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DEPARTMENT OF JUS
CIVIL DIVISION

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

In The Matter Of: Lorrie K. Hanby-Coll, RN, Grievant	OPINION

Parties Present:

Katy K. Woo, Chairperson
Gary Fullman, Board Member
Walter Bowers, Board Member
Dallas Green, Board Member

James J. Hanley, Deputy Attorney General
Counsel for the Board

Loretta LeBar, Deputy Attorney General
Attorney for the Department of Health and Social Services

Lorrie K. Hanby-Coll, RN
Pro se

The Merit Employee Relations Board ("the Board") conducted a hearing on February 15, 1995 in the Tatnall Building in Dover, Delaware. The hearing concerned the appeal by Ms. Hanby-Coll of her termination from employment by the Department of Health and Social Services ("the Department") for continued unauthorized absences and abandonment of her position. At the beginning of the hearing, the Grievant indicated that she desired a closed hearing.

SUMMARY OF THE EVIDENCE

1. Michael Rushlow was sworn and testified as follows:

Mr. Rushlow stated that he is employed by the Department as a Personnel Officer at the Delaware State Hospital ("the Hospital"). He is familiar with the Grievant and noted that she

had been out of work since April, 1993 as a result of an automobile accident. He stated that the Grievant was cleared for return to work in August, 1994 and was offered a position on the 3-to-11 shift. The Grievant called him and asked if the Hospital had the right to change her shift assignment from 7-to-3 to 3-to-11. He added that he informed the Grievant that Merit Rule 6.0500 permitted it. The Grievant did not return to work or contact or speak with anyone from the Hospital.

On cross-examination, Mr. Rushlow stated that in a September 25, 1994 letter, he had offered the Grievant the 3-to-11 position, a psychiatric nurse position, at the same pay level. Although the Grievant was only a Psychiatric Nurse II, she would be underfilling a Psychiatric Nurse III position. He testified that at the August 2 meeting, he was unaware that the Grievant's 7-to-3 position was filled and does not recall the issue of time being discussed on August 2. He added that Ms. Alden was the Grievant's supervisor at the time she left and was listed as her supervisor at the time of the hearing. The return to work form used for the Grievant is the same form used for all psychiatric nurses. Prior notes had listed restrictions too burdensome to allow the Grievant to return to work. Now, he testified, the Americans With Disabilities Act is factored into returning to work.

The witness stated that the August 25, 1994 return to work note contains restrictions, and the Grievant was returned to work with restrictions. He stated that a May 27, 1993 letter did state that the policy of the Hospital was to require return to full duty only. He added that only after August, 1994 was the Grievant able, but unwilling, to return to work. He advised that, while the Grievant was out of work, if the form her doctor used was insufficient, someone should have given her a Department form. There was a difference in the October, 1993 and the August, 1994 return to work form. He was not involved in reviewing the return to work form and is not sure who made the decision to return the Grievant to work.

Mr. Rushlow testified that the Grievant was charged with abandonment of her position and the position that was referenced was the position on the 3-to-11 shift. Ms. Alden was not the proper person to contact concerning return to work. Ms. Stasik was the proper person.

In mid-October, Mr. Debman wrote the Grievant a letter indicating that the Grievant's absences from work were unauthorized. The Department does not treat abandonment of a position as a voluntary resignation. The Department made efforts to return the Grievant to

work and, therefore, the time limits in the Merit Rules were not followed. The Grievant was given the opportunity to show she could return by going to the doctor. The Grievant did request a pre-termination hearing in April, 1994 and the hearing was held in August, 1994.

In further testimony, Mr. Rushlow stated that in the return to work form in May, 1994, the limitations by the doctor were too restrictive. In August, 1994, the work restriction was not carrying equipment over ten pounds.

2. Ms. Lucille Stasik was sworn and testified as follows:

Ms. Stasik was employed at the Hospital as a unit director. The Grievant worked in her unit. She was aware that the Grievant submitted a return to work form, and she did receive a call from the Grievant.

