Issue: Group II Written Notice with termination (due to accumulation) (violation of call-in policy); Hearing Date: 10/21/05; Decision Issued: 10/25/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8186; Outcome: Employee granted partial relief; **Administrative Review: EDR Ruling Request received 11/04/05; EDR Ruling No. 2006-1188 issued 12/28/05; Outcome: Remanded back to HO to reconsider in accordance with ruling; Reopened Hearing Date: 02/14/06; Reconsideration Decision 8186-R issued: 04/24/06; Outcome: Agency upheld in full; Administrative Review: EDR Ruling Request on Reconsideration Decision received 05/04/06; EDR Ruling No. 2006-1348 issued 08/11/06; Outcome: Remanded to HO to modify in accordance with ruling; Revised Decision 8186-R2 issued 08/16/06; Outcome: Employee granted partial relief; Administrative Review: DHRM Ruling Request received 11/04/05; DHRM form letter issued 02/13/06; Outcome: No basis to interfere; HO's Decision Affirmed; Administrative Review: DHRM Ruling Request on Reconsideration Decision received 05/04/06; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8186

Hearing Date: October 21, 2005
Decision Issued: October 25, 2005

PROCEDURAL HISTORY

On June 30, 2005, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

> *[Grievant] violated the Department's call-in policy for the second time in less than 60 days. On June 12, 2005, [Grievant] was off duty and was scheduled to report to work the following night at 5:45 p.m. She called in 6/12/05 and notified one of the Corrections Officers on the outgoing shift that she would be out of work until 6/14/05. [Grievant] failed to call back two hours prior to her shift to speak to her direct supervisor, [Lieutenant B]. [Lieutenant B] called [Grievant] at home on 6/13/05 at 4:10 p.m. to find out if she would be returning to work on 6/14 or 6/15. [Grievant] stated that she would be returning to work on 6/15/05. [Lieutenant B] informed [Grievant] that she failed to appropriately notify her supervisor two hours in advance of her shift on 6/13/05 that she would not be coming in to work that day. [Lieutenant B] informed this writer that during the week of April 18, 2005, [Grievant] also failed to appropriately notify her supervisor that she would not be reporting to work. [Grievant] was counseled on the correct procedure in April for calling in regarding notification of her supervisor. This is the second time that she has abused this policy. I met with [Grievant] on 6/27/05 to give her notice of the Group II charge and to*

allow her sufficient time to respond to the agency's evidence against her. On 6/29/05 [Grievant] met with me and produced a hand-written memo stating that she was drowsy from taking medication prescribed to her by the physician on 6/12/05. [Grievant] failed to produce the prescriptions, but did provide the discharge papers from the hospital noting that the doctor prescribed [Flexaril] and [Naprosyn]. [Grievant] failed to produce documentation that she actually got these prescriptions filled. [Grievant] did acknowledge that she had been notified by [Lieutenant B] in April to make sure that she always spoke to her supervisor when calling in. Due to the issuance of this Group II offense and an active Group III offence, [Grievant] is being terminated.

On July 14, 2005, 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 September 22, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 21, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 Department of Corrections employed Grievant as a Corrections Officer Senior at one of its Facilities. She began working at the Facility in January 2005 after working at another Agency facility. On April 1, 2005, Grievant received a Group III Written Notice for mental and verbal abuse of an inmate.[1]

On April 18, 2005, Lieutenant B counseled Grievant that policy required her to call and speak to Lieutenant B when she called in to report she would not be coming to work due to illness. Grievant testified that Lieutenant B told her that if Grievant were to call into the Facility and Lieutenant B was not there, then Grievant should call back later when Lieutenant B was working.

Facility security staff work 12 hour shifts. There are a total of four shifts, two shifts (night and day) of employees work on A break and two shifts work on B break. Lieutenant T was the day shift supervisor for A break. Officer H was the night shift supervisor for the A break. Lieutenant B was the day shift supervisor for B break. Grievant worked on the B shift. Employees on one break work for seven days and then the employees on the other break work for seven days. Officer H's break ended at 6 a.m. on June 13, 2005. Lieutenant B's break began at the same time.

