Issue: Group III Written Notice (absence in excess of three days without proper authorization or a satisfactory reason) and Group II Written Notice with termination (failure to follow supervisory instructions); Hearing Date: 05/16/05; Decision Issued: 05/18/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8048; Outcome: Agency upheld in full; **Administrative Review: EDR Ruling Request received 06/02/05; Outcome: Letter sent 07/01/05 instructing grievant to ask HO to reconsider or reopen the hearing within 10 calendar days. Administrative Review: HO Reconsideration Request received 07/18/05; HO Reconsideration Decision issued 07/20/05; Outcome: Request untimely. Original decision affirmed; EDR Ruling No. 2005-1073 issued 08/03/06; Outcome: Remanded back to HO; Second Reconsideration Decision Issued 09/02/05; Outcome: Original decision affirmed. Judicial Review: Appealed to the Circuit Court in Chesapeake (10/05); Final Order issued 06/15/06 [CL06-0707, CL06-0859]; Outcome: HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8048

Hearing Date: May 16, 2005
Decision Issued: May 18, 2005

APPEARANCES

Grievant
Attorney for Grievant
Warden Senior
Advocate for Agency
Four 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?

FINDINGS OF FACT

The grievant filed a timely grievance from two disciplinary actions which resulted in her removal from employment effective January 19, 2005. One of the actions was a Group III Written Notice for absence in excess of three days

without proper authorization or a satisfactory reason.[1] The second disciplinary action was a Group II Written Notice for failure to follow supervisory instructions.[2] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[3] The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 19 years. She was a Corrections Captain at the time of her removal from state employment. Grievant has no prior disciplinary actions and has been a satisfactory performer.

From time to time corrections officers are permitted to leave work early to attend school classes. However, the warden requires that requests to attend school be approved by her prior to the beginning of classes. The warden must approve all such requests in order to assure that only a limited number of officers leave early and, that adequate staffing for security purposes is maintained at the facility. During the fall of 2004, two corrections officers enrolled in school without obtaining prior approval from the warden. After the officers paid tuition and began to attend class, they were told by supervisors that they must cease attending class because they had not received prior approval.

When the warden learned about the situation, she granted retroactive approval for the two officers to attend school. On November 2, 2004, she directed grievant to inform two lieutenants who supervise the two corrections officers that they could continue to attend school. The warden informed her assistant warden of the instruction given to grievant and instructed the assistant warden to follow up with grievant to assure that she complied with the warden's directive. Later that day, the assistant warden spoke with grievant who said that she spoke with one of the lieutenants but that she did not recall being told to speak with the second lieutenant.[4] The following day, November 3, 2004, grievant told the assistant warden that she had spoken to the second lieutenant. The assistant warden spoke with the two lieutenants; both denied that grievant had relayed the warden's instructions regarding the two officers being allowed to continue with their schooling. Both lieutenants subsequently affirmed in separate e-mail messages that grievant had not spoken to them about the matter.[5]

On November 10, 2004, grievant met with the assistant warden and the Chief of Security (a major) to discuss the conflicting information. Grievant requested that one of the lieutenants be confronted in their presence. The lieutenant was called in and confronted, but he was adamant that grievant had not told him that the corrections officers could continue to attend school. Grievant continued to insist that she had spoken with both lieutenants but, when confronted with the second lieutenant's written denial, grievant recanted and

[1] Agency Exhibit 1. Group III Written Notice, issued January 19, 2005.
[2] Agency Exhibit 5. Group II Written Notice, issued January 19, 2005.
[3] Agency Exhibit 1. Grievance Form A, filed February 15, 2005.
[4] Agency Exhibit 6. Memoranda from assistant warden to warden, November 4 & 10, 2004.
[5] Agency Exhibit 7. E-mails from two lieutenants to assistant warden, November 6 & 7, 2004.

acknowledged that she had not spoken with him. Grievant was advised that day that the warden would be considering possible disciplinary action as a result of grievant not complying with the warden's instructions.

