Issue: Group I Written Notice (unsatisfactory attendance) (with termination due to accumulation); Hearing Date: 08/26/03; Decision Issued: 09/02/03; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 5781;
Administrative Review: HO Reconsideration Request received 09/12/03; Reconsideration Decision issued 09/15/03; Outcome: No basis to reopen hearing or change original decision.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5781

Hearing Date: August 26, 2003
Decision Issued: September 2, 2003

PROCEDURAL ISSUES

Grievant requested as part of the relief he seeks, recission of a previously issued disciplinary action. In the instant case, grievant grieved his removal from employment on April 23, 2003 and the Group I Written Notice issued on April 21, 2003 that precipitated his removal. In his grievance form, grievant also discusses a previous disciplinary action issued on March 5, 2003. The hearing officer has no authority to adjudicate disciplinary actions that are grieved more than 30 days after issuance. Therefore, the Group III Written Notice issued on March 5, 2003 may not be adjudicated as part of this grievance.

Grievant also requested that he be transferred to a different work location. Hearing officers may provide certain types of relief including rescission of discipline and payment of back wages and benefits.[1] However, hearing officers do not have authority to transfer employees.[2] Such a decision is an internal

[1] § 5.9(a) EDR *Grievance Procedure Manual*, effective July 1, 2001.
[2] § 5.9(b)2. *Ibid.*

management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Attorney for Grievant
Transportation Operations Manager
Advocate for Agency
One witness for Agency

ISSUES

Did the grievant's actions warrant 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

The grievant timely filed a grievance from a Group I Written Notice issued for unsatisfactory attendance.[3] The grievant's employment was terminated as the result of an accumulation of active disciplinary actions. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4]

The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant for five years as a construction crewmember. Grievant has two prior active disciplinary actions including a Group II Written Notice for violation of a safety rule[5], and a Group III Written Notice for sleeping during work hours.[6] Neither of the two prior disciplinary actions was grieved within the applicable time limit.

Grievant is designated an essential employee pursuant to both the Commonwealth's and the agency's Emergency Closings policies.[7] These policies provide that designated personnel must work during inclement weather and emergency operations. During the past three years, grievant had been counseled on two or three occasions that he had exhausted his leave balances.

[3] Exhibit 2. Written Notice, issued April 21, 2003.
[4] Exhibit 1. Grievance Form A, filed May 22, 2003.
[5] Exhibit 8. Group II Written Notice, issued March 12, 2001.
[6] Exhibit 7. Group III Written Notice, issued March 5, 2003.
[7] Exhibit 9. DHRM Policy no. 1.35, *Emergency Closing*, February 14, 2000 and, VDOT Policy No. 1.35, *Emergency Closings*, revised December 1, 2002.

The superintendent counseled grievant in writing in 2000 about: 1) exhausting his leave balances, 2) the procedures required to notify supervision of absences and, 3) that failure to follow the policy could result in disciplinary action.[8] Grievant's supervisor also counseled grievant in conjunction with his most recent performance evaluation (2002) about the need to improve his attendance.[9] Grievant had developed a pattern of exhausting his available leave and depleting his leave balances. On one occasion, grievant had told his supervisor that the leave balances were his to use as he saw fit.

On March 5, 2003, grievant's supervisor gave grievant a letter of intent advising him that he would be disciplined for unsatisfactory attendance and gave him 15 days to provide a response. Since January 10, 2003, grievant had exhausted his 2003 allocation of personal leave (32 hours), sick leave (72 hours), and all his annual leave. On January 24, 2003 grievant failed to call in to advise his supervisor that he would be absent. On January 29, 2003, grievant was absent for medical reasons. When asked to bring a physician's excuse to cover the absence, grievant refused to do so on two separate occasions.[10] On February 26, 2003 grievant requested leave to meet with his child's schoolteacher. However, school was closed due to inclement weather and grievant did not report to work. He again failed to notify his supervisor that he would be absent on March 4, 2003. By March 5, 2003 grievant had also used four days of leave without pay because of his absences. Grievant was suspended without pay from March 6-19 due to the Group III discipline issued on March 5, 2003. He failed to return to work on March 20, 2003 as scheduled. Grievant was absent due to illness from March 23 through April 22, 2003.