Grievant was scheduled to work B break beginning at 6:00 p.m. on June 13, 2005 and ending at 6 a.m. on June 14, 2005. On June 13, 2005, at approximately 12:30 a.m. or 1:00 a.m., Grievant left the emergency room at a hospital. As she was departing, she used her mobile telephone to call the Facility. She spoke with the Officer in Charge (Officer H) working the A shift and said, "This is [Grievant]. I am in the hospital emergency room. I am leaving the hospital. My doctor has me out for the next couple of days. I will not be to work. Can you pass that on." When the shift changed at 6 a.m., the Officer in Charge briefed Lieutenant B whose shift began at 6 a.m. The Officer in Charge told Lieutenant B what Grievant had told the Officer in Charge. Lieutenant B expected Grievant to call Lieutenant B sometime between 6 a.m. to 4 p.m. on June 13, 2005 since Grievant was scheduled to work that day. At 4:10 p.m. on June 13, 2005, Grievant had not called Lieutenant B so Lieutenant B called Grievant's home to inquire whether she would be in on June 14, 2005 or June 15, 2005. Grievant was sleeping prior to Lieutenant B's telephone call. Grievant told Lieutenant B she would be at work on June 15, 2005. Lieutenant B told Grievant that she had not called to the Facility to speak with her supervisor, namely Lieutenant B. Grievant responded "Oh".

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." Department of Corrections Procedure Manual "(DOCPM") § 5-10.15. Group II

[1] Agency Exhibit 6.

offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

"Inadequate or unsatisfactory job performance" is a Group I offense.[2] In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Lieutenant B told Grievant to make sure to call Lieutenant B if Grievant was going to be absent from work. Lieutenant B also told Grievant that if Grievant called the Facility and Lieutenant B was not working, then Grievant should call Lieutenant B when Lieutenant B was working. Grievant properly called the Facility to notify the supervisor at that time that she would not be coming into work. Grievant, however, failed to call a second time to speak directly with Lieutenant B to notify Lieutenant B personally that Grievant would not be coming into work. Grievant's behavior is inadequate or unsatisfactory job performance.[3]

Grievant has an active Group III Written Notice. With the addition of a Group I Written Notice there exists a sufficient accumulation of disciplinary action to support the Agency's removal of Grievant. Accordingly, Grievant's removal from employment is upheld.[4]

The Agency contends Grievant failed to comply with policy such that its issuance of a Group II Written Notice should be sustained. DOCPM § 5-10.8(C) provides:

> Unexpected absences including reporting to work late or leaving work early, should be reported to supervisors as promptly as possible.
>
> Grievant's work performance is subject to Post Order #5 which provides:
>
> To report any illness or injury, which will keep you from reporting for duty, to your supervisor at least two (2) hours prior to the beginning of your shift. If your supervisor is not on duty at the time of call in, you should talk with the Supervisor on duty.[5]

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[2] DOCPM § 5-10.15(B)(4).

[3] Lieutenant B did not testify at the hearing or document in writing Lieutenant B's conversation with Grievant. The evidence is insufficient to determine whether Lieutenant B's April 18, 2005 discussion with Grievant was merely a comment regarding Grievant's work performance or was a specific instruction such that Grievant's failure to call amounted to failure to follow a supervisor's instruction, a Group II offense.

[4] No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings.*

[5] Agency Exhibit 4.

On November 9, 2004, the Major sent Facility security staff including Grievant a memorandum stating:

> Shift workers shall notify the Officer in Charge, or the Watch Commander, at least two (2) hours before the beginning of their shift, if they will be absent.[6]

Grievant complied with DOCPM § 5-10.8(C) because she reported her unexpected absence as soon as possible to a supervisor, the Officer in Charge. Grievant complied with Post Order #5 because she notified the "Supervisor on duty" at the time she called the Facility when she was leaving the emergency room. Officer H was the supervisor on duty at the time Grievant called. Grievant complied with the November 9, 2004 memorandum because she notified the Officer in Charge at least two hours before the beginning of her shift at 6 p.m. on June 13, 2005.

Nothing in the Agency's policy specifically states that an employee working on the B break night shift must notify the supervising Lieutenant on the day shift B break.[7] Grievant's obligation to do so arose only because of Lieutenant B's conversation with Grievant in April 2005.

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. Grievant's removal from employment is upheld based on the accumulation of active disciplinary action.

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.

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[6] Agency Exhibit 4.

