Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 09/05/02; Decision Date: 09/09/02; Agency: Dept. of Mental Health, Mental Retardation & Substance Abuse Services; AHO: David J. Latham, Esq.; Case No.: 5508; **Administrative Review: Hearing Officer Reconsideration Request received 09/20/02; Reconsideration Decision Date: 09/23/02; Outcome: Request untimely. Decision has become final**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5508

Hearing Date: September 5, 2002
Decision Issued: September 9, 2002

PROCEDURAL ISSUE

Grievant submitted an extensive quantity of documentation in a loose-leaf binder. Although not proferred into evidence, this documentation has been retained with the evidence, in case a further appeal is filed. Through testimony elicited during the hearing it became apparent that this documentation related to grievant's contention that she should be entitled to benefits pursuant to the Family and Medical Leave Act (FMLA). Hearing officers have the authority to uphold, reduce or rescind disciplinary action.[1] Hearing officers do not have authority to establish or revise benefits.[2]

The FMLA provides that an "eligible" employee who has met FMLA's notice and certification requirements may ***not*** be denied FMLA leave. The agency has not approved grievant's application for FMLA benefits. If grievant believes that the agency is violating the law, her remedy is to file a complaint with

[1] § 5.9(a)2, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[2] § 5.9(b)3, *Ibid.*

the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor (DOL).

APPEARANCES

Grievant
Human Resources Manager
Representative for Agency
Seven witnesses for Agency

ISSUES

Were the grievant's absences from April 20, 2001 through April 4, 2002 subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely appeal from a Group I Written Notice issued for unsatisfactory attendance.[3] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4]

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as "agency") has employed grievant as a registered nurse (RN) for 25 years. She supervises six registered nurses and has had to counsel some of them for attendance problems.

The agency implemented an attendance policy in 1999 to address, among other things, call-ins, unanticipated absences and problem patterns of absenteeism. Section III of the policy states, in pertinent part:

> B. **Occurrence:** An unscheduled absence from work that does not meet the criteria defining a scheduled absence, to include leaving work early (citing reasons that can not reasonably be denied by supervision); or being more than 60 minutes late in reporting for work; or calling in to request time off without having requested the leave before the end of the last workday preceding the planned day of absence.

[3] Exhibit 1. Written Notice, issued April 10, 2002.
[4] Exhibit 2. Grievance Form A, filed May 9, 2002.

C. **Unsatisfactory Attendance:** When a person exceeds 8 occurrences within a twelve (12) consecutive month period, or when a person has established a pattern of absences.

H. **Disciplinary Action:** Once a person exceeds 8 occurrences within any twelve (12) consecutive month period, he/she should normally receive disciplinary action in the form of a Group I Written Notice for "Unsatisfactory Attendance."[5]

Grievant's supervisor has counseled her about the attendance policy and grievant's increasing number of occurrences. In 2001, the supervisor's annual performance evaluation advised grievant that she had an attendance/tardiness problem that required correction.[6] Between April 20, 2001 and April 4, 2002, grievant accumulated 10 call-ins for unscheduled absences and 6 tardies of more than one hour each for a total of 13 occurrences in the 12-month period.[7] Grievant agrees that all of the occurrences were correctly recorded and that the chart is an accurate summary of the occurrences. Grievant has been experiencing significant problems with her son (who is suffering depression) and some of her absences have been related to her son's difficulties. Grievant had advised the facility director at one time that her job caused her to be under stress. The facility director offered to remove grievant from her supervisory position while retaining the same salary but grievant did not accept the offer.

Grievant's supervisor consulted with the Human Resources department before issuing the Group I Written Notice to grievant on April 10, 2002.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

[5] Exhibit 4. Human Resources Policy Number: HR-05b, *Attendance/Call-ins*, Date of Origination September 1, 1999.
[6] Exhibit 10. Annual performance evaluation, signed October 17, 2001.
[7] Exhibit 6. Summary chart and leave request forms from period from April 20, 2001 through April 4, 2002.

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[8]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[9] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses are the least severe and include behavior such as unsatisfactory attendance.[10]

The agency's attendance policy is, in effect, a no-fault policy that charges an occurrence whenever an employee incurs an unscheduled absence (occurrence). The policy does not address pre-approved and scheduled absences such as court appearances, pre-scheduled appointments with physicians, or lengthy medical recovery periods. Rather, the policy addresses unscheduled call-ins, tardiness, and absences that have not been approved in advance. These types of unplanned absences are disruptive to the agency, and cause problems for both supervision and coworkers. They also jeopardize the ability of the agency to fulfill its mission because it must operate with fewer staff than scheduled.

As a supervisor, grievant is expected to be a role model for subordinates. Part of her obligation is to abide by the agency's attendance expectations.

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[8] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

[9] Now known as the Department of Human Resource Management (DHRM).

[10] Exhibit 3. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant has monitored the attendance of her subordinates and has recommended disciplinary action when subordinates exceed the allowable number of occurrences. The policy has been applied to grievant's absences in the same manner as all other employees. She has had significantly more than the eight-occurrence threshold that normally triggers disciplinary action. Therefore, the agency has demonstrated, by a preponderance of the evidence, that grievant's attendance has been unsatisfactory and warrants issuance of disciplinary action pursuant to Policy HR-05b.

Grievant's primary contention is that some of her occurrences would have been covered under FMLA, if she had been approved for FMLA. It appears that at least four absences were primarily attributable to problems involving grievant's son. The undisputed fact is that grievant did not file an application for FMLA until March 26, 2002.[11] All but one of grievant's occurrences were prior to this date. When FMLA is approved, it is always applied prospectively, not retroactively. Therefore, even if grievant had been approved for FMLA, her attendance for the period at issue would still be unsatisfactory.