In January 2003, grievant learned that he had high blood pressure. He also developed a problem that was subsequently diagnosed as a bleeding ulcer.

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).

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[8] Exhibit 5. Memorandum from superintendent to grievant, January 14, 2000.
[9] Exhibit 12. Grievant's annual Performance Evaluation, October 2, 2002.
[10] Exhibit 6. Supervisor's daily calendar pages for January 29 & 30, 2003. Grievant now avers that he was "joking."

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.[11]

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 Human Resource Management 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 Standards of Conduct policy provides that Group I offenses include acts and behavior that are deemed least serious; one example is unsatisfactory attendance.[12]

The Standards of Conduct provides that, if employees cannot report as scheduled, they should arrange planned absences in advance with supervisors and, they should report unexpected absences to supervisors as promptly as possible.[13] The agency has demonstrated that grievant failed to comply with these requirements. Moreover, the agency has also shown that grievant had little regard for the work needs of the agency. Grievant had developed a pattern of exhausting all available leave balances and then going on leave without pay, notwithstanding counseling from his supervisor. After being counseled in October 2002, grievant was absent without notifying his supervisor in advance on January 29, 2003 and March 4, 2003. His personal leave and sick leave balances were replenished on January 10, 2003 and yet he exhausted his 2003 allocation less than two months into the year. In addition, he exhausted his annual leave and began using leave without pay.

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[11] § 5.8 EDR *Grievance Procedure Manual,* effective July 1, 2001.
[12] Exhibit 11. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[13] Exhibit 11. Section III.A.2, DHRM Policy 1.60, *Ibid.*

An agency must have its employees at work in order to accomplish the agency's mission. Grievant's pattern of exhausting all leave balances and expecting to use leave without pay adversely affected the agency's ability to accomplish its objectives. It is important to note that the agency is not required to grant leave without pay. The Commonwealth's policy providing for leave without pay applies only under specified circumstances and is not a mandatory policy. Rather, the policy gives agencies authority to grant leave without pay if the agency determines that it is in the agency's interest to do so.[14] In the instant case, the frequency of grievant's absences and his failure to fulfill his responsibility to provide advance notice to his supervisor about his absences became a significant problem for the agency. The agency is not obligated to grant leave without pay every time the grievant wants to take time off from work.

Another employee who also has an attendance problem has been counseled but not yet disciplined because he always calls his supervisor in advance of an absence. Since supervision and management can better plan work activity with advance knowledge of absences, that employee's absenteeism is not yet considered as serious as grievant's. The supervisor has counseled two other employees about their absenteeism. The counseling had the desired effect and those employees have not had further absenteeism problems.

Grievant suggested that the agency's decision to discipline him might have been motivated, in part, because grievant had spoken with the Equal Employment Opportunity (EEO) office. While the operations manager had heard a rumor that grievant had spoken with EEO, the agency has never had any contact from EEO nor has anyone confirmed that grievant actually filed a complaint. Moreover, grievant has not presented any evidence that he has ever filed a complaint with, or even spoken with, EEO.

The grievant stated in his grievance, and testified under oath, that he had never been counseled about his absenteeism. However, the documentary evidence cited above and the testimony of grievant's supervisor and operations manager outweigh grievant's denial. Therefore, where there were differences in testimony, the hearing officer found the testimony of agency witnesses to be more credible than that of grievant.

The agency has demonstrated, by a preponderance of evidence, that grievant's attendance was unsatisfactory. Grievant had ample prior warning since he had verbal counseling about his pattern of exhausting leave balances and expecting to use leave without pay. Therefore, the evidence reflects that grievant's excessive absenteeism warranted issuance of the Group I Written Notice. Further, the accumulation of active disciplinary actions warrants removal of grievant from state employment pursuant to the Standards of Conduct policy.[15]

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[14] DHRM Policy No. 4.45, *Leave Without Pay Conditional and Unconditional*, September 16, 1993.