On cross-examination, Ms. Stasik testified that she never received notice from Carol Alden that the Grievant said that she could not work the 3-to-11 shift at Sussex 3. The nurses submitted a schedule of days they want off and what days they work. The Director of Nursing told her the Grievant had been offered a position. Ms. Stasik added that she did discuss the Grievant's return to work form because she was the unit director of the position that was being filled. She advised that there was a difference in age between Sussex 1 and Sussex 3. She also stated that in the Code Green policy, all nurses are expected to respond even if they have not had the "handle with care" training.

3. The Grievant was sworn and testified as follows:

She stated that she received a letter of termination from Secretary Nazario terminating her employment for excessive absenteeism and abandonment of her position. This letter contains errors. She did not respond to the October, 1994 letter from Mr. Debman. She added that the rights afforded to her in August, 1994 should have been applied to her in April, 1993. She stated she never requested a leave of absence and did not ask that any leave be ended. She testified that she made it clear that she wanted to return to work, but not on the 3-to-11 shift.

On cross-examination, the Grievant stated that she did not call Ms. Stasik because she had asked Ms. Alden to relay the message that she could not work the 3-to-11 shift and cannot accept the position. Her May 2, 1994 return to duty note stated that she could not

handle combative patients. The August 2, 1994 note indicated that she could handle combative patients with assistance. She stated that she is medically able to go back to work but is only available for the 7-to-3 shift.

4. Francis A. Coll, Jr. was sworn and testified as follows:

Mr. Coll, the Grievant's husband, testified that at the pre-termination hearing on August 2, 1994 , there was a conversation concerning a teaching position.

5. Ms. Carol Roberts was sworn and testified as follows:

Ms. Roberts is employed by the Department as Personnel Technician and was located at the Hospital. In May, 1994, there was an effort to bring the Grievant back to work. The Grievant did not bring back the return to duty slips. The Grievant did ask concerning light duty.

FINDINGS OF FACT AND CONCLUSION OF LAW

Based upon the testimony and documents received, the Board found the following facts to be supported by substantial evidence:

1. The Grievant ceased working for the Department following an automobile accident in April, 1993.
2. The Department and the Grievant were engaged in a process of attempting to return the Grievant to work but, until August, 1994, the restrictions imposed on the Grievant's working were too restrictive for the Department.
3. In August, 1994, the Department found that the return to work note received from the Grievant's physician was sufficiently non-restrictive to allow the Grievant to be employed at the Hospital.
4. The Grievant, in August, 1994, was medically able to return to work.
5. The Department offered the Grievant an opportunity to return to work by assigning her a position on the 3-to-11 shift.
6. The Grievant contacted Mr. Rushlow to inquire concerning the legality of assigning her to the 3-to-11 shift when she previously worked the 7-to-3 shift at the Hospital.

7. On October 6, 1994, Ms. Debman, the Hospital Director, wrote a letter to the Grievant noting that the Grievant had not contacted anyone at the Hospital since August, 1994 and specifically had not called Ms. Alden in September, 1994 as requested in order to avoid a recommendation of dismissal.
8. The Grievant was on notice that the Department was planning her dismissal from employment if she failed to accept the assigned position on the 3-to-11 shift.
9. The Merit Rules do not give the Grievant a right to be returned to her previous assignment, and, in fact, Merit Rule 6.0500 specifically limits any such right to six months.
10. The Department had the right as the employer to assign the Grievant to the 3-to-11 shift.

DECISION

The Board finds that there was just cause to terminate Ms. Hanby-Coll from her employment with the Department. The evidence supports a finding that it was the Department's intent to return the Grievant to duty when her medical restrictions allowed her to do the duties of the position of Psychiatric Nurse. In August, 1994, the Department assigned the Grievant a position on the 3-to-11 shift and, after a single contact questioning the legality of the assignment, the Grievant made no further contact with the Department. This decision by the Grievant to ignore the Department when the Department demanded a response was an abandonment of her position resulting in unauthorized absences and the Grievant's termination. The Board concludes that in the circumstances of this case, the Department's decision to terminate the Grievant was appropriate under the circumstances.

IT IS SO ORDERED, this 15th day of March, 1995

Katy K. Woo, Chairperson

Dallas Green

Gary Fullman

Walter Bowers

JJH:EVM
3/13/95

Issue Date: March 23, 1995