Issue: Group III Written Notice with termination (absence in excess of 3 days without authorization); Hearing Date: 04/21/04 Decision Issued: 04/26/04; Agency: DSS; AHO: David J. Latham, Esq.; Case No. 644

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 644

Hearing Date: April 21, 2004
Decision Issued: April 26, 2004

PROCEDURAL ISSUES

Grievant filed two grievances. She filed the first grievance on December 8, 2003 over two weeks after receiving a due process notice from her supervisor that the agency was considering termination of grievant's employment. By the time of this filing, grievant had already been terminated on December 5, 2003. She then filed a second grievance on December 17, 2003 grieving the termination. In the second grievance, grievant requested that the two grievances be consolidated for deliberation. The agency did not respond to this request. The first grievance did not go through the resolution steps, and is still an open, active grievance. Grievant did not request the Department of Employment Dispute Resolution (EDR) to consolidate the grievances for hearing. Even if she had made such a request, EDR would have been unable to do so because the three-step resolution process has not yet been completed. Therefore, this Decision addresses only the second grievance (filed on December 17, 2003) because it is the only grievance qualified for hearing.[1]

The first grievance grieved not only the notice of intent to terminate grievant's employment, but also that grievant did not receive a performance evaluation for the 2003 cycle.[2] Therefore, the first grievance remains open and active, and must be brought to a conclusion through the resolution process.

[1] Exhibit 13. *Grievance Form A*, filed December 17, 2003.
[2] Exhibit 14. *Grievance Form A*, filed December 8, 2003.

Grievant requested as part of the relief she seeks: that she be transferred to a different unit;[3] that a Notice of Improvement Needed/Substandard Performance be removed from her file; that her 2003 performance evaluation be completed by someone other than her supervisor; that she receive a salary increase; and that the agency refund her money for a parking pass. Hearing officers may provide certain types of relief including reduction or rescission of the disciplinary action.[4] However, hearing officers do not have authority to transfer employees, grant salary increases, change agency policy, or direct the means by which work activities are carried out.[5] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

The written notice proffered as evidence by the agency is the Group III Written Notice with termination of employment issued on December 5, 2003. Although the agency subsequently made a unilateral decision to reduce the Written Notice to a Group II with suspension (see Findings of Fact, *infra*), no such revised notice has yet been prepared. The agency made a handwritten notation of the reduction in discipline on the face of the Group III Written Notice. When an agency modifies a disciplinary action, the original written notice should be removed from the employee's personnel file and replaced with a revised written notice.[6]

APPEARANCES

Grievant
Fraud Program Manager
Representative for Agency
Three witnesses for Agency

ISSUES

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

[3] When the agency reinstated grievant to her job, it agreed to allow grievant to transfer to a vacant position in a different unit. Therefore, this particular request for relief is now moot.
[4] § 5.9(a)2. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[5] § 5.9(b)1, 2, 3, 4, 6 & 7. *Ibid.*
[6] Exhibit 8. Section VII.B.4.b, Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct, September 16, 1993. The Standards of Conduct permits the agency to retain the removed Written Notice but it must be retained in a separate grievance or other confidential file.

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued for an absence from work in excess of three days without proper authorization or a satisfactory reason.[7] As part of the disciplinary action, the grievant was removed from employment effective December 5, 2003. During the grievance resolution process, the third-step respondent unilaterally rescinded the termination of grievant's employment and reduced the discipline to a Group II Written Notice with ten days suspension without pay.[8] Grievant accepted the reduction in discipline but elected to grieve the reduced disciplinary action.[9]

The Virginia Department of Social Services (Hereinafter referred to as "agency") has employed the grievant as a program administration specialist for five years.

Grievant began short-term disability (STD) leave on July 25, 2003 under the aegis of the Virginia Sickness and Disability Program (VSDP).[10] During the course of her employment, grievant has utilized the VSDP on five occasions and is very familiar with the procedures and requirements of the program. Among the requirements is that the employee must "Maintain communication with your agency/supervisor while on VSDP."[11] Grievant had kept her supervisor informed of status changes during her prior disability leaves and, during the period of July 25, 2003 through October 29, 2003.

On Wednesday, October 29, 2003, grievant and her supervisor had a telephone conversation in which the supervisor advised grievant that, according to the most recent CORE action report,[12] grievant was expected to return to work on Monday, November 3, 2003. Grievant said she was scheduled to see her physician on November 3rd but that, in any case, her doctor was going to certify her disability through December 1, 2003. Grievant did not call her supervisor during November 2003.[13] CORE subsequently extended the period of disability through December 1, 2003.

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[7] Exhibit 15. Written Notice, issued December 5, 2003.
[8] Exhibit 13. Letter to grievant and third-step response from agency head, January 28, 2004.
[9] Exhibit 17. Letter to agency head from grievant, February 6, 2004.
[10] Exhibit 12. Letter from VSDP to grievant, August 7, 2003. NOTE: When an employee is on STD, there is no direct communication between the agency and the employee's physician. A third-party administrator (CORE) receives periodic medical updates from the employee's physician and decides whether the period of disability should be extended. If CORE approves an extension of the disability period, it sends an "Action Report" to the agency's human resource department advising only that approval has been granted for a specified additional period of disability. Therefore, the agency asks employees to keep their supervisor advised of their status so that the supervisor can make appropriate plans and adjustments in work schedules.
[11] Exhibit 4. VSDP Handbook, p. 22. *See also* Exhibit 9. Email from Department of Human Resource Management (DHRM) Policy Analyst, April 12, 2004, containing guidance on maintaining communication between employee and supervisor.
[12] Exhibit 11. VSDP Action Report, October 28, 2003.
[13] Exhibit 10. Log of calls received on supervisor's telephone during November 2003.

During the first two weeks of November 2003, unbeknownst to grievant's supervisor, grievant's physician had certified continuing disability to CORE. On November 14, 2003, CORE transmitted (via email) an action report to the agency stating that grievant's period of disability had been extended through November 16, 2003.[14] Subsequently, CORE submitted another action report extending disability through December 1, 2003.

Grievant does not like her supervisor and does not like working with her. She also believes that her supervisor does not like her. Grievant believes that her supervisor is dictatorial.

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.[15]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-

[14] Exhibit 11. VSDP Action Report, November 14, 2003. NOTE: CORE transmits action reports to the agency via email on the date of the report. The agency's human resources department generally sends a facsimile copy to the supervisor on the same day.

[15] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

1201, 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.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. One example of a Group III offense is an absence in excess of three days without proper authorization or a satisfactory reason.[16]

The agency sought to present evidence concerning grievant's excessive absenteeism problem during the past five years. While it is understandable that the agency is very concerned about this serious problem, such evidence has no relevance in this hearing because the agency did not discipline grievant for unsatisfactory attendance. The agency could have disciplined grievant for her unacceptable absenteeism but in this instance only disciplined her for one specific absence in excess of three days. Hearing officers may adjudicate only the offense contained in the written notice.

In this case, the written notice specifies that the offense (absence in excess of three days) occurred on November 3, 2003; it does not list the period of time (must be at least three days) during which the offense was alleged to have occurred. During the hearing, grievant's supervisor testified that she believed the offense occurred during the period beginning on November 17, 2003 but acknowledged that she was uncertain about the actual dates. The person who issued the written notice did not testify. The Employee Relations Manager believed the date listed on the written notice was erroneous and that it should have stated the period beginning on November 17, 2003. His email message to grievant's supervisor corroborates that date.[17]

However, it is unnecessary to resolve that question because the alleged offense would be equally applicable to either period of time. The issue in this case is whether grievant had either "proper authorization" or a "satisfactory reason" for being absent in excess of three days. Grievant had been absent due to an extended short-term disability since July 25, 2003. When an employee is on leave under the auspices of the VSDP, the only entity that can "authorize" the absence is the third-party administrator – CORE. The undisputed evidence establishes that CORE authorized grievant's absence through December 1, 2003. It appears that CORE may have had either communication problems with

[16] Exhibit 5. Section V.B.3.a, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[17] Exhibit 22. Email from Employee Relations Manager to grievant's supervisor, November 17, 2003.

grievant's physician or internal miscommunication that resulted in issuance of two action reports reflecting earlier closure of grievant's case. However, CORE subsequently issued additional action reports that extended the disability period and established the final closure date as December 1, 2003. The agency has not produced any evidence to show that grievant should be held accountable for whatever glitches may have occurred within CORE or between CORE and grievant's physicians. Because the third-party administrator ultimately certified one continuous period of disability through December 1, 2003, grievant had not only proper authorization, but also a satisfactory reason for her absence in November 2003.

From the testimony and evidence offered, it appears that the agency is attempting to justify the discipline on a different basis than stated on the Written Notice. The agency now asserts that it disciplined grievant because she did not maintain satisfactory communication with her supervisor during her disability leave. However, the Written Notice makes no mention of this offense. Moreover, the Notice of Intent to terminate grievant's employment does not state this offense.[18] An agency may reasonably expect an employee to maintain communication with her supervisor during a period of disability. However, if the agency wants to discipline an employee with suspension or removal from employment for failure to maintain such communication, it must clearly state the reasons for the discipline on *both* the advance notice to the employee, and the written notice.[19] Because the agency did not notify grievant in advance or on the written notice that it was disciplining her for failure to maintain communication with her supervisor, it may not raise this issue *ex post facto*.

However, even if the agency were able to raise this issue after the fact, it has not shown, by a preponderance of evidence that grievant failed to maintain reasonable communication with her supervisor. Grievant had been on disability leave in the past and had never failed to keep her supervisor properly informed. After beginning the most recent disability leave in July 2003, grievant regularly contacted her supervisor and kept her informed of status changes through October 29, 2003. On that date, the supervisor avers that grievant promised to call her back after a physician's visit on November 3, 2003; grievant testified that she told her supervisor that her physician would be extending her disability through December 1, 2003. The supervisor said she left a voice mail message for grievant asking about her status on November 14, 2003; grievant maintains that the voice mail message asked only about a cell phone (to which grievant

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[18] Exhibit 14. Memorandum from supervisor to grievant, November 21, 2003.

[19] Exhibit 8. Section VII.E.2, DHRM Policy 1.60, *Ibid*, states: "Advance notice to employees: Prior to any (1) disciplinary suspension, demotion, and/or transfer with disciplinary salary action, or (2) disciplinary removal action, **employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge,** and a reasonable opportunity to respond." (Emphasis added).

Section VII.E.5 states: "A Written Notice form **confirming the cause and nature of the disciplinary action** … shall be provided to any employee who subsequently is disciplined." (Emphasis added).

responded by email).[20] Both grievant and her supervisor testified equally credibly. The agency has not offered any evidence that would suggest the grievant is less credible than her supervisor. The agency has the burden to show that its case is preponderant. The fact that grievant has had unacceptable attendance for several years is not proof that she is less credible than her supervisor. When, as here, the case comes down to a "she said – she said" dispute, and both are equally credible, the agency must provide other evidence to show that the supervisor's version is more credible. The agency has not done so in this instance and, therefore, it has not borne the burden of proof.

Workplace harassment

To establish a claim for workplace harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on a protected classification; (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 cites the disciplinary action as unwelcome conduct. While grievant understandably found the disciplinary action to be unwelcome, she has not offered any evidence to show that it was based on any protected classification. Disciplinary actions issued in compliance with the Standards of Conduct do not constitute an abusive work environment but are necessary to address unacceptable performance and/or behavior. She also offered unrebutted testimony that her supervisor had called her on two or three occasions during her disability leave to request that grievant perform work. However, grievant was unable to show that this request was made on the basis of a protected classification.

Retaliation

In her written grievance, grievant alleged that the disciplinary action was retaliatory. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[21] To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law. Grievant did engage in a protected activity – she made a complaint against her supervisor through the Hotline for Fraud, Waste and Abuse. However, unrebutted testimony established that neither grievant's supervisor nor her manager knew that grievant had filed the complaint until months after the disciplinary action. Thus, while grievant engaged in protected activity, and did suffer an adverse employment

[20] Exhibit 14. Email from grievant to supervisor, November 14, 2003.
[21] EDR *Grievance Procedure Manual*, p.24

action (discipline), she has failed to establish a connection between the two. Therefore, grievant has not borne the burden of proof to demonstrate retaliation.

Racial discrimination

Grievant alleges that the discipline was discriminatory because it was based on her race (African-American). An employee may demonstrate racial discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact resulting from the selection process. In this case, grievant has not presented any testimony or evidence of remarks or practices that would constitute racial discrimination. In fact, during the hearing grievant acknowledged that she had no evidence to support this allegation.

DECISION

The disciplinary action of the agency is reversed.

The Group II Written Notice for an absence in excess of three days without proper authorization or satisfactory reason, and the ten-day suspension issued on December 5, 2003 are hereby RESCINDED. The agency is directed to remove the Written Notice issued on December 5, 2003 from grievant's personnel file pursuant to Section VII.B.4 of the Standards of Conduct.

In the case of the first grievance, filed on December 8, 2003, the agency is directed to follow the required resolution steps to bring the grievance to a conclusion.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.[22] 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.[23]

[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

[22] 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).

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