Issue: Group I Written Notice with 30-day suspension (unsatisfactory attendance); Hearing Date: 12/02/02; Decision Date: 12/03/02; Agency: DOC; AHO: David J. Latham, Esq.; Case No.: 5577

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5577

Hearing Date: December 2, 2002
Decision Issued: December 3, 2002

PROCEDURAL ISSUE

Grievant requested as part of her relief to be transferred to another facility. Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with law or policy. Transfer of an employee is among the types of relief that are not available to a hearing officer.[1]

APPEARANCES

Grievant
Warden
Two witnesses for Agency
Observer for Agency

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

ISSUES

Was the grievant's conduct from January through July 2002 subject to 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 I Written Notice issued for unsatisfactory attendance.[2] She was suspended without pay for 20 12-hour workdays (equivalent to 30 8-hour workdays). 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 (Hereinafter referred to as "agency") has employed grievant for four years. She is a correctional officer senior.

Grievant was given written counseling regarding tardiness in June 2001.[4] She currently has three active disciplinary actions – A Group III Written Notice for sleeping during working hours,[5] a Group I Written Notice for unsatisfactory attendance and excessive tardiness,[6] and a Group I Written Notice for unsatisfactory attendance.[7] Generally, the agency considers more than 48 hours of sick leave per year to be unsatisfactory.

The facility's policy on tardiness states, in pertinent part:

> Normally each employee will be given five (5) tardies in a twelve-month period before disciplinary action will be taken. On the sixth time in a 12-month period a counseling session will be given. The seventh time may result in a Group I Written Notice for "Excessive Tardiness." Additional tardiness will result in continued disciplinary actions in accordance with the Standards of Conduct.[8]

During the period from January 9, 2002 through July 23, 2002, grievant was absent from work on six occasions (totaling 10 missed workdays) and was tardy for work on five occasions.[9] This level of absenteeism and tardiness is not acceptable to the facility and it therefore issued grievant a Group I Written Notice. Because this Written Notice is the fourth active disciplinary action, the agency

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[2] Exhibit 2. Written Notice, issued August 29, 2002.
[3] Exhibit 7. Grievance Form A, filed September 28, 2002.
[4] Exhibit 6. Counseling documentation, June 21, 2001.
[5] Exhibit 5. Written Notice, issued May 19, 2000.
[6] Exhibit 4. Written Notice, issued December 5, 2000.
[7] Exhibit 3. Written Notice, issued November 19, 2001.
[8] Exhibit 19. IOP 202-7.8
[9] Exhibit 2. Memorandum from unit housing manager to assistant warden of programs, August 12, 2002.

could have terminated grievant's employment. However, the agency elected to mitigate the discipline and instead imposed a suspension of 20 workdays.

Grievant is a full-time employee of the agency. She is also a full-time student at a state university attempting to obtain a bachelor's degree. In addition, grievant is fulfilling a reserve military commitment that requires up to three weeks of military leave per year.

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).

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. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[10]

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[11] 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.

[10] Section 5.8, EDR *Grievance Procedure Manual*, effective July 1, 2001.
[11] Now known as the Department of Human Resource Management (DHRM).

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 include acts and behavior of the least serious nature (compared with Group II and III offenses).[12] 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 5-10.15 of the DOC Standards of Conduct addresses Group I offenses; one example is unsatisfactory attendance.[13]

Hostile work environment

Grievant contended in her written grievance that she is working in a hostile work environment. To establish a claim that there is a hostile work environment, grievant must prove that: (i) the conduct was unwelcome; (ii) the conduct was based on a protected class (race, age, gender, etc.); (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. Grievant did not directly address this issue during the hearing. The unwelcome conduct of which she complains is the discipline issued by the agency. However, the grievant failed to present any evidence that the discipline was based on any protected classification. Rather, the weight of the evidence supports a conclusion that discipline was issued solely because of grievant's unacceptable attendance. Discipline, when issued consistently and in accordance with policy, does not constitute an abusive or hostile work environment. Therefore, the grievant has not borne the burden of proof to demonstrate her contention.

Absenteeism

The agency has borne the burden of proof, by a preponderance of evidence, to show that grievant's attendance (absences and tardies) exceeds the allowable levels established by the agency. It has also demonstrated that it takes appropriate corrective action for all employees whose attendance becomes unacceptable.

All employers view absenteeism seriously because absences disrupt the normal flow of work. When an employee is absent from a job in the private sector, perhaps production will be delayed. However, in a correctional facility, an absence means that another correctional officer must be found to cover

[12] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[13] Exhibit 1. Department of Corrections Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

grievant's post; the agency cannot leave a post unmanned if it is to fulfill its mission of protecting public safety. Thus, the agency is significantly affected by any absence – regardless of how justified the absence may be. The more frequently a correctional officer is absent, the more disruption occurs when attempting to schedule employees for work and filling vacancies. In grievant's case, she is also absent due to her military obligations. Even though policy provides for military leave time, this significantly complicates the scheduling problem.

Grievant's desires to further her education and serve her country by fulfilling a military obligation are commendable. However, grievant must evaluate how the demands of these commitments affect her ability to fulfill her obligation to her employer. The Commonwealth provides a significant amount of both paid and unpaid time to employees to fulfill military obligations. However, each agency has an obligation to the public to assure that employees fulfill their responsibilities to the agency that employs them. One of the tools used by agencies to evaluate all employees is attendance. Frequent absenteeism, regardless of the reason, is always a cause for concern.

Grievant believes that her discipline is harsh because she has no control over her illnesses, family illness or a plumbing leak in her house. The legitimacy of grievant's illnesses, family problems and other problems was not contested by the agency. Grievant presented ample documentation to support her illnesses and the plumbing mishap. What grievant must recognize, however, is that the agency has taken corrective action because the number of absences over a long period of time has become excessive. While each individual absence may have been necessary or reasonable, that does not alter the fact that grievant is absent from work an unacceptably high number of times.

Grievant has previously been counseled and disciplined about her unsatisfactory attendance. One of the purposes of disciplinary action is to assure that the employee clearly understands how importantly the agency views the issue for which discipline is given. Grievant could have been removed from state service for sleeping during working hours in April 2000 but the agency was lenient. She could have been discharged again for a second disciplinary action in December 2000. With the third disciplinary action in November 2001, the agency again could have dismissed her but opted to show leniency. In this instance, a fourth active disciplinary action usually results in removal from state service. Again however, the agency elected to demonstrate leniency by imposing a suspension rather than discharge grievant.

Grievant should not be mislead by the agency's reduction of discipline in the past. She is encouraged to reassess whether her employment as a corrections officer is a good fit with her military obligations and educational goals. In trying to balance her job, education, and military commitment, grievant must make a decision as to which is most important and act accordingly. However,

grievant must recognize that as long as she remains a full-time employee of the Commonwealth, the agency expects her to comply with all of its policies, including the attendance policy.

DECISION

The decision of the agency is hereby affirmed.

The Group I Written Notice and suspension issued on August 29, 2002 are UPHELD. The disciplinary action shall remain active for the period specified in Section 5-10.19.A 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:

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.[14]

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

[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