

Issue: Group III Written Notice with Termination (absent for 3 days without authorization); Hearing Date: 04/09/13; Decision Issued: 04/11/13; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 10044; Outcome: Full Relief.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10044**

Hearing Date: April 9, 2013  
Decision Issued: April 11, 2013

#### **PROCEDURAL HISTORY**

On January 16, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal effective December 17, 2012 for absence in excess of three days without authorization.

On February 13, 2013, Grievant timely filed a grievance to challenge the Agency's action. The grievance proceeded to hearing. On March 11, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 9, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
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:

The Virginia Department of Health employed Grievant as a Registered Nurse at one of its facilities. She began working for the Agency in 2006. She provided the Agency with her address at that time. She moved to another residence in 2007 and provided the Agency with her new address which she described as:

1111 Word1 Word2 Word3 Road  
City VA Zipcode

None of the three words in Grievant's street address ended with an "e".

On May 24, 2012, Grievant suffered an injury at work when the back of a chair in which she was sitting broke. She fell backward and strained her back. She sought workers compensation benefits. She began medical treatment. She was assigned to be treated by a "Panel Doctor", Dr. M.

Grievant was scheduled for an appointment to see Dr. M on September 14, 2012 but she went to see her personal doctor because she felt she was not getting better and wanted a second opinion. Her personal doctor placed her out of work until October 1, 2012. She went to see Dr. M on September 25, 2012. Dr. M did not release her to work. At some point, Grievant also applied for short term disability with the Third Party Administrator and began receiving VSDP benefits on September 14, 2012.

On September 28, 2012, the Program Support Tech called Grievant on her cell phone and indicated she was not to report to work because she had not been released to work.

On September 29, 2012, the Agency received a fax from Dr. M for which the Program Support Tech felt needed clarification.

On October 4, 2012 at 8:37 a.m., Grievant called the Agency and left a voice message asking if there was any new information regarding her return to work date. Grievant said she received a message from the Program Support Tech telling her not to report to work until further notice. Grievant stated her cell phone number during the voicemail message. The Agency did not respond to Grievant while it awaited further information from the Third Party Administrator.

Grievant sought unemployment compensation on November 13, 2012.

On November 27, 2012, the Third Party Administrator closed Grievant's claim for short term disability effective November 1, 2012. On November 29, 2012 and December 4, 2012, Grievant faxed information to the Third Party Administrator and awaited a further response. Grievant retained an attorney to represent her with her workers compensation claim.

Grievant exhausted her leave balances except for approximately eight hour of leave that the Agency did not apply to her absences.

On December 6, 2012, the Agency sent Grievant a letter by certified mail and by regular mail. The letter informed Grievant that "in order to continue your employment with the [Agency] you must report to work by December 13, 2012 (with a return to work certification from your provider)."<sup>1</sup> The Agency incorrectly addressed the letter to Grievant:

1111 Word1 Word2e Word3e Road  
City Virginia Zipcode

The City did not have a residence with an address which contained "e" after Word2 and Word3.

The certified mail receipt was returned to the Agency stating:

RETURN TO SENDER  
VACANT  
UNABLE TO FORWARD<sup>2</sup>

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<sup>1</sup> Agency Exhibit 1.

<sup>2</sup> Grievant Exhibit 9.

Grievant did not respond to the December 6, 2012 letter because she did not receive it.

On January 16, 2013, the Agency sent Grievant a letter with a Group III Written Notice attached removing her from employment for being “3 days absent without authorization and Failure to Report without Notice.”<sup>3</sup> The Agency incorrectly addressed the letter to Grievant:

1111 Word1 Word2 Word3e Road.  
City Virginia Zipcode

Grievant received the January 16, 2013 letter although the Agency incorrectly added an “e” to the end of Word3.

In February 2013, Grievant was released by her physician to return to work.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>4</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

The Agency argued that Grievant was absent from work in excess of three work days without authorization and, thus, should receive a Group III Written Notice with removal. The Agency’s evidence does not support a basis for disciplinary action with removal. Grievant’s absence from work was authorized by the Agency. Grievant was instructed on September 28, 2012 not to return to work. From that date forward, her absence was authorized until such time as she was notified she was obligated to return to work. The Agency did not properly notify her of her obligation to return to work. Grievant did not have actual or constructive knowledge of her obligation to return to work.

The Agency knew Grievant’s cell phone number but did not call her and tell her to report to work.

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<sup>3</sup> The Agency appears to have relied on the Offense Code attached to the Written Notice form which states “3 days absent without authorization”. This is inconsistent with Attachment A, DHRM Policy 1.60 which requires “Absence **in excess** of three workdays without authorization” – in other words, more than three workdays of absence, not merely three workdays of absence. This distinction did not affect the outcome of this case.

<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

In 2007, Grievant informed the Agency of her correct mailing address which did not contain an “e” at the end of Word2 or Word3. The Agency sent Grievant a letter dated December 6, 2012 demanding that she return to work December 13, 2012. Grievant did not receive the letter. On January 16, 2013, the Agency sent Grievant a letter of termination to an address different from the address on the December 6, 2012 letter. It was reasonable for Grievant to expect the Agency to correctly address correspondence to her given that she provided the Agency with her correct mailing address.

The Agency argued that Grievant should have contacted it on a timelier basis to determine the status of her return to work date. Although it is possible that Grievant could have taken a more aggressive approach to determining the status of her employment with the Agency, she had been instructed by the Agency not to report to work until told to do so and she was never properly told to report to work. If the Agency wanted to inform her by mail of her obligation to return to work, it was obligated to use the address she provided. At no time did Grievant inform the Agency that Word2 or Word3 had an “e” at the end of the words. The Agency must bear the consequence of its erroneously drafted December 6, 2012 letter.

## 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 prior to removal, or if the position is filled, to an equivalent position.<sup>5</sup>

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>5</sup> The Agency is not ordered to provide Grievant with back pay and benefits and seniority because she went on short term disability effective September 14, 2012 and did not return to full time status.

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>6</sup>

[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

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.