Issue: Termination of Employment; Hearing Date: 06/30/04; Decision Issued: 07/02/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 743; **Administrative Review: HO Reconsideration Request received 07/19/04; Reconsideration Decision Issued: 07/21/04; Outcome: Request untimely; Reconsideration denied.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 743

Hearing Date: June 30, 2004
Decision Issued: July 2, 2004

APPEARANCES

Grievant
Warden
Advocate for Agency
Three witnesses 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? Was the agency's action discriminatory?

FINDINGS OF FACT

The grievant filed a timely grievance from the termination of her employment on April 9, 2004. Following failure of the parties to resolve the

grievance at the third resolution step, the agency head qualified the grievance for a hearing.[1]

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for six years. She was a Corrections Sergeant at the time of her separation from employment.[2]

On February 24, 2003, the Chief of Security and a Corrections Lieutenant counseled grievant about her failure to report for work on February 14, 2004.[3] Grievant had been scheduled to work but failed to report or call in to notify the shift commander that she would not be at work.[4] During the counseling session, grievant was advised that if she needed to take a medical leave of absence, the warden must first approve it.[5]

The grievant then met with the warden and requested one month off from work to deal with "family and physical challenges."[6] The warden granted grievant a leave of absence from February 26 through March 25, 2004. Grievant did not request medical leave or leave pursuant to the Family and Medical Leave Act (FMLA). During her absence, the time away from work was charged to her available annual leave and compensatory leave balances. On March 1, 2004, the warden was reassigned to a position in agency headquarters.

A new warden reported for work on March 25, 2004. On Friday, March 26, 2004, the day grievant was due to return to work, she telephoned to speak with the warden. The warden was busy with her new responsibilities and was unable to return the call that day. On the following Tuesday, March 30, 2004, the warden was able to return grievant's call. Grievant explained that the previous warden had verbally approved her leave through March 25, 2004 and requested the new warden to approve a two-week extension. The warden advised grievant that she would have to look into the matter, check the leave records, and get back to her later. She also told grievant that she requires all leave requests to be in writing. She told grievant to submit a written request for the leave extension she was requesting. She directed grievant to meet with her on April 2, 2004.

By April 2, 2004, grievant had exhausted her compensatory leave and annual leave balances. Grievant told the warden that she needed the time off to deal with "personal issues" involving her son. Grievant wanted to utilize sick leave but the warden felt that grievant's reasons did not constitute an illness that would qualify as sick leave. Grievant said that she could get medical

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[1] Agency Exhibit 1. Grievance Form A, filed April 21, 2004.
[2] Agency Exhibit 4. Employee Work Profile Work Description, November 2002 - October 2003.
[3] Agency Exhibit 5. Memorandum from Chief of Security to grievant, March 29, 2004.
[4] Agency Exhibit 5. Email from Captain, February 18, 2004.
[5] Agency Exhibit 5. Email from Lieutenant, March 29, 2004. NOTE: The first line of this email refers to the date of 3/24/04; this appears to have been a typographical error and should have been 2/24/04.
[6] Grievant Exhibit 3. Email from previous warden to EDR, June 22, 2004.

documentation to show that she was eligible for sick leave. Grievant did not submit to the warden the previously requested written request for leave. The warden advised grievant that her continuing absence from work was unauthorized, and could be handled pursuant to the Standards of Conduct. She also told grievant that unless she could obtain certification from a physician to document an illness, she could not use sick leave. She also referred grievant to the human resources office to obtain information on FMLA leave. Grievant contacted the human resources office and requested an FMLA form which was mailed to her on April 5, 2004.[7] Grievant did not fill out the form. She gave it to her physician, who took no action on it because he recognized that it was a form that grievant must complete.

Grievant did not contact the warden during the next week. Grievant did not notify the watch commander or anyone else that she would not be reporting to work as scheduled during the two weeks after her authorized leave ended. She did not submit a written request for any type of leave, did not submit a request for FMLA leave, and did not provide any documentary evidence of illness from her physician. By April 9, 2004 grievant had been absent without authorization significantly in excess of three days. On that date, the warden terminated grievant's employment because she had been absent in excess of three days without proper authorization or a satisfactory reason.[8]

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

[7] Grievant Exhibit 1. Request for FMLA form.
[8] Agency Exhibit 1. Letter from warden to grievant, April 9, 2004.

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, such as claims of discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[9]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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* 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.[10] 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 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.[11] An absence in excess of three days without proper authorization or a satisfactory reason is one example of a Group III offense.

The agency has shown, by a preponderance of evidence that, after taking an approved leave of absence for one month, grievant was absent for two additional weeks without authorization or satisfactory reason. Grievant was scheduled to return to work on March 26, 2004 but failed to report for work and failed to notify the watch commander why she was not reporting for work. No one ever granted authorization for any form of leave after March 25, 2004. The warden advised grievant that she must submit to the warden a written request for any leave she wanted; grievant failed to comply with this instruction. The warden told grievant that medical documentation would be needed to substantiate any alleged illness or medical condition; to date, grievant has not provided any letter from a physician to explain her absence from work. Grievant was given the opportunity to apply for FMLA leave but has never submitted the required form.

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

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

[11] Agency Exhibit 6. Procedure Number 5-10, *Standards of Conduct,* June 15, 2002.

Accordingly, grievant has failed to show either that she had authorization for her absence or that she had a satisfactory explanation as to why she could not have reported to work.

Grievant asserts that she had high blood pressure during the time of her absence. However, grievant failed to provide the agency with either any medical evidence of such a diagnosis or a statement from a physician that would excuse her from work due to hypertension. Even though nearly three months have passed since grievant's removal from employment, she has still failed to produce a letter from her physician, a request for leave, a completed FMLA form, or any other documentation that would support her absence from work. Grievant submitted only one brief note from a physician which does not provide a diagnosis but states that grievant is able to work "but at times her severe symptoms preclude her from working." Two other notes were not signed by physicians and only attest that grievant had appointments on three different occasions.[12] Two of the dates (February 13, 2004 and March 24, 2004) were prior to the period of unauthorized absence; the other dates (April 7-8, 2004) were not scheduled workdays for grievant. Therefore, none of these appointments explain grievant's unauthorized absence for scheduled work days occurring after March 25, 2004.

Discrimination

Grievant alleges that she was discriminated against "based on medical disability." To sustain a claim of discrimination, grievant must show that: (i) she is a member of a protected group; (ii) she suffered an adverse job action; (iii) she was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's protected classification.[13] Grievant has satisfied the second and third prongs of this test because she was discharged from employment, and was performing at a satisfactory level. However, grievant has not shown that medical disability is one of the classifications entitled to protection under the law. More importantly, grievant has not shown that she had a medical disability. In fact, grievant has never provided any medical documentation that would justify her six-week absence, let alone establish a medical disability. Accordingly, grievant has not met the first prong of the four-part test to establish a claim of discrimination. Therefore, grievant has failed to prove that the agency discriminated against her.

Other issues

Grievant complains that the agency neither counseled her nor issued her a written notice prior to terminating her employment. The Standards of Conduct

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[12] Grievant Exhibit 3. Notes from medical providers dated April 13, 2004, June 14, 2004 and June 23, 2004.

[13] *Cramer v. Intelidata Technologies Corp.*, 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

policy provides agencies with a range of possible corrective actions including counseling and the issuance of written notices. However, the policy does not mandate that either counseling or written notices precede the termination of employment. When an employee commits a minor offense, the agency may choose to first counsel the employee and, if the offense is repeated, issue a written notice for a recurrence of the offense. However, if an offense is sufficiently severe, the agency may elect to immediately terminate the offender's employment.

Grievant asserts that her length of service with the agency and her performance record should be considered as mitigating circumstances. Grievant has been employed for six years – a moderate but not long term of service. Her performance has been satisfactory; she was rated "Contributor" during the last three performance evaluation cycles. Accordingly, these factors are not sufficient to mitigate the discipline from the normal disciplinary action imposed for the offense.

DECISION

The decision of the agency is affirmed.

The grievant's removal from employment effective April 9, 2004 is hereby UPHELD.

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.[14] 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]

David J. Latham, Esq.
Hearing Officer

[14] 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).

[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. 743

Hearing Date:	June 30, 2004
Decision Issued:	July 2, 2004
Reconsideration Request Received:	July 19, 2004
Response to Reconsideration:	July 21, 2004

ISSUE

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

FINDINGS OF FACT

On July 19, 2004, the hearing officer received from the grievant a request for reconsideration of a Decision of Hearing Officer issued on July 2, 2004.

APPLICABLE LAW

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 July 2, 2004; the decision was mailed to the grievant on July 2, 2004. The final date by which a request for reconsideration must be received was July 12, 2004. The grievant's request for reconsideration was received by the Department of Employment Dispute Resolution on July 19, 2004.

The grievant has provided no explanation for having submitted her request for reconsideration after the 10-calendar day period mandated by the Grievance Procedure Manual. Therefore, the grievant's request for reconsideration was not timely received. The hearing decision became final on July 13, 2004 when the 10-day calendar period expired.

Grievant's request for reconsideration is procedurally deficient for two additional reasons. First, grievant failed to indicate that she complied with the requirement to provide a copy of her request to the opposing party. Second, grievant failed to demonstrate that the document she submitted with her request could not have been presented at the hearing on June 30, 2004. Grievant had ample opportunity prior to that date, with the exercise of due diligence, to have obtained the physician's note for presentation during the hearing. Accordingly, grievant has not shown that the document is *newly discovered* evidence.

Grievant's request for reconsideration essentially amounts to a recitation of her testimony during the hearing; her testimony has already been considered and a decision rendered based on all evidence presented at the hearing.

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[16] § 7.2(a) Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2000.
[17] § 7.2(d) Ibid.

DECISION

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.[18]

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David J. Latham, Esq.
Hearing Officer

[18] 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).