Issue: Group II Written Notice (disruptive behavior and failure to follow supervisor's instructions, perform assigned work or otherwise comply with established written policy); Hearing Date: 01/24/05; Decision Issued: 02/16/05; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 7941

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7941

Hearing Date: January 24, 2005
Decision Issued: February 16, 2005

PROCEDURAL HISTORY

On August 10, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

> *Disruptive behavior and failure to follow a supervisor's instructions, perform work or otherwise comply with established written policy.*

On August 13, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 16, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 24, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action for disruptive behavior and failure to follow a supervisor's instructions.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Health employs Grievant as a Health Counselor II at one of its regional Facilities. She began working in her current position in January 2004. She received a medical degree from a foreign university. English is her second language. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On June 2, 2004, Grievant was inside an elevator within the Facility when the electric power for the building stopped. She had entered the elevator on the fourth floor. The elevator dropped an unknown number of feet thereby causing Grievant to believe the elevator may fall further. After approximately 45 minutes, the power resumed and Grievant exited the elevator. On the following day, she began having headaches and nightmares associated with being inside the elevator when the power stopped. She filed a worker's compensation claim.

On July 13, 2004, the Supervisor and Grievant met to discuss Grievant's sick leave. The Supervisor followed her meeting agenda[1] which provides:

Subject:

Chronic use of sick leave

1. 7/2/04 (4-4:30 p.m.)
2. 7/6/04 (8 a.m. – 4:30 p.m.)

[1] Grievant signed the agenda to acknowledge her receipt.

3. 7/8/04 (8 – 9:37 a.m.)
4. 7/12/04 (8 – 9:26 a.m.)
5. 7/13/04 (8 – 9:23 a.m.)

Sick leave balance as of 7/8/04 (11:17:07 a.m.) 15.6 hours.

Expectation

- Report to work as scheduled
- Comply with policy, "When possible, request for sick leave should be submitted in advance" (see attached Administrative Policy and signed Certificate of Receipt)
- Avoid Leave Without Pay (LWOP) status, unless approved by health district (see attached LWOP information and signed Certification of Receipt), 2nd reminder

Future Sick Leave Request

Future sick leave request *may* be denied.

On July 26, 2004, Grievant sent the Supervisor an email stating:

> 5. On 07/14/04 I came to work terribly ill with the persistent headache that I have been having after the "WC" incident of 06/02/04 (elevator lock in during blackout for 45 minute incident on 06/02/04). I was forced to come [in to work] since your office stated to me the afternoon prior that I could "no longer call in sick even if I was sick." My understanding was that I will face dismissal if I did [call in] sick even if it was related [to] my "WC 06/02/2004 incident."

Grievant sent a copy of the email to the Business Manager and to the Personnel Assistant.

Neither the Supervisor nor anyone in her office told Grievant that Grievant could no longer call in sick even if she was sick even if the sickness related to Grievant's worker's compensation claim.

On June 15, 2004, Grievant informed the Supervisor of the elevator mishap. The Supervisor prepared an Employee First Report of Accident based on information provided by Grievant and in the presence of the Business Manager. On June 16, 2004, the First Report was sent to the Agency's Central Office and also to the Third Party Administrator serving in the capacity of the worker's compensation insurance carrier. Grievant was provided with contact information for the Third Party Administrator. On July 15, 2004 at 8:45 a.m., Grievant met with the Business Manager who informed Grievant that the First Report had been sent to both the Agency's Central Office and to the Third Party Administrator. The Personnel Assistant also spoke with the Agency's

Central Office and the Third Party Administrator regarding their receipt of the First Report.

On July 15, 2004 at 9:10 a.m., Grievant sent the Supervisor an email stating:

> Per, your office directive I spoke with [Business Manager], I also contacted the [Worker's Compensation] office. I was directed to [inquire] with my supervisor "Who is the insurance company carrier for this agency WC claim." Since, they have not received the [First Report] form or any other paperwork to date.

In Grievant's July 26, 2004 email she states:

> 6. On Wednesday July 14, 2004, the physician office denied my care on the basis that they were told they could not see me (from the list of physician given to me for the incident medical visit) called this office and that of the city nurse. I was also told by office of the physician given to me that numerous calls have been made [to the Supervisor and Personnel Assistant). Please refer to physician messages to your office.
> 7. Again on 07/14/04, I was not seen due to the above, I requested verification of my visit etc and it was not given, I made several calls to [Facility Human Resources] from the clinic and so did the nurse and physician. Authorization to see the physician was still denied referred to [Personnel Assistant] when [Personnel Assistant] get back to work.) I was not seen or given any paperwork, since however they spoke with from the agency and the "city nurse office" told the physician and nurse "NOT AUTHORIZED TO SEE ME".[2]

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[3] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

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[2] Agency Exhibit 1.