Agency Procedure 5-12.13B requires that employees requesting sick leave must provide appropriate medical documentation to verify the need for sick leave. While a diagnosis is not necessarily required on the documentation, the physician must provide some explanation of why the employee is unable to perform her job duties. A clarifying memorandum specifically notes that statements such as "Patient under my care" or "Excuse from work" are not acceptable.[6] Grievant acknowledged that she is familiar with the requirements of the policy and the clarification memorandum.[7]

Grievant was on annual leave from November 17 through December 15, 2004. She was scheduled to return to work on December 16, 2004 but failed to do so.[8] Grievant's next scheduled workdays were December 18 & 19, 2004; she worked on December 18th but on December 19th, she left work early without notifying her supervisor. She was next scheduled to work on December 21, 2004 but called in to her supervisor at the start of the shift stating that her physician excused her from work.[9] Later that day, the physician faxed to the agency a note that contains the words "long term disability" but no explanation of any physical or mental limitations that would preclude grievant from working.[10] The Human Resources Officer (HRO) notified grievant that the note was unacceptable.

On December 22, 2004, grievant was scheduled to work. She came to the facility but was not in uniform and apparently came only to deliver a second note from the physician. The note indicated only that the physician had seen grievant on December 20, 2004 but again failed to provide any explanation of why she could not work.[11] The HRO advised grievant of proper call-in procedures and told her that the physician's second note was also unacceptable. On December 23, 2004, grievant called in and spoke with the HRO. The HRO told grievant that if she was not going to come in on her next scheduled workday that she would have to provide proper call-in notice to her direct supervisor. The HRO again reiterated the need for acceptable medical documentation.

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[6] Agency Exhibit 4. Memorandum from Human Resource Director, September 29, 2000.

[7] Agency Exhibit 2. Human Resource Officer's Memo for Record, January 11, 2005

[8] Grievant had requested four weeks of leave; the warden approved three weeks. Grievant appealed to the regional director who granted three additional days of leave. Grievant asserts that the regional director granted her four additional days, not three.

[9] Agency Exhibit 4. Item 17, Conditions of Employment, signed by grievant, November 1, 1993, requires that security staff must call the shift commander at least two hours before the beginning of their shift if they will be absent due to illness. See also Agency Exhibit 3, Sections IV.E & F, Operating Procedure 208, *Employee Work Schedules*, November 10, 2004. But grievant's supervisor testified that he has permitted grievant to call in as late as the start of the shift.

[10] Agency Exhibit 2. Physician's note, December 21, 2004.

[11] Agency Exhibit 2. Physician's note, December 20, 2004.

Grievant was scheduled to work from December 27-30, 2004 but failed either to report for work or to call her supervisor on any of the four days. On December 30, 2004, the HRO mailed a certified letter to grievant, which grievant received, directing her to contact the HRO within three days. The HRO further advised grievant that failure to contact her would result in removal from employment. Grievant did not respond and did not send in an acceptable note from her physician. During late December and early January, the HRO spoke with grievant on multiple occasions to explain why the physician's notes were unacceptable and to request that grievant discuss her status with the warden; grievant refused to speak the warden.[12] On January 10, 2005, the warden sent a letter to grievant detailing much of the above history and concluding that grievant's actions (and inactions) represented a knowing avoidance of contacting her supervisors, a failure to comply with guidance from the HRO regarding call-in requirements and the necessity to provide adequate medical documentation for her absence. The warden directed grievant to contact her within three days. Grievant did not contact the warden within three days. All correspondence mailed to grievant in December 2004 and January 2005 was sent certified; receipts were received for all letters verifying that grievant did receive them.[13]

Grievant called the warden on January 18, 2005 but said that she would not discuss her failures to call in her absences or her failure to provide adequate medical documentation. Throughout the entire period of grievant's absence, the HRO had consulted with the Human Resources Director in Richmond to assure that proper procedures were followed. The warden drafted the disciplinary notices and notified grievant that she was removed from employment effective January 19, 2005.[14] After grievant was removed from employment, she filed a grievance form on February 15, 2005 and submitted information from her physician and a social worker indicating that she had a generalized anxiety disorder.[15] Grievant's physician saw her on December 20, 2004, prescribed an anti-depressant medication, and referred her to a social worker. Until receipt of the grievance form in mid-February 2005, the warden had no knowledge of the reason for grievant's absence.

