

Issue: Group III Written Notice with Termination (failure to report to work without notice, absent 3 days without authorization, job abandonment); Hearing Date: 02/29/16; Decision Issued: 03/18/16; Agency: NSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10750; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10750

Hearing Date: February 29, 2016
Decision Issued: March 18, 2016

PROCEDURAL HISTORY

On November 10, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to report to work without notice, absence in excess of three days without authorization, and job abandonment.

On December 1, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 5, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 29, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
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 Maintenance Tech II. Grievant worked for the Agency for approximately 16 years. No evidence of prior active disciplinary action was introduced during the hearing.

On February 19, 2015, Grievant suffered an injury while working. He was walking to the Shop and slipped on ice. He was taken by ambulance to a local hospital. He was given pain medication.

Grievant began receiving worker's compensation benefits. The Agency offered Grievant "light duty" on March 10, 2015. Some of Grievant's duties included performing building inspections. This required him to travel to different buildings on campus and determine what items needed repair.

As of April 9, 2015, Grievant had used all of his available annual and sick leave. He began leave without pay status on April 9, 2015.

On June 22 2015, Grievant signed a Termination of Wage Loss Award indicating that "the parties agree that the injured worker returned to work at the pre-injury wage or is able to return to pre-injury work."¹

¹ Agency Exhibit 5.

A Physical Therapy provider conducted a Functional Capacity Evaluation of Grievant on June 2, 2015. The provider concluded:

Overall testing findings, in combination with clinical observations, suggest that considerable question should be drawn as to the reliability and accuracy of [Grievant's] reports of pain and disability. ***

[Grievant's] demonstrated capacities would place him at the Sedentary Physical Demand Level.²

Grievant remained on light duty.

On August 31, 2015, the HR Director sent Grievant a letter stating:

On April 9, 2015, you were granted leave under the Family and Medical Leave Act (FMLA) and you were advised that you had 12 weeks of FMLA leave time available to you. This letter is to inform you that as of July 24, 2015, your FMLA allotment has been exhausted for the year.

You had been on worker's compensation from the period of February 19, 2015 to March 10, 2015. The University granted you light duty, but you refused the assignment. Currently, you are on Leave Without Pay (LWOP). We have no documents to support this absence. If you do not return to work or provide medical information substantiating your absence, you may be terminated for job abandonment.³

On September 1, 2015, an Orthopedic provider stated:

Based on the information on his FCE, I would suggest a release back to modified duty at the very least at this point.⁴

Grievant remained on light duty at his work.

On October 13, 2015, an Orthopedic provider stated:

[T]he therapist feels that the patient cannot return to his full duties, not because of the work-related injury, but because of his deconditioning and poor medical condition at this time.⁵

² Agency Exhibit 5.

³ Agency Exhibit 6.

⁴ Agency Exhibit 5.

⁵ Agency Exhibit 5.

On October 21, 2015, Grievant met with the Supervisor, HR Director and Ms. W. They discussed Grievant's employment including the possibility of him filing for short term disability benefits. Grievant did not request short term disability benefits.

CONCLUSIONS OF POLICY

The Agency alleged that Grievant abandoned his job. The listing of Group III offenses under the Standards of Conduct does not refer to or define the phrase "job abandonment." To show that an employee has abandoned his or her job, an agency must show some intent expressed verbally or through the employee's actions that he or she no longer wishes to remain an employee of the agency. In this case, the Agency has not established that Grievant expressed a desire to leave his employment with the Agency. The Agency showed that Grievant did not believe he could perform the full duties of his position. An inability (or perceived inability) to perform the duties of a position is not job abandonment.

Absence in excess of three workdays without authorization is a Group III offense. The Agency alleged that Grievant failed to report to work for more than three days without authorization to do so. The Agency did not show the dates Grievant was scheduled to work and that he failed to obtain authorization from the Supervisor to be absent from work. Indeed, the Agency could not establish Grievant's last day of work.⁶ This evidence is not difficult for an agency to identify yet it failed to do so.

The Agency alleged that Grievant failed to report to work without notice. Grievant presented copies of numerous text messages to his Supervisor indicating he would not be reporting to work because he was experiencing pain. The Agency presented a document showing that Grievant did not report to work on September 18, 2015. The Agency's document, standing alone, is not sufficient to support a Group II or Group III Written Notice.

The Agency has not presented sufficient evidence to support the issuance of disciplinary 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 **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is **not** obligated to pay Grievant **back pay** given that he was on leave without pay status. The Agency is obligated to provide Grievant with credit for leave and seniority that the employee did not otherwise accrue.

⁶ Ms. S testified she would have to "look it up."

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.⁷

⁷ Agencies must request and receive prior approval from 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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer