

Issue: Separation from State (CLWOP); Hearing Date: 10/03/14; Decision Issued: 10/06/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10455; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10455

Hearing Date: October 3, 2014

Decision Issued: October 6, 2014

PROCEDURAL HISTORY

On July 25, 2014, the Agency notified Grievant by letter that her classified employment with the Agency ended on May 30, 2014.

On August 22, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter was qualified for hearing. On September 9, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 3, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant's removal from employment was consistent with State policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. 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 Department of Behavioral Health and Developmental Services employed Grievant as a Licensed Practical Nurse at one of its facilities.

On December 11, 2013, Grievant stopped working at the Facility. She was placed on Short Term Disability on December 18, 2013. She received 100 percent of her pay until January 21, 2014. From January 22, 2014 through May 25, 2014, Grievant received 80 percent of her pay under STD. She was able to supplement her pay by using her accrued leave balances. On May 25, 2014, Grievant began receiving only 60 percent of her pay. On May 30, 2014, the Agency placed Grievant on Conditional Leave Without Pay status because Grievant had exhausted her leave balances and had not returned to work. The Agency’s objective was to afford Grievant sufficient opportunity to contact the Third Party Administrator to enable the Third Party Administrator to decide whether to extend Grievant’s STD or take some other action favorable to Grievant.

The Agency considered Grievant to be an employee on May 29, 2014 even though her STD ended May 28, 2014.

On June 25, 2014, the Human Resource Specialist sent Grievant a letter stating in part:

You have exhausted your leave and, therefore, have been transferred to a Conditional Leave Without Pay (CLWOP) status effective May 30, 2014. Please note how this will affect your employment and benefits:

Employment

An employee’s approved absence from work without pay (other than for military leave) guarantees reinstatement only if the employee’s position is available when he or she desires to return from leave. If the position is not available, the employee will be separated and may be employed again only after going through the normal recruitment and selection process. Please note, due to the needs of this Facility, all nursing positions will begin the recruitment process when someone is placed on Conditional Leave Without

Pay. If your position is filled while you are on Conditional Leave Without Pay, we will send you a letter separating you from employment.¹

On July 17, 2014, the Human Resource Specialist spoke with Grievant and told Grievant that she had 24 hours to provide the Agency with doctor's notes that would support Grievant's return to work or justify keeping her out of work.

On July 25, 2014, the Human Resource Manager sent Grievant a letter stating:

Your Short Term Disability Claim was closed May 28, 2014 and you exhausted your personal leave May 29, 2014. Due to the needs of the facility your position cannot be held and recruiting has been initiated. Therefore, your classified employment with [Facility] ended on May 30, 2014. Please call Human Resources [name and telephone phone number] to schedule the required exit interview. Please bring with you any [Facility] property to the exit interview. Options regarding your benefits will be discussed during the exit interview.²

Sometime after July 25, 2014, Grievant met with the Human Resource Specialist and presented her with doctor's notes. The notes were created sometime in May 2014 and presented to the Third Party Administrator.

CONCLUSIONS OF POLICY

Classified employees have a property interest in their ongoing employment. This interest cannot be removed without procedural due process. In Garraghty v. Jordan, the Fourth Circuit Court of Appeals held, "It is well settled that due process requires that a public employee who has a property interest in his employment be given notice of the charges against him and a meaningful opportunity to respond to those charges prior to his discharge." Although this case does not involve removal by disciplinary action, it involves a material change in employment status such that principles of due process are controlling.

While employees are on Short Term Disability, they have job protection because "[e]mployees' positions are held during periods of STD."³

Under DHRM Policy 4.45, Leave Without Pay Conditional and Unconditional, Conditional leave without pay is:

¹ Agency Exhibit 2.

² Agency Exhibit 3.

³ DHRM Policy 4.57, Virginia Sickness and Disability Program.

An employee's approved absence from work without pay (other than for military leave) that guarantees reinstatement only if the employee's position is available when he or she desires to return from leave. If the position is not available, the employee will be separated and may be employed again only after going through the normal recruitment and selection process.

An employee's "job protection" is materially different under STD and Conditional Leave Without Pay status. Under STD an employee is guaranteed to return to employment once he or she ends his STD and is able to return to work. Under Conditional Leave Without Pay, an employee is guaranteed to return to employment at the discretion of the agency. By placing an employee's right to work at the discretion of the agency, the agency has altered the employee's property interest in ongoing employment. An agency may do so only after affording the employee procedural due process.

In this case, the Agency placed Grievant on Conditional Leave Without Pay status on May 30, 2014. The Agency notified her of this change on June 25, 2014. The change was retroactive to the notice given by the Agency and, thus, the Agency failed to provide Grievant with adequate procedural due process. The consequence of the Agency's failure to provide adequate notice of the change cannot become effective May 30, 2014 as claimed by the Agency. Grievant's "job protection" remained unchanged until such time as the Agency provided Grievant with adequate notice and opportunity to respond to the proposed change in her employment status from guaranteed to "only if" her position was available.

The Agency's error was harmless under the facts of this case. Agency employees testified that Grievant's position remained available from May 30, 2014 until July 25, 2014 when the Agency began recruitment to fill Grievant's position. Once Grievant was given notice on June 25, 2014 that the Agency considered her to be under Conditional Leave Without Pay status, she had sufficient opportunity prior to July 25, 2014 to present medical documentation to show she could return to work and to return to work. Sometime after July 25, 2014, Grievant presented to the Human Resource Specialist notes from her doctor. Grievant's doctor drafted the notes in May 2014 and, thus, they would have been available for Grievant to present to the Agency in June 2014. The doctor's notes did not clear Grievant to return to work at the Facility in her prior position.

Under the facts of this case, Grievant has established that the Agency failed to give her proper notice and opportunity to be respond prior to imposing a material change in her employment status. Grievant has not established that the Agency's error should affect the outcome of this case. Grievant's request to be restored to her employment status prior to May 30, 2014 must be denied.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

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.⁴

⁴ 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