The Virginia Sickness & Disability Program includes benefits for short-term disability (STD); the program is administered by a third-party administrator (TPA). Grievant called the TPA on December 24, 2004 and initiated a claim for STD benefits. The TPA contacted grievant's physician and the social worker to obtain information about her condition. The TPA completed its review after grievant had been removed from state employment and notified her in late January 2005 that he disability claim had been approved from December 20, 2004 through the date of her removal from employment (STD coverage automatically ends when an

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[12] Agency Exhibit 2.
[13] One letter was initially returned by the post office but it was resent and grievant did receive it.
[14] Agency Exhibit 1. Letter from warden to grievant, January 20, 2005.
[15] Agency Exhibit 1. Attachment to Grievance Form.

employee leaves state employment).[16] Grievant did not advise the agency that she was filing an STD claim. The agency learned from the TPA that grievant had filed a claim. However, pursuant to the contract between the Commonwealth and the TPA, the TPA does not disclose any medical information to the agency; it advises the agency only whether an employee is approved or disapproved for benefits.

Grievant states that she is still not able to return to work. However, grievant's physician stated in May 2005 that he had certified her as disabled only until January 13, 2005.[17]

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.[18]

[16] Grievant Exhibit 6. Letter from TPA to grievant, January 29, 2005.
[17] Grievant Exhibit 1. Affidavit of grievant's physician, May 5, 2005.
[18] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

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.[19] 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.[20] An absence in excess of three days without proper authorization or a satisfactory reason is one example of a Group III offense. Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to follow a supervisor's instructions is a Group II offense.[21]

Group II offense

The agency has shown, by a preponderance of evidence, that grievant failed to follow the warden's instruction to advise two lieutenants that two corrections officers were to be allowed to continue their schooling. Grievant asserts that this was simply a "misunderstanding of communication."[22] However, grievant has not shown what the alleged misunderstanding was. Grievant has not contended, and there is no evidence, that she misunderstood the warden's instruction. To the contrary, grievant maintains that she complied with the instruction and relayed the message to the two lieutenants. The two lieutenants denied that grievant relayed the message. Grievant has not offered any evidence to show that either lieutenant had any motive to be untruthful when questioned about this matter.

The weight of the evidence establishes that grievant did not relay the warden's instruction to the lieutenants. Perhaps, although she did not assert this, grievant simply forgot to tell the lieutenants. If she had acknowledged this from the beginning, there would be no intentional failure to follow instructions.

[19] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[20] Agency Exhibit 8. Procedure Number 5-10*, Standards of Conduct,* June 15, 2002.
[21] Agency Exhibit 8. *Ibid.*
[22] Agency Exhibit 1. Attachment to Grievance Form.

However, by insisting that she had told the lieutenants, grievant compounded the problem by attempting to cover up her mistake.

The second reason for the Group II Written Notice was grievant's failure to properly notify her supervisor of her absence. Grievant contends that after notifying her supervisor on one day, there was no need to provide further notification because the physician had excused her from December 20, 2004 to January 8, 2005. If one has an illness or injury that obviously requires a long recuperative period (e.g., broken leg, major surgery, pneumonia), then it is true that a properly documented medical excuse from a physician would obviate the necessity for daily call-ins. However, grievant did not provide a properly documented medical excuse from a physician to explain why she was absent from work. Until she provided such an excuse, the agency was entitled to a daily call-in until a satisfactory explanation was forthcoming. Moreover, the HRO explained to grievant at length, and on more than one occasion during this period, the necessity for compliance with the call-in policy and the necessity to speak with her supervisors to explain her situation. Grievant's refusal to comply with this minimal requirement was a failure to follow supervisory instructions.

Group III offense

The agency's policy requiring satisfactory documentation of the reasons for an absence is reasonable. It is particularly reasonable when, as here, the absence is going to extend for weeks or months. Had grievant requested her physician to provide the minimal information necessary, and had she properly explained her absence situation, there would not have been any discipline. The agency's Standards of Conduct policy mirrors the Commonwealth's policy in considering that an absence in excess of three days without proper authorization or a satisfactory reason is a terminable offense.

Grievant is familiar with the Standards of Conduct policy and with the policy that defines what constitutes proper authorization or a satisfactory reason (Agency Exhibit 4). Grievant knew that the physician's note she provided was not an acceptable excuse from work. Moreover, the HRO told grievant on several occasions that the physician's initial note as well as subsequent notes were not acceptable. Accordingly, grievant knew that she did not have proper authorization for her absence, and that she had not given her supervisors a satisfactory reason for her absence.

Grievant appears to believe that her filing of a claim for STD benefits automatically suspends her obligations to properly notify the agency of her absences, to comply with agency requests for documentation, or to speak with her supervisors to provide a satisfactory explanation for her absence. In fact, the mere filing of a claim for benefits does not suspend grievant's other obligations to her employer. If an employee is in a coma or otherwise physically incapable of any communication, then such obligations would, of course, be temporarily

suspended. However, grievant was able to communicate and, in fact, did speak with the HRO on several occasions.

To explain her failures to fulfill her obligations, grievant relies on advice given her by the social worker not to come to work. Given the medical information submitted by grievant, it is understandable that the social worker would recommend not coming to work. However, the issue is not whether grievant should report to work, but whether she should have at least spoken with her supervisors *by telephone* to explain her situation and to request her physician to provide the minimal medical information necessary to document why she could not report to work.

Grievant testified that she had called and asked to speak with the warden on five occasions but that the warden refused to speak with her. However, the warden denied this allegation, averring that she had spoken with grievant on the one occasion that grievant called. The warden's secretary corroborated the warden's testimony stating that the warden never refused to speak with grievant at any time. Grievant's misrepresentation of the facts taints her credibility.

Grievant argues that the agency *now* has complete medical documentation of the reason for her absence and that she should therefore be allowed to return to work. However, grievant did not provide the requested information until weeks <u>after</u> she had been removed from employment. If grievant were permitted to return to work now, it would, in effect, repudiate the agency's policy requiring sick leave verification. Doing so would be saying to other employees that they can take leave, provide no explanation or documentation of the necessity for the leave, and only after returning to work, provide *ex post facto* physician's excuses. Clearly, no employer can function efficiently on such a basis. Every employer needs reliable, documented evidence of the expected length of an absence so as to be able to properly adjust staff to cover the absence.

The agency's requirement that employees provide certain minimal information about an absence is very reasonable. Basically, grievant could have satisfied the agency's need for information with two telephone calls – one to her physician asking him to provide the specific information required by agency policy, and one to the warden to fully explain what grievant's situation was. While grievant felt that the source of her stress was conditions in the workplace, making these two telephone calls would not have exposed her to daily workplace stressors.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice for being absent in excess of three days without proper authorization or a satisfactory reason, the Group II Written Notice for failing to follow a supervisor's instructions, and grievant's removal from employment, are hereby UPHELD.

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. 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 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.[23] You must file a notice of appeal with the clerk of the circuit court in the

[23] 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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[24]

[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

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that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[24] 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:

Grievance No: 8048

Hearing Date:	May 16, 2005
Decision Issued:	May 18, 2005
Reconsideration Request Received:	July 18, 2005
Response to Reconsideration:	July 20, 2005

ISSUE

Has the grievant submitted a timely request for reconsideration pursuant to either Section 7.2 of the Grievance Procedure Manual, or the directive issued by the Director of the Department of Employment Dispute Resolution on July 1, 2005?

FINDINGS OF FACT

On July 18, 2005, the hearing officer received via facsimile transmission from the grievant a request for reconsideration of a Decision of Hearing Officer issued on May 18, 2005. The grievant was represented by an attorney during the grievance hearing but has apparently now elected to proceed on a *pro se* basis.

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 15 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.[25]

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 15 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.[26]

DISCUSSION

In order to be a timely request, a request for reconsideration must be received by the Hearing Officer within 15 calendar days of the date of the original hearing decision. The date of the hearing was May 16, 2005; the decision was mailed to grievant on May 18, 2005. The final date by which a request for reconsideration must be received was June 2, 2005. Grievant did not submit a request for reopening or reconsideration to the hearing officer. She did, however, submit a timely request for review to the EDR Director; the request did not provide a copy of her request to the opposing party.

The EDR Director advised grievant that it appeared from her request for procedural review that grievant *may* also be suggesting that her hearing be reopened or reconsidered by the hearing officer.[27] The Director informed grievant that under the grievance procedure, a party's request to reopen a hearing must be made directly to the hearing officer with a copy to the opposing party. The Director further advised grievant that, if she wanted her hearing reopened or the decision reconsidered, she must make a written request directly to the hearing officer, "**within ten calendar days of this letter.**" The Director extended the original time limit by telling grievant that her request for reopening or reconsideration would be deemed timely *providing* she submitted it within this ten-day period (i.e., not later than July 11, 2005).

Grievant sent a letter by facsimile transmission to the hearing officer on July 18, 2005. She attached a copy of her letter of June 2, 2005 and a letter dated July 13, 2005. Grievant again failed to send a copy of her request to the opposing party. Grievant did not provide an explanation for having submitted her request for reopening or

[25] § 7.2(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.
[26] § 7.2(d) Ibid.
[27] Letter from EDR Director to grievant, July 1, 2005.

reconsideration after the 10-calendar day extension period offered by the EDR Director. Therefore, the grievant's request for reconsideration was not timely submitted.

Even if grievant's request had been timely submitted, she has not shown either any evidence of incorrect legal conclusions or any new evidence that could not have been discovered before the hearing. She seeks to reopen the hearing to take testimony from three witnesses whom she could have called at the hearing in May. Grievant chose not to call the witnesses at that time because she did not want to place them in a position where they might be subject to retaliation from the warden. Since grievant knew of these witnesses and could have called them during the hearing, their testimony does not constitute *newly discovered* evidence.

DECISION

The grievant's request for reconsideration was not filed either within the period specified in the Grievance Procedure Manual, or within the 10-calendar day extension period offered by the EDR Director. Therefore, the hearing officer has no authority to either reopen the hearing or reconsider the decision.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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.[28]

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[28] 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).

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 8048

Hearing Date:	May 16, 2005
Decision Issued:	May 18, 2005
Reconsideration Request Received:	July 18, 2005
Response to Reconsideration:	July 20, 2005
Administrative Review of Director	August 3, 2005
Second Reconsideration	September 2, 2005

DISCUSSION

Pursuant to EDR Ruling 2005-1073, *Administrative Review of Director*, issued August 3, 2005, the hearing officer has reconsidered the issues raised by the Review.

First, the Review concludes that the hearing decision did not discuss or acknowledge the physician's excuse slip of January 8, 2005 and the social worker's letter of January 12, 2005. Although the decision did not identify the dates of these two notes, the decision referred to them (page 4, 3rd full sentence) and indirectly referenced them in footnote 12. The hearing officer gave ample consideration to these two documents because the lack of any useful information in the documents was the reason the agency repeatedly requested that grievant obtain acceptable medical excuses. Thus, these two notes were a material factor in finding that grievant had not complied with policy.

The agency's policy on sick leave verification is clear.[29] The policy emphasizes that it does <u>not</u> request or require the medical provider to give a diagnosis. However, the policy does require that the medical provider state the physical or mental limitation that prevented the employee from working. The policy provides examples such as, "patient is recuperating from surgery," "patient is contagious," and "extreme dizziness makes working hazardous." Neither the physician's note of January 8th nor the social worker's letter of January 12th documented *any* physical or mental limitation. The notes

[29] Agency Exhibit 4.

said only “current illness.” Such wording is no different from notes such as “patient was under my care” or “please excuse from work,” – comments that the policy specifically states are not acceptable. “Current illness” is no more informative than the two examples quoted in the preceding sentence. In this case, if the physician had stated any one of the symptoms grievant was experiencing (dizziness, shortness of breath, chest pain), that might have satisfied the agency’s requirement for a physical limitation without revealing the diagnosis. Accordingly, it is concluded that the January 8th and January 12th notes did not provide sufficient information to comply with the September 2000 memorandum.

Second, the Director’s Review notes that the decision did not address either the Americans with Disabilities Act (ADA) or the Family and Medical Leave Act (FMLA). Although these statutes were given consideration, they were not mentioned in the decision because grievant did not present any evidence or argument to suggest that the agency was not in compliance with them. The Director’s Review ordered that the following specific questions be addressed: (1) whether grievant was a “qualified individual with a disability;” (2) if so, whether grievant’s request for leave constitutes a “reasonable accommodation” under the ADA, and whether the agency properly denied the leave; (3) whether the agency’s requests for information and demand that the grievant explain her condition directly to the warden were permissible under the ADA; (4) whether the agency had any duty under the ADA to consider the medical information obtained through the grievance process in determining whether to uphold the discipline; (5) whether grievant was covered by FMLA; (6) whether grievant’s condition constituted a serious health condition; and (7) whether the agency’s demands for medical documentation were in accordance with the limitations imposed under that statute.

