Issues: Group II Written Notice (failure to follow policy), and Termination (due to accumulation); Hearing Date: 04/03/17; Decision Issued: 04/05/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10959; Outcome: Full Relief; **Administrative Review: EDR Ruling Request received 04/20/17; EDR Ruling No. 2017-4534 issued 05/16/17; Outcome: Remanded for clarification; Remand Decision issued 06/19/17; Outcome: No change to original decision.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10959

Hearing Date: April 3, 2017
Decision Issued: April 5, 2017

PROCEDURAL HISTORY

On January 4, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. She was removed from employment based on the accumulation of disciplinary action.

On January 5, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 21, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 3, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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:

The Department of Behavioral Health and Developmental Services employed Grievant as a Forensic Mental Health Technician at one of its facilities. She had been employed by the Agency for approximately 20 years. Grievant had prior active disciplinary action. On September 14, 2016, Grievant received a Group II Written Notice for failure to call the Facility two hours in advance of her shift start time on a day she did not report to work as scheduled.

When Grievant reported to work, she was a "very good" employee.

Grievant worked at a Facility that had to be adequately staffed every hour of its operation. If an employee failed to report to work, the Facility had to force an employee working on an existing shift to continue working or obtain assistance from an employee who was not otherwise scheduled to work. If the Facility was not adequately staffed, the safety of employees and patients at the Facility could be placed at risk.

To ensure adequate staffing and minimize overtime payments, the Facility required its employees providing direct care services to call the Facility at least 2 hours before their shifts to report unscheduled absences. This requirement provided the Facility with an opportunity to timely assign other staff to work at the Facility. This call in procedure was applied to employees with and without FMLA approved leave.

Grievant's work shift began at 7 a.m. This meant she had to call in by 5 a.m. to notify the Facility when she could not report to work as scheduled.

Grievant has a 20 year old Daughter with Down syndrome. The Daughter has had open heart surgery, two ear surgeries, her adenoids removed, and five stomach

surgeries. She suffers from reflux, gastritis, constipation, asthma, and fainting. The Daughter receives continuing health care provider treatments.

With the exception of medical professionals, Grievant is the only caregiver for her Daughter. Grievant is not able to predict when her Daughter will become ill.

At approximately 6 a.m. on December 12, 2016, Grievant's Daughter started vomiting. The Daughter's stomach began swelling and Grievant knew that the Daughter would not stop vomiting until her stomach was empty. Grievant had to monitor the Daughter to ensure the vomit did not enter the Daughter's lungs. The Daughter periodically stopped vomiting, but then resumed. Once the Daughter stopped vomiting, Grievant had to monitor her Daughter's condition. The Daughter's vomiting resulted from her serious health condition.

On December 12, 2016 at 6:12 a.m., Grievant called the Facility and said she would not be reporting to work as scheduled. A Supervisor completed a Leave Request Form and checked a box for "FMLA."

The Daughter's medical problems continued to the following day. On December 13, 2016 at 5:05 a.m., Grievant called the Facility and said she would not be reporting to work that day. A Supervisor completed a Leave Request Form and checked a box for "FMLA."

On December 29, 2016, Grievant wrote that:

> 12-12-2016 and 12-13-2016 were call ins for [daughter] which I have a FMLA for.[1]

CONCLUSIONS OF POLICY

Employers may not discipline employees for taking Family Medical Leave. 29 CFR § 825.220(c) provides, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions."

Facility Policy Q-2 requires employees to notify the Facility at least two hours before the scheduled start of their shifts if they do not intend to report to work. The Agency took disciplinary action against Grievant because she failed to call the Facility before 5 a.m. to indicate she would not be coming to work on December 12, 2016 and December 13, 2016.

Grievant asserted she was approved for intermittent FMLA leave and that on December 12, 2016 and December 13, 2016 she was seeking FMLA leave for her

[1] Agency Exhibit 1.

Daughter. The Daughter had a serious health condition as defined under the FMLA. The Agency did not deny that Grievant was approved for FMLA. The Agency's documents show Grievant was asking for FMLA leave on those dates. The Hearing Officer finds that Grievant was approved to take intermittent FMLA leave for her Daughter's serious health condition and Grievant was requesting FMLA leave for December 12, 2016 and December 13, 2016.

29 CFR 825.303(c) provides:

> When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case.

29 CFR 825.302(b) defines "as soon as practicable" to mean:

> as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

Grievant could not foresee or predict when her Daughter would become ill. Thus, it was not possible for her to call the Facility at before 5 a.m. on December 12, 2016 because her Daughter did not become ill until at least 6 a.m. Grievant reported her request for FMLA leave at 6:05 a.m. on December 12, 2016 which was as soon as practicable. The Agency may not take disciplinary action against her for failing to request leave by 5 a.m. that day.

Grievant called the Agency at 5:05 a.m. on December 13, 2016. The Daughter's illness was ongoing and continued into December 13, 2016. If the Hearing Officer assumes the Grievant could have called five minutes earlier on December 13, 2016, it does not affect the outcome of this case. Under the circumstances of this case, a five minute delay is not material. There is no reason to believe a five minute delay prevented the Agency from timely and efficiently identifying another employee to work Grievant's shift. The Agency took disciplinary action against Grievant for both December 12, 2016 and December 13, 2016 and the Agency's action was improper for December 12, 2016. In other words, the Agency's disciplinary action reflects an improper motive.

The Agency argued that it is permitted to enforce its usual and customary notice procedures (e.g. a two hour call in deadline). 29 CFR § 825.303(d) provides:

> An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for

requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

An unusual circumstance includes when an employee cannot predict when her daughter will become sick. The facts of this case present an unusual circumstance that justifies Grievant's failure to comply with the Agency's usual and customary notice requirement.

Because the Agency may not discipline Grievant for requesting FMLA leave, the disciplinary action must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action 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 directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.[2]

[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

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