Issue: Group II Written Notice (failure to report to work without proper notice to supervisor); Hearing Date: 09/17/02; Decision Date: 09/18/02; Agency: Department of Corrections; AHO: David J. Latham, Esq.; Case No.: 5518

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5518

Hearing Date: September 17, 2002
Decision Issued: September 18, 2002

PROCEDURAL ISSUE

Grievant states (in his grievance form) that he was suspended. Section III of the Written Notice does not include a suspension, and there is no other evidence to indicate that grievant was suspended from work. However, grievant was not paid for the days he failed to report to work. The agency declined to accept the physician's excuse that grievant submitted for reasons discussed later in this decision. Payment for sick leave is a benefit provided by the Commonwealth's Sick Leave policy. Hearing Officers do not have the authority to revise benefits.[1]

APPEARANCES

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

Grievant
Warden
Assistant Warden
One witness for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for failure to report to work without proper notice to supervisor.[2] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3] The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant as a correctional officer senior for two years.

The facility's standard procedure requires security employees to submit annual leave requests prior to December 10 for the following calendar year.[4] The facility then prepares a Master Roster scheduling annual leave and training for all employees. Employees may submit leave after December 10, or even shortly before the requested leave time, however, approval of leave is then subject to staffing requirements and personnel availability. When leave is denied because the facility is short-staffed, an employee may advise his supervisor if there is a special situation (e.g., family emergency). In such a situation, facility management attempts to accommodate the request by allowing the employee to work previously scheduled rest days, or by attempting to swap shifts with other employees.

On April 12, 2002, grievant submitted a leave request form seeking approval for annual leave during the week of April 21-26, 2002.[5] He submitted it through the regular process and did not notify his supervisor or anyone else of any special circumstances. By April 17, 2002, grievant had not received notification that the request had been either approved or disapproved. Grievant then submitted a second request for annual leave during the week of April 30 to May 5, 2002.

[2] Exhibit 6. Written Notice, issued May 8, 2002.
[3] Exhibit 8. Grievance Form A, filed May 19, 2002.
[4] Exhibit 3. Facility Institutional Operating Procedure (IOP) 407, *Security Staffing*, June 7, 2000.
[5] Exhibit 1. Leave request form, April 12, 2002.

By Friday, April 19, 2002, grievant had still not received notification regarding his first leave request. He went to the Assistant Warden of Operations (AWO) and asked why his leave request had not been acted on. The AWO contacted a lieutenant who, in turn, contacted the captain responsible for approving leave requests. The captain denied the request for leave during the week of April 21-26, 2002 because there were too many staff already on leave or in training. The lieutenant advised grievant that his leave request was disapproved and asked if he could work on April 21, 2002. Grievant responded affirmatively and the lieutenant suggested that if grievant came in that day, perhaps "something could be worked out" for the rest of the week. Grievant did not tell either the AWO or the lieutenant of any special circumstances regarding his leave request.

When grievant left work on the afternoon of April 19, 2002, he went to an immediate care medical facility (not his regular physician) and complained of stress. The physician wrote an "activity excuse" for the period of April 19-26, 2002.[6] He directed grievant to see another physician on April 26, 2002. Grievant did not report for work between April 19 and April 30, 2002. At about 1:00 a.m. on April 21, 2002, grievant telephoned the facility to provide notice that he would not be returning to work until April 30, 2002.[7] When he returned to work on April 30, 2002, he learned that his second leave request (April 30-May 5) had been approved. Grievant never went to see the physician recommended by the immediate care medical facility. Grievant did not bring to the hearing any evidence to substantiate his contention that the immediate care physician prescribed medication for stress.

When grievant returned to work he submitted the "activity excuse" to cover his absence from April 21-26, 2002. Management evaluated this excuse in light of the other facts surrounding grievant's absence from work and concluded that the excuse was insufficient to justify grievant's unauthorized absence from work for six days. The agency relied on its leave of absence procedure, which states, in pertinent part, "Notification does not mean leave will be approved."[8] The Chief of Security then issued a Group II Written Notice to grievant on May 8, 2002 for failure to report to work without proper notice to a supervisor.

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

[6] Exhibit 4. Activity Excuse, April 19, 2002.
[7] Exhibit 7. Logbook page for April 21, 2002.
[8] Exhibit 5. DOC Procedure No. 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997.

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).