(1) Qualified individual with a disability

The ADA provides that a person may be considered an “individual with a disability” if: (i) the individual has a physical or mental impairment, and the impairment substantially limits one or more of the individual’s major life activities; or (ii) the employer has a record that the individual has a substantially limiting impairment; or (iii) the individual is regarded by the employer as having a substantially limiting impairment.

In the instant case, the agency’s records for grievant are devoid of any evidence that she has a record of a substantially limiting impairment. Similarly, because the agency was unaware of grievant’s condition, it had never regarded grievant as having a substantially limiting impairment. Therefore, since prongs two and three of the test are inapplicable in this case, it is necessary to determine whether grievant meets the first prong.

A physical or mental impairment can include any mental or psychological disorder such as emotional or mental illness. Grievant submitted (after she had been removed from employment) documentation from her physician indicating that she had generalized anxiety disorder. Because this qualifies as an emotional disorder, it is concluded that a mental impairment existed. Grievant asserted that this impairment affected her ability to work (a major life activity). However, in order to qualify a person as an “individual with a disability,” the ADA provides that the impairment must *substantially limit the major life activity*.

Grievant has consistently alleged that her anxiety limits her from working only in her position at the agency because of what she considers to be specific stressors in the

agency work environment. Grievant does not assert that she could not work elsewhere; she states that the anxiety occurs only from working in the specific agency environment. The ADA states that an individual is not substantially limited in working just because she is unable to perform a particular job for one employer.[30] Grievant is not substantially limited in the ability to perform any other major life activity (such as walking, speaking, seeing, hearing, learning, performing manual tasks, caring for herself, sitting, standing, lifting, or reading). The ADA provides that a person who is not substantially limited in the ability to perform any other major life activity but who is only unable to perform a specialized job is *not substantially limited in working*.[31] Since grievant is not substantially limited in the major life activity of working, she does not meet the ADA definition of an individual with a disability.

(2) Reasonable accommodation

Because grievant is not an "individual with a disability," the question of reasonable accommodation is moot. However assuming, for the sake of argument, that grievant had met the ADA definition, the issue would be whether grievant's request for leave constitutes a request for reasonable accommodation. Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation under the ADA when necessitated by an employee's disability.[32] The remaining issue is whether the agency properly denied grievant's request for leave.

In the instant case, the agency was unaware of the reason for grievant's absence. The reason for her absence was not known or obvious to the agency. If grievant had a known condition (surgery and postoperative recovery) or an obvious condition (broken limb, influenza, etc.), the agency would not need to make any further inquiries. However, in this case, there was no known or obvious reason for grievant's absence and grievant refused to provide reasonable documentation to the agency. Under these circumstances, the agency was not required to grant grievant's request for accommodation.

(3) Agency requests for information

The ADA permits employers to make inquiries when there is a need to determine whether an employee is still able to perform the essential functions of her job. It also permits employers to make inquiries or require medical examinations necessary to the reasonable accommodation process described in the ADA statute.[33] Disability-related inquiries that follow up on a request for reasonable accommodation when the disability is not known or obvious also may be job-related and consistent with business necessity.[34] If an individual's disability or need for reasonable accommodation is not obvious, and

[30] 29 CFR 1630.2(j)
[31] *Ibid.* See *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).
[32] 29 CFR 1630.2(o).
[33] 29 CFR 1630.14(c)
[34] EEOC Enforcement Guidance: *Disability-Related Inquiries and Medical Examination of Employees under the Americans with Disabilities Act.*

she refuses to provide the reasonable documentation requested by the employer, then she is not entitled to reasonable accommodation.[35]

In this case, the ADA clearly permits the agency to request information to support grievant's request for leave. As an alternative to requesting documentation, the ADA also permits an employer to simply discuss with the person the nature of her disability and function limitations.[36] Here, the warden had requested, as an alternative, that grievant explain why she was requesting leave. Had grievant taken a few moments to have this telephone conversation with the warden, the warden might have been able to approve grievant's leave request.

(4) Information obtained during grievance process

When an employee with a disability violates a conduct rule that is job-related, an employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future except where the punishment for the violation is termination of employment.[37] Moreover, since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even it is the result of the individual's disability.[38] In the instant case, grievant did not provide the information necessary to approve her request for accommodation until after she had incurred an absence substantially in excess of three days and was subsequently removed from employment. It was grievant's prolonged absence without approval or satisfactory reason that precipitated termination of her employment. Thus, even if grievant had been an "individual with a disability" pursuant to the ADA, the agency is not required to excuse grievant's misconduct on a retrospective basis.

(5) FMLA coverage & (6) serious health condition.

FMLA coverage for an eligible employee provides unpaid leave for up to 12 weeks when the employee is unable to work because of a serious health condition.[39] It is undisputed that grievant met the requirements to be considered an eligible employee. According to the definitions in the FMLA, grievant had a serious health condition because she received at least two treatments from a provider of health care services upon referral by a health care provider.[40] Accordingly, grievant could have been covered under FMLA because she was eligible and had a serious health condition.

(7) Agency requests for information

Pursuant to the FMLA, the U.S. Department of Labor has published a Certification of Health Care Provider form (Form WH-380) to be used when an employee

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[35] See *Templeton v. Neodata Servs., Inc.*, No. 98-1106, 1998 WL 852516 (10th Cir. Dec. 10, 1998); *Beck v. Univ. of Wis. Bd of Regents*, 75 F.3d 1130, 1134, 5 AD Cas. (BNA) 304, 307 (7th Cir. 1996).
[36] Item 6, Requesting Reasonable Accommodation, EEOC Enforcement Guidance: *Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act.*
[37] Item 36, Other Reasonable Accommodation Issues, *Ibid.*
[38] See *Siefken v. Arlington Heights*, 65 F.3d 664, 666, 4 AD Cas. (BNA) 1441, 1442 (7th Cir. 1995)
[39] 29 CFR 825.100.a.
[40] 29 CFR 825.114 & 29 CFR 825.118.

applies for family or medical leave under the FMLA. In this case, the agency used this federally approved form. The agency gave grievant this form and asked her to have her health care provider fill it out; grievant did not return a completed form.

The form requires the health care provider to identify the employee's "serious health condition," provide medical facts that support the physician's certification, a description of the treatment regimen, how the condition affects the employee's ability to perform job functions, and other basic information. The agency's verbal request for information was even more limited than the basic information required by the FMLA form. Accordingly, the information requested by the agency to determine whether FMLA could be approved was in accordance with the limitations imposed by the FMLA law.

Mitigation

Finally, the Review observes that the decision did not specifically address the issue of mitigation.[41] In reviewing this case, the hearing officer did consider both mitigating and aggravating circumstances. In fact, the decision cites at some length a number of aggravating circumstances. The evidence revealed only two possible mitigating circumstances – grievant's length of service and her otherwise satisfactory work record. However, the evidence also revealed a significant number of aggravating circumstances that outweigh the mitigating circumstances. First, grievant had been on an extended vacation trip out of the country from November 17 through December 15. She failed to return to work on December 16th as scheduled. Second, on December 19th, grievant left work early without notifying her supervisor. Third, the Human Resource Officer (HRO) repeatedly informed grievant that the December notes from her physician were unacceptable but grievant took no action to obtain acceptable documentation.

Fourth, although scheduled to work from December 27-30, grievant failed to report for work or call her supervisor on any of the four days. Fifth, grievant failed to contact the HRO, even after receiving a certified letter directing her to call the HRO within three days. Sixth, grievant failed to respond to the warden's certified letter of January 10th requesting that she call him within three days. Seventh, and most significantly, grievant was a Corrections Captain who knew from her years of service as a manager the importance of complying with orders and directives from the agency. She knew that her failure to return from vacation timely, leaving the work site without permission and, her failure to respond to multiple instructions and contacts from the HRO and the Warden would subject her to disciplinary action. Therefore, it was concluded that there is no basis to reduce the level of discipline because the aggravating circumstances outweigh the possible mitigating circumstances.

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[41] Section VI.B, *Rules for Conducting Grievance Hearings,* effective August 30, 2004 provide that a hearing officer shall *consider* mitigating and aggravating circumstances. Subsection IV.B.1 requires that the hearing officer state the basis for mitigation in the decision "If the hearing officer mitigates the agency's discipline." Since the hearing officer did not mitigate the agency's discipline, the issue was not addressed in the written decision.

DECISION

The hearing officer has carefully reconsidered the Decision in conjunction with the EDR Director's Administrative Ruling. Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has addressed the specific issues ordered by the Ruling and concludes that there is no basis either to reopen the hearing or to change the Decision issued on May 18, 2005.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. 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.[42]

S/David J. Latham

David J. Latham, Esq.
Hearing Officer

[42] 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).