Issue: Group I Written Notice (unauthorized absences and failure to follow instructions); Hearing Date: 09/06/18; Decision Issued: 09/19/18; Agency: DVS; AHO: Thomas P. Walk, Esq.; Case No. 11242; Outcome: Full Relief; **Administrative Review Request received 10/09/18; EDR Ruling No. 2019-4798 issued 11/16/18; Outcome: Remanded to AHO; Reconsideration Decision issued 11/28/19; Outcome: Group I Written Notice reinstated.**

VIRGINIA: IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

IN RE: CASE NO.: 11242

DECISION OF HEARING OFFICER

HEARING DATE: September 6, 2018
DECISION DATE: September 19, 2018

I. PROCEDURAL BACKGROUND

The grievant commenced this proceeding by filing her Form A on April 23, 2018. I was appointed as Hearing Officer effective July 24. After some delay caused by incorrect information as to the identity of agency counsel, I conducted a prehearing conference call with the grievant and counsel for the agency on August 3, setting the matter for hearing by agreement for September 6, 2018. The hearing was held on that date, lasting approximately two hours.

II. APPEARANCES

Legal counsel represented the agency. One witness, who was also present throughout the hearing as the agency representative, testified. The agency presented fourteen exhibits, all of which were accepted into evidence without objection.

The grievant represented herself and served as her only witness. She submitted two documents as exhibits. The agency objected to them being considered as not being timely provided. I overruled the objection and allowed them into evidence.

III. ISSUE

Whether the agency acted appropriately in issuing the grievant a Group I Written Notice on April 12, 2018 for offenses on March 14, 15, 16, and 19 in the year of 2018?

IV. FINDINGS OF FACT

The grievant is employed by the agency as a Service Representative. Her Supervisor is the Regional Director for the agency. In the first part of January 2018, the grievant was not at work, being on short term disability. On January 17 she sent a text message to the Supervisor apprising him that she would need to leave work early on the following day for a medical appointment. That text was the first indication that the Supervisor had that the grievant was returning to work.

The Supervisor was relatively new to the position. His immediate predecessor in the office had a process by which employees could request leave informally and then enter the request into the Time Attendance Leave (TAL) system at the end of the month in which the leave was taken. TAL is the computer record keeping system utilized by the agency and others in the Commonwealth for the request and approval of leave by employees. On January 18 the grievant had no accumulated leave that she could take, having not yet worked a full day upon her return from short term disability status. The Supervisor explained to the grievant that he required all requests for leave to be entered in TAL prior to being taken and that approval would need to be reflected in that system. He gave the grievant a verbal counseling for her failure to follow his policy.

The grievant entered a request in TAL on February 28 to take leave on March 14, 15, and 16. The Supervisor denied the request due to mandatory training for his employees being previously scheduled during that time frame. The grievant sent the Supervisor a text message on March 14 apprising him that she was unable to work and attend the training due to the illness of her children. He approved leave for that day. The grievant did not work either March 14, 15, or

16. On March 15 the Supervisor directed her to provide to him appropriate documentation reflecting the illness of the children and to arrange for make-up training. He gave her an additional verbal counseling via text message on March 15. She has failed to provide any supporting documentation regarding the claimed illness. It is unclear if the leave for March 15 and 16 would have been approved had the documentation been timely provided.

On March 9 the grievant had submitted by e-mail to the Supervisor notice that she needed to be away from work on March 19 for a dental appointment. She did not submit a formal request for leave through TAL. The Supervisor contacted the grievant on March 19 and was told that she was on her way to the dental appointment. This was during her normal work hours. On March 22 he told the grievant that she would receive a written disciplinary action for the March 19 unauthorized absence. On April 9, he again engaged in verbal counseling with the grievant. He issued her a Group I Written Notice on April 12, 2018. The offense dates shown in the written notice are March 14, 15, 16, and 19. The document cites the grievant for unauthorized absences and failure to follow instructions.

V. DISCUSSION AND ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual* (*GPM*). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is

supplemented by a separate set of standards promulgated by the Department of Equal Employment and Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The evidence of the agency establishes that on March 14, 15, 16, and 19 the grievant was away from her work duties. The evidence is also clear that after January 18, 2018, the grievant was fully aware of the policy of the Supervisor as to how leave was to be requested and approval obtained. The grievant chose to ignore the specific directions from the Supervisor.

The agency submitted as an exhibit (Exhibit 9) the Annual Leave policy of the Department of Human Resource Management, Policy No. 4.10. Section III (A) of DHRM Policy 4.30 (Leave Policies – General Provisions) requires approval by the agency for all leaves of absence. Although the policy does not specifically require leave request to be made in the TAL system, Section III (B)(1)(B) says that "employees should submit requests for leaves of absence in accordance with the specific requirements set forth in the respective leave policies, and which may be set forth in their agency's procedures for requesting leaves." This subsection, therefore, required the grievant to follow the instructions given by the Supervisor to request, and

obtain approval, through TAL. The grievant had completed training in the TAL system on June 17, 2016 and is presumed to be familiar with how to utilize it to request leave. She, in fact, admitted to that knowledge.