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.[9]

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[10] 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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[11] The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.16 of the DOC Standards of Conduct addresses Group II offenses; one example is failure to report to work without proper notice to a supervisor.[12]

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[9] § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

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

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

[12] Exhibit 10. DOC Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.

The basic facts in this case are undisputed. Grievant requested annual leave for the period of April 21-26, 2002. The facility denied the request because there was no one else available to work in grievant's place. Grievant went to a physician, complained of stress, and persuaded the physician to write an activity excuse. Grievant did not report to work during April 21-26, 2002.

Grievant contends that he should not be disciplined because he submitted an excuse from a physician that covered the period of absence. Sick leave protects employees against loss of pay when they must miss work because of illness or injury. Employees may use sick leave for absences related to conditions that prevent them from performing their duties. An employee may be asked, in the case of illness or injury, to provide a physician's statement describing the extent of the condition and the date upon which the employee is expected to be able to return to work.[13] However, a physician's statement is not an approval of sick leave; sick leave can be approved only by the agency. In evaluating an employee's request for sick leave, the agency may consider not only the physician's excuse but also the circumstances surrounding the request. The agency will approve sick leave only if it appears from all available evidence that the absence resulted from a bona fide illness or injury.

In this case, the grievant sought annual leave that was denied. On the very afternoon grievant learned of the denial, he went to a physician and complained of stress. The agency concluded that the physician's excuse for the same period of time grievant had sought leave was not coincidental. The hearing officer concurs with this assessment. Grievant had not previously sought medical help for stress. Moreover, after obtaining the excuse, grievant did not return to the physician, or make an appointment with the referral physician. If grievant was suffering from stress so severe as to require medical attention, it is highly likely that he would have sought follow-up medical appointments to obtain treatment. Grievant maintains that he went to his regular physician on April 23 or 24, 2002 but did not submit any evidence to substantiate this visit.

While physicians can generally diagnose physical illness or injury with relative certainty, the diagnosis of nebulous complaints such as "stress" is far more difficult. In general, physicians must rely almost entirely on the patient's own subjective description of symptoms or complaints. Unfortunately, it is much too easy for a patient to fabricate or exaggerate symptoms to the point that the physician, acting out of caution, will arrive at the diagnosis to which the patient is leading the physician. After considering the totality of the circumstances herein, it is concluded that more likely than not, grievant told the physician whatever was necessary in order to obtain an excuse from work during the week he wanted to take annual leave.

[13] DHRM Policy 4.55, *Sick Leave*, September 16, 1993.

Grievant avers that, prior to April 12, 2002, he had received telephone calls from his ex-wife regarding their 12-year-old daughter. Grievant's divorce was not amicable and he had not spoken to his wife or seen his daughter for nine years.[14] Grievant states that his wife was seeking medical background information from the grievant because his daughter was about to undergo medical testing. Grievant wanted to take leave from April 21-26 in order to be with his daughter during her medical testing. However, during these telephone calls, grievant did not ask for his ex-wife's telephone number or address, and still does not know where she is living. Grievant also states that his ex-wife called him again on April 19, 2002 saying that it was extremely important that grievant be with his daughter during testing for medical background and support.[15] But his wife never told grievant where they were or where to meet them. If his ex-wife was so insistent on grievant being there, it is highly improbable that she would not have given grievant such vital information. If grievant had wanted to be with his daughter during testing, he would have to know where she is. Grievant's ex-wife said the testing was to be performed in Atlanta, but grievant did not find out how to meet with his ex-wife and daughter.

In summary, the agency has demonstrated by a preponderance of the evidence that grievant has not provided sufficient verification that he was suffering from an illness or injury during the period of April 21-26, 2002. Accordingly, the agency reasonably determined that grievant's absence during this time constituted a failure to report to work without proper notice to a supervisor. Had grievant advised the AWO of the circumstances surrounding his request on April 19, 2002, it is probable that the AWO could have found an accommodation. Grievant's failure to disclose this information until the second resolution step as well as the inconsistencies in his story raise questions about the story's credibility.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on May 8, 2002 for failure to report to work without proper notice to a supervisor is UPHELD. The disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

APPEAL RIGHTS

[14] Grievant testified that he had not seen his daughter in nine years but his grievance attachment states that he not seen her for six years.
[15] Exhibit 8. Attachment to Grievance Form A.

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

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.[16]

[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

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