[15] Exhibit 11. Section VII.D.1.b.(2), DHRM Policy No. 1.60, *Ibid*.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for unsatisfactory attendance issued on April 21, 2003, and grievant's removal from employment are hereby UPHELD. The Written Notice shall remain in grievant's personnel file for the length of time specified in Section VII.B.2.c 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.[16] You must file a notice of appeal with the clerk of the circuit court in the

[16] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[17]

[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

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

DECISION OF HEARING OFFICER

In re:

Case No: 5781

Hearing Date:	August 26, 2003
Decision Issued:	September 2, 2003
Reconsideration Received:	September 12, 2003
Reconsideration Response:	September 15, 2003

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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 request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution (EDR). The 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.[18]

[18] § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

OPINION

Grievant states that he does not understand the significance of his statement to the supervisor that he could use leave as he (grievant) saw fit. The agency grants leave only for the purpose specified. For example, if an employee is granted educational leave, the employee may only use the authorized leave time for educational studies – not to take vacation. There are two types of leave – annual leave and personal leave – which may be used for any discretionary purpose of the employee's choice. However, an employee may not take annual or personal leave at any *time* that he sees fit. The employee must receive agency approval for the desired time of such leave.[19] The request for leave should be made as far in advance as possible. Therefore, grievant's assumption that he can use leave whenever he sees fit is incorrect. More significantly in this case, grievant's exhaustion of all available leave balances caused him to be in a leave without pay (LWOP) status for further absences. Grievant's assumption that he could use leave without pay indiscriminately is what exacerbated his already poor absenteeism record. This justified the Group I Written Notice.

The unsatisfactory attendance does not, in and of itself, justify the termination of his employment. Rather, grievant's accumulation of multiple active prior disciplinary actions is what justified his removal from state service, pursuant to Section VII.D. of the Standards of Conduct.

The decision did not note grievant's assertion that he had been told he might have cancer for two reasons. First, grievant presented no evidence to support this assertion. Second, grievant never stated definitively that he had been *diagnosed* with cancer. In fact, to the contrary, grievant said that he was only diagnosed with high blood pressure and a bleeding ulcer. While it may have taken multiple tests and physician appointments to reach the ultimate diagnosis, grievant failed to show that he could not have given advance notice of such appointments. Administrative notice is taken of the fact that medical tests and physician appointments are usually made well in advance. Even when a doctor grants a quick appointment (e.g., come in tomorrow), there is still ample time for grievant to call his supervisor and advise of the appointment.

Grievant correctly observes that a conclusory allegation alone does not rise to a preponderance of evidence. However, the totality of the evidence in this case is sufficient to conclude that grievant's absenteeism was excessive. Such excessive absenteeism, over time, inevitably impacts management's ability to efficiently plan projects and schedule work assignments. As grievant observes, other employees also had absences. However, grievant's absenteeism was the most egregious among his coworkers.

Management is obligated to determine what level of absenteeism is acceptable and, to take corrective action against those who exceed that level.

[19] DHRM Policy No. 4.10, *Annual Leave*, September 16, 1993.

Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." In this case, management determined that grievant's absenteeism had become sufficiently high that it had to take corrective action in order to fulfill its own responsibilities. The disciplinary action taken by the agency was the lowest possible level – a Group I Written Notice. The record is sufficient to conclude that management acted reasonably in deciding to take action against the most egregious offender, and that the choice of a Group I Written Notice was the appropriate level of discipline for the offense.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis to change the Decision issued on September 2, 2003.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an 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.

Judicial Review of Final Hearing Decision

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.[20]

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David J. Latham, Esq.
Hearing Officer

[20] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton,* 39 Va. App. 439, 573 S.E.2d 319 (2002).