Grievant also argues that the use of adjusted workweek (AWW) should not be charged as an occurrence. AWW is utilized by supervisors to make schedule changes within a workweek or a pay period to compensate an employee for more than the standard 40 hours per week. However, such schedule adjustments should be rarely used, and only with prior approval from supervision. Moreover, as an exempt employee, grievant is expected to work more than 40 hours when required by operational needs. Therefore, AWW is an optional tool for exempt employees, not a requirement.

Grievant alleges that the attendance policy is not consistently applied to all employees. However, she has failed to present any specific information to support this allegation. There is more to proving a charge than merely making an unsupported allegation. Grievant believes that another employee or employees have as many or more occurrences than she does. However, she did not identify any such employee. Moreover, she does not know whether these other employees' absences were part of an extended absence, resulted from a schedule adjustment, or may have been covered under FMLA. Further, grievant is not aware that several employees have, in fact, been disciplined for unsatisfactory attendance.

Grievant also contends that two of her absences (January 22, 2002 and February 23, 2002) were partially attributable to wrist pain secondary to an earlier on-the-job injury. She argues that these two absences should be covered by workers' compensation and, therefore, not chargeable as occurrences. However, documentation from the physician does not list wrist pain as the reason for either absence. Rather, grievant was absent on January 22, 2002 for

[11] Grievant's application for FMLA was not approved. As of the date of this hearing, grievant has not been approved for FMLA, and has not filed an appeal with DOL.

stomach medications, and on February 23, 2002 for influenza. Moreover, even if these two absences had been covered by workers' compensation, the grievant's total number of occurrences would have exceeded eight and would, therefore, still have been unsatisfactory.

Grievant also notes that she was absent continuously from December 7, 2001 through December 13, 2001.[12] She was charged with two occurrences – one for December 7 and one for December 12. Grievant signed two separate leave slips and was charged with two occurrences. She did not appeal to human resources or file a grievance within 30 days of signing these forms.[13] A letter from grievant's physician states that grievant was unable to work on December 7, 2001, and December 12-14, 2001.[14] This strongly suggests that grievant had two separate occurrences, not one. Nevertheless, even if the hearing officer views this in the light most favorable to grievant, her total number of occurrences still result in unsatisfactory attendance.

The hearing officer empathizes with grievant. It is understandable that grievant, who is experiencing significant problems with her son believes that her excessive absenteeism should be overlooked. However, when one works for an employer, one implicitly agrees to be subject to the conditions and policies of that employer. In this case, the agency has an unambiguous attendance policy that requires specified discipline when a certain number of absences occur. Grievant exceeded the limit and is therefore subject to the discipline required by the policy.

DECISION

The decision of the agency is hereby affirmed.

The Group I Written Notice issued on April 10, 2002 is UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

[12] Exhibit 7. This computer printout reflects that grievant was absent continuously from December 7 through 17, 2001. However, grievant maintains that she actually returned to work on December 14, 2001. No documentation was presented to resolve this apparent discrepancy.

[13] A written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute. Section § 2.2, EDR *Grievance Procedure Manual*, effective July 1, 2001.

[14] Exhibit 8. Letter from grievant's physician, December 17, 2001.

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.[15]

[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]

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David J. Latham, Esq.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5508

Hearing Date:	September 5, 2002
Decision Issued:	September 9, 2002
Reconsideration Request Received:	September 20, 2002
Response to Reconsideration:	September 23, 2002

ISSUE

Has the grievant submitted a timely request for reconsideration pursuant to Section 7.2 of the Grievance Procedure Manual?

FINDINGS OF FACT

On September 20, 2002, the grievant submitted via facsimile transmission a request for reconsideration of the Decision of Hearing Officer issued on September 9, 2002.

APPLICABLE LAW OR PROCEDURE

A hearing officer's original decision is subject to administrative review. The Grievance Procedure Manual addresses administrative review of Hearing Decisions and states, in pertinent part:

> However, all requests for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the

> original hearing decision. A copy of the requests must be provided to the other party. A request to reconsider a decision is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.[16]

The Grievance Procedure Manual further provides that a hearing officer's decision becomes final as follows:

> A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.[17]

OPINION

In order to be a timely request, a request for reconsideration must be received by the Hearing Officer within 10 calendar days of the date of the original hearing decision. The date of the original hearing decision was September 9, 2002.[18] The final date to request reconsideration was September 19, 2002. The grievant's request for reconsideration was received by facsimile transmission in the Department of Employment Dispute Resolution on September 20, 2002.

The grievant has provided no explanation for having submitted her request for reconsideration after the 10-calendar period specified in the Grievance Procedure Manual. Therefore, the grievant's request for reconsideration was not timely received. The hearing decision became final on September 19, 2002 when the 10-day calendar period expired.

Notwithstanding the untimely filing of the request for reconsideration, the Hearing Officer reviewed grievant's brief letter. Grievant's concerns regarding application of the FMLA policy were addressed on page one of the Decision. Moreover, the Hearing Officer advised grievant of the correct remedy to address her concerns, viz., she may file a complaint with the U.S. Department of Labor.

DECISION

[16] § 7.2(a) Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.
[17] § 7.2(d) Ibid.
[18] The decision was mailed to the grievant by certified mail. The grievant received and signed for the decision on September 11, 2002.

The grievant's request for reconsideration was not filed within the period specified in the Grievance Procedure Manual. Therefore, the Hearing Officer's original decision has become final pursuant to § 7.2(d) of the Grievance Procedure Manual.

APPEAL RIGHTS

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal. The final date to appeal to circuit court is October 19, 2002.

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David J. Latham, Esq.
Hearing Officer