The failure by the grievant to properly obtain approval for the leave and follow the directions of the Supervisor does constitute misconduct under Department of Human Resource Management Policy 1.60, the Standards of Conduct. The agency has given this discipline to the grievant at the level of being a Group I offense. The policy describes that level as being appropriate for "acts of minor misconduct that require formal disciplinary action, including repeated acts of minor misconduct." I believe that the actions of the grievant, in failing to obtain approval for the leave times in March, in accordance with the request and procedures of the Supervisor, does constitute misconduct within the meaning of the Grievance Procedure Manual and Policy 1.60.

The much closer question is whether the issuance of the Written Notice to the grievant is consistent with policy. The intent of the policy is "that agencies follow a course of progressive discipline that fairly and consistently addresses employee behavior, conduct or performance that is incompatible with the states standards of conduct." In keeping with that intent, the policy distinguishes between a corrective action and a disciplinary action. A corrective action is defined a "any intervening informal or formal counseling action taken by management to address employment problems." A disciplinary action is "a formal action taken in response to unacceptable performance or misconduct." The policy prescribes that "counseling is typically the first level of corrective action but is not a required precursor to the issuance of Written

Notices." A Written Notice is appropriate "when counseling has failed to correct misconduct or performance problems, or when an employee commits a more serious offense."

The question raised by this case is whether an agency may issue a disciplinary action after giving a corrective action for the same incident of misconduct. This question is implicated by the Supervisor's having given a verbal counseling to the grievant for her behavior on the same dates as listed in the Written Notice. I find that Policy 1.60 is ambiguous on this question.

Section A of the policy suggests that management prior to taking any "corrective action should consider…previous counseling whether formal or informal that addressed the same or similar misconduct or performance." One possible interpretation of that section is that "same misconduct" refers to the same, singular event, rather than interpreting it as being identical misconduct on more than one occasion. This interpretation must be judged by looking at the entirety of the policy. Turning to Section B (2) of the policy, we find the directive that a Written Notice should be issued "when counseling has failed to correct misconduct or performance problems, or when an employee commits a more serious offense." To further confuse matters, later in that section it sets out that offenses for formal discipline are organized into three groups designed to "assist management in the assessment of the appropriate corrective action." As stated above, corrective actions are defined in the policy as being counseling and are distinct from disciplinary actions. Therefore, the policy is somewhat self-contradictory.

I believe that the Standards of Conduct should be interpreted, by analogy, the same as provisions in a contract of employment. Under Virginia law, the terms of most employment contracts are to be construed against the employer to the extent that they are ambiguous. *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc., 270 Va. 246, 618 S.E.2d 340*

(2005). I will construe Policy 1.60 in the light most favorable to the grievant. The counselings given her in March and on April 9 were clearly justified and appropriate under Policy 1.60. Because the policy is written with the purpose of providing for *progressive* discipline, the agency would have been justified in issuing a Group I Written Notice for leave taken without approval after March 15, the date of the second verbal counseling. It chose not to do so. Instead, the Supervisor merely provided oral notice on March 22 of a forthcoming disciplinary action. It then issued a subsequent verbal counseling on April 9, despite the unapproved absence on March 19, and followed with the disciplinary action on April 12.

To be consistent with the spirit of Policy 1.60, to discipline the grievant the agency should have issued the Written Notice prior to, and in the place of, the counseling on April 9. To allow the agency to impose counseling and a disciplinary action for the same events (as opposed to merely the same type of misconduct) is inconsistent with Policy 1.60. I am not condoning the attitude of the grievant, that she was complying with policy by merely notifying the Supervisor where she was while not at work. That was not his procedure, a procedure that as a subordinate she was required to follow. My decision is based on the inappropriateness of the agency's issuing a "corrective action" and a subsequent "disciplinary action" for the same offenses. She deserved either, but not both.

VI. DECISION

For the reasons stated above, I hereby find that the Group I Written Notice issued on April 12, 2018 was improper and the same is hereby voided.

VII. APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant.

ORDERED this September 17, 2018.

/s/Thomas P. Walk________
Hearing Officer

IN THE VIRGINA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO. 11242

DECISION UPON RECONSIDERED ADMINISTRATIVE REVIEW

This matter comes back before me upon the ruling by the Director of the Office of Equal Employment and Dispute Resolution dated November 16, 2018, Ruling No. 2019-4798. As explained in that ruling, it supersedes the administrative review ruling dated November 13, 2018. The factual and procedural backgrounds contained in those Rulings are incorporated herein.

Upon the finding by the Director that the reference to verbal counseling contained in agency Exhibit 1 was insufficient evidence that the conduct of the grievant on March 19 was the subject of verbal counselling prior to a Written Notice being issued, in part, for that conduct, I hereby uphold the issuance by the agency of the Group I Written Notice to the grievant dated April 12, 2018. The parties are hereby referred to the DHRM Ruling for their appeal rights.

ENTERED this November 28, 2018.

/s/ Thomas P. Walk

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