[3] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

"Disruptive behavior" is a Group I offense.[4] When an employee unnecessarily interferes with an agency's customary operations, the employee may be disciplined for engaging in disruptive behavior.

On July 26, 2004, Grievant sent an email alleging she was told that she could no longer call in sick even if she was sick and that she would face dismissal if she did call in sick. In actuality, Grievant had been instructed to comply with sick leave policies and was not told she could not call in sick even if she was sick or that she would face dismissal for doing so. Grievant's email caused frustration and anger by the Supervisor who had properly informed Grievant of DHRM leave policies. Grievant knew or should have known that her statements were inaccurate.

On July 15, 2004, Grievant sent the Supervisor an email stating she had been asked to inquire regarding the identity of the Agency's worker's compensation carrier. Grievant also stated the First Report had not been received. Grievant knew or should have known that this information was false since only a few minutes before sending her email, Grievant had spoken with the Business Manager who told Grievant the First Report had been sent to the Agency's Central Office and to the Third Party Administrator who would administer her worker's compensation claim. Grievant's failure to understand the information provided by the Business Manager and then to write an email containing information that she knew could not be correct, was disruptive to the Agency's operations. Grievant created unnecessary frustration with the Supervisor who received the email and the Business Manager who learned of the email.

Grievant's behavior was disruptive to the Agency's operations. She did not pay attention to information provided by her Supervisor, the Business Manager, and the Personnel Assistant. She made contacts with physician's staff and Third Party Administrator staff, failed to inform them of the information she knew or should have known, and then reported their comments to the Supervisor without describing in detail the particular facts necessary for the Supervisor to understand the nature of the problem. Grievant created unnecessary frustration on the part of Agency staff by causing staff to divert additional attention to Grievant after having already addressed her concerns. Grievant's position as a Health Counselor II requires her to have a significant educational background and an ability to understand complicated health information and to explain it to others with less education. The degree of confusion and misunderstanding Grievant displayed is inconsistent with the capabilities she must possess to routinely perform her job.

The Agency contends that Grievant told "outside sources" that the Facility was denying her access to medical treatment. Grievant denied making such statements and the Agency did not present any direct evidence from outside sources suggesting Grievant made such statements. The evidence supporting the Agency's allegation remains speculative.

[4] DHRM Policy 1.60(V)(B)(1)(e).

The Agency contends that Grievant has made allegations of harassment, termination, and having to work in a threatening environment. An employee is free to make such allegations and may not be disciplined for doing so. The Agency responded appropriately by informing Grievant of her obligation to satisfy her job duties.

The Agency presented evidence regarding leave request forms for which Grievant wrote dates on post-it notes. No evidence was presented suggesting Grievant was absent from work without taking necessary leave. Grievant contends she sought leave approval shortly before a scheduled doctor's appointment and when she did not get immediate approval she delayed the doctor's appointment. No evidence was presented suggesting Grievant acted contrary to any policy.

The Agency presented evidence regarding its assertion that Grievant failed to follow her supervisor's instructions. The evidence presented addressed events occurring in 2003 and in the early part 2004. The Agency has waited too long to bring disciplinary action against Grievant for these alleged offenses.[5] With respect to the Web Vision Access Form which authorizes Grievant to have computer access, Grievant testified that she submitted a corrected form to the Agency's information technology staff immediately upon being asked to do so. The Agency has not establish that Grievant failed to follow a supervisor's instructions.

Grievant contends the Agency has retaliated against her by taking disciplinary action. She also expressed concern that the Agency has not permitted her to use "MD" on her business cards even though she is a medical doctor. No credible evidence was presented suggesting the Agency was retaliating against Grievant for engaging in any protected activity. The Agency took disciplinary action because of Grievant's disruptive behavior. Determining what information may be displayed on a business card is within the Agency's right to manage its employees.

When an agency fails to establish all of the facts underlying its disciplinary action, the Hearing Officer has greater discretion to determine the appropriateness of the disciplinary action. In this instance, the Agency has presented several fact situations that would give rise to a Group I offense for disruptive behavior.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice for disruptive behavior.

[5] The Supervisor had difficulty identifying any dates on which Grievant failed to follow a supervisor's instructions.

APPEAL RIGHTS

You may file an administrative review request within **15 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. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

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. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   830 East Main St. STE 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 15 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 15-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.[6]

[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].

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

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Carl Wilson Schmidt, Esq.
Hearing Officer