main St. STE 301
   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 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-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.[11]

[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].

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

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