[7] The Hearing Officer notes that an employee working on the B break day shift could not notify Lieutenant B two hours prior to the beginning of that employee's shift because Lieutenant B would not begin working until 6 a.m. (at the same time that the day shift employee began working). The Agency's interpretation of policy can only apply to the night shift and not the day shift; yet nothing in the policy makes such a distinction.

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.[8]

[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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Carl Wilson Schmidt, Esq.
Hearing Officer

[8] 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: 8186-R

Reconsideration Decision Issued: April 24, 2006

PROCEDURAL HISTORY

On December 28, 2005, the EDR Director issued Ruling No. 2006-1188 returning case number 8186 to the Hearing Officer for reconsideration. The EDR Director asked the Hearing Officer to "reconsider his hearing decision to clarify in his decision the basis for his conclusion that the grievant's conduct constituted inadequate or unsatisfactory performance." The EDR Director added the Hearing Officer should consider if the Grievant was covered by the FMLA. The EDR Director asked the Hearing Officer to expand on his analysis regarding mitigation. The Hearing Officer permitted the parties to submit additional evidence in a second hearing.

RECONSIDERATION FINDINGS OF FACT

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

The Department of Corrections employed Grievant as a Corrections Officer Senior at one of its Facilities. She began working at the Facility in January 2005 after working at another Agency facility. Grievant has an active Group III Written Notice for mental and verbal abuse of an inmate.[9] She received that Written Notice on April 1, 2005.

On April 18, 2005, Lieutenant B counseled Grievant that policy required her to call and speak to Lieutenant B when she called in to report she would not be coming to

[9] Agency Exhibit 6.

work due to illness. Lieutenant B told Grievant to call Lieutenant B two hours prior to the beginning of Grievant's shift. Lieutenant B told Grievant that if she were to call into the Facility and Lieutenant B was not there, then Grievant should call back later when Lieutenant B was working.[10]

Facility security staff work 12 hour shifts. There are a total of four shifts, two shifts (night and day) of employees work on A break and two shifts work on B break. Lieutenant T was the day shift supervisor for A break. Officer H was the night shift officer-in-charge for the A break. Lieutenant B was the day shift supervisor for B break. Grievant worked on the B shift. Employees on one break work for seven days and then the employees on the other break work for seven days. Officer H's break ended at 6 a.m. on June 13, 2005. Lieutenant B's break began at 6 a.m.[11] Only Lieutenant B could approve Grievant's request for leave. Officer H lacked the authority to approve Grievant's leave request.[12]

Grievant was scheduled to work B break beginning at 6:00 p.m. on June 13, 2005 and ending at 6 a.m. on June 14, 2005. On June 13, 2005, at approximately 12:30 a.m. or 1:00 a.m., Grievant left the emergency room at a hospital. As she was departing, she used her mobile telephone to call the Facility. She spoke with the Officer in Charge (Officer H) working the A shift and said, "This is [Grievant]. I am in the hospital emergency room. I am leaving the hospital. My doctor has me out for the next couple of days. I will not be to work. Can you pass that on." When the shift changed at 6 a.m., the Officer in Charge briefed Lieutenant B whose shift began at 6 a.m. The Officer in Charge told Lieutenant B what Grievant had told the Officer in Charge. Lieutenant B expected Grievant to call Lieutenant B sometime between 6 a.m. to 4 p.m. on June 13, 2005 since Grievant was scheduled to work that day. At 4:10 p.m. on June 13, 2005, Grievant had not called Lieutenant B. Lieutenant B called Grievant's home to inquire whether she would be in to work. Grievant was sleeping prior to Lieutenant B's telephone call. Grievant told Lieutenant B she would be at work on June 15, 2005. Lieutenant B told Grievant that she had not called to the Facility to speak with her supervisor, namely Lieutenant B. Grievant responded "Oh".

Grievant did not apply for leave under the Family Medical Leave Act. Grievant did not argue the Agency failed to comply with any provision of the FMLA.

CONCLUSIONS OF POLICY

[10] Lieutenant B did not testify during the first hearing. During her testimony, she made it clear that she gave a specific instruction to Grievant rather than simply informing Grievant of a general job expectation. The former would support issuance of a Group II Written Notice, but the latter would only support issuance of a Group I Written Notice upon Grievant's failure to comply.

[11] Even though Grievant and Lieutenant B work on different shifts, Lieutenant B is Grievant's supervisor.

[12] Officer H did not report to Lieutenant B. Grievant did not report to Officer H.

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." Department of Corrections Procedure Manual "(DOCPM") § 5-10.15. 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." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

DOCPM § 5-12.10(D) governs the procedure employees must follow if they know they will be absent due to illness. Under this policy, an employee working on the day shift must take two separate actions. First, the employee must "notify the officer in charge, or the shift commander, at least two hours before the beginning of [her] shift." The officer in charge of the shift commander would be supervisor of the night shift. Second, the employee must "notify the supervisor not later than one-half hour after the beginning of the normal work hours." This supervisor would be employee's immediate supervisor on the day shift or the shift commander on the day shift.

Grievant complied with the first step. She called Officer H and told Officer H she would be absent due to illness. Grievant failed to comply with the second step. She did not notify her supervisor, Lieutenant B, within one-half hour after the beginning of the normal work hours. Although Lieutenant B called Grievant prior to one-half hour after the beginning of Grievant's normal work hours, there is no reason to believe Grievant would have called Lieutenant B within the time period required by the policy.[13]

Consistent with the intent of DOCPM § 5-12, Lieutenant B instructed Grievant to call Lieutenant B two hours prior to the beginning of Grievant's shift. Grievant failed to do so thereby acting contrary to a supervisor's instruction.

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. DOCPM § 5-10.16(B)(1). Grievant failed to follow DOCPM § 5-12 because she failed to call Lieutenant B within the required time period. Consistent with but independent of DOCPM § 5-12, Grievant failed to follow Lieutenant B's instruction to call Lieutenant B two hours prior to the beginning of Grievant's shift. Grievant failed to follow a supervisor's instructions. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. Grievant has an active Group III Written Notice. Based on the accumulation of disciplinary action, the Agency has presented evidence to support Grievant's removal from employment.

FMLA

No evidence was presented suggesting the Agency failed to follow the requirements of the Family Medical Leave Act. Neither Grievant nor the Agency raised

[13] The Agency did not present DOCPM § 5-12 during the first hearing.

this issue in the original hearing. The issue was created by the EDR Director. Grievant did not present any evidence regarding FMLA. Grievant did not present any argument alleging the Agency failed to comply with FMLA.

Mitigation

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[14] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld.**

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 DHRM, 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

[14] *Va. Code § 2.2-3005.*

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Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8186-R2

Second Reconsideration Decision Issued: August 16, 2006

PROCEDURAL HISTORY

On October 25, 2006, the Hearing Officer issued the original hearing decision for Case No. 8186. Grievant filed her first request for administrative review of the original Hearing Decision.

On December 28, 2005, the EDR Director issued Ruling No. 2006-1188 returning case number 8186 to the Hearing Officer for reconsideration. The EDR Director asked the Hearing Officer to "reconsider his hearing decision to clarify in his decision the basis for his conclusion that the grievant's conduct constituted inadequate or unsatisfactory performance." The EDR Director added the Hearing Officer should consider if the Grievant was covered by the FMLA. The EDR Director asked the Hearing Officer to expand on his analysis regarding mitigation. The Hearing Officer permitted the parties to submit additional evidence in a second hearing.[15] The Hearing Officer issued a Reconsideration Decision on April 24, 2006.

Grievant submitted a second request for administrative review to the EDR Director to challenge the Hearing Officer's April 24, 2006 Reconsideration Decision.[16]

[15] EDR Ruling 2005-1188 states, "If additional information is required, the hearing officer is directed to reopen the hearing as necessary to take appropriate evidence from the parties." EDR Ruling 2006-1348 clarifies this language to provide, "'reopen the hearing as necessary to take appropriate evidence from the parties' to address the FMLA issue." (Emphasis added).

[16] Grievant also requested administrative review by the Director of the Department of Human Resource Management. In footnote 10 to the EDR Director's Ruling 2006-1348, the EDR Director states, "DHRM declined to consider the grievant's appeal to that Department because the grievant failed to identify a policy with which the hearing decision was inconsistent." Accordingly, the Hearing Officer's April 24, 2006 Reconsideration Decision modifying the Original Hearing Decision became a Final Hearing Decision with no further possibility of administrative appeal. Section 7.2(d) of the Grievance Procedure Manual states:

Grievant's second request for administrative review was not timely because it was not submitted "within 15 calendar days of the date of the **original** hearing decision."[17] (Emphasis added). On August 11, 2006, the EDR Director issued Ruling No. 2006-1348.[18] The EDR Director considered Grievant's second request for administrative review as if it was timely because the hearing was reopened for the submission of additional evidence and "equity dictates that the parties be allowed to request an administrative review …."[19]

SECOND RECONSIDERATION DISCUSSION

Inadequate or Unsatisfactory Performance

Supervisors communicate with subordinates regarding the work duties of subordinates. These communications can be through general discussions of work duties or specific instructions regarding work duties. When an employee fails to perform work as communicated to the employee by the supervisor, the employee's failure is inadequate or unsatisfactory job performance. Inadequate or unsatisfactory work performance is a Group I offense. The employee's inadequate or unsatisfactory work performance can be elevated to a Group II offense, if the employee failed to follow a supervisor's instruction. Whether a Group II offense has occurred depends on the specificity of the instruction given by the supervisor to the employee. For example, if a supervisor says to a subordinate, "perform your accounting duties in a professional manner" that instruction would rise no higher than a Group I offense because the instruction lacks specificity. In other words, the instruction fails to identify a specific task or tasks for the subordinate to complete. If the supervisor says to the subordinate, "create a worksheet showing agency computer expenses for the month of April", the supervisor has identified a specific task (among many tasks that the employee has to complete). By identifying a specific task within a certain time frame, the subordinate is obligated to complete the task as directed otherwise the subordinate may receive a Group II Written Notice for failure to follow a supervisor's instruction.

> 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 request 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 DHRM, the hearing officer has issued a revised decision.

[17] Grievance Procedure Manual § 7.2(a).

[18] Nothing in the Grievance Procedure Manual or the Rules for Conducting Grievance Hearings authorizes the EDR Director to issue a Second Administrative Ruling.

[19] See EDR Director Ruling 2006-1348, page 3. The Hearing Officer will assume for the sake of argument that the EDR Director had jurisdiction to issue Ruling 2006-1348 and, thus, that the Hearing Officer has jurisdiction to issue this Second Reconsideration Decision.

On April 18, 2005, Lieutenant B counseled Grievant that policy required her to call and speak to Lieutenant B when she called in to report she would not be coming to work due to illness. Grievant testified that Lieutenant B told her that if Grievant were to call into the Facility and Lieutenant B was not there, then Grievant should call back later when Lieutenant B was working. Based on this evidence, it may appear that a supervisor, Lieutenant B, gave Grievant a specific instruction that Grievant failed to follow thereby justifying the issuance of a Group II Written Notice. The Hearing Office refused to uphold a Group II Written Notice because Lieutenant B did not testify to clarify the context in which her instruction was made. In other words, was the instruction given in the context of a general discussion of Grievant's work assignments? If so, then the instruction appears to be a communication of general work duties and Grievant's failure to complete one of her general work duties would justify issuance of only a Group I Written Notice for inadequate or unsatisfactory work performance. If Lieutenant B was speaking with Grievant only about the issue of calling prior to the beginning of Grievant's shift, then Grievant's failure to comply with the instruction would justify the issuance of a Group II Written Notice. In the absence of the context to Lieutenant B's comments to Grievant, the Hearing Officer will not presume the instruction was so specific as to justify issuance of a Group II Written Notice. Accordingly, the Written Notice must be reduced to a Group I Written Notice. Grievant's removal must be upheld based on the accumulation of disciplinary action.[20]

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[21] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."

Grievant contends the disciplinary action should be mitigated because she was unable to comply with the instruction. No credible evidence was presented to support this conclusion. Although Grievant took medications at approximately 1:00 a.m. on June 13, 2005, it is unclear what effect those medications had on Grievant at 4 p.m. (approximately 15 hours later). In addition, the fact that Grievant asked Officer H to

[20] This Reconsideration Decision supersedes the Reconsideration Decision issued April 24, 2006.

[21] *Va. Code § 2.2-3005.*

pass on the information to Lieutenant B is not a mitigating circumstance because Grievant knew that speaking with anyone other than Lieutenant B was not acceptable and not in accordance with Lieutenant B's request. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

FMLA

The EDR Director states her ruling[22]:

> In particular, the hearing officer's decision did not consider if the grievant was covered by the FMLA; if so, whether her illness constituted a "serious health condition" under the FMLA; and if both of these questions were answered in the affirmative, whether the requirement that the grievant speak with her supervisor was in accordance with the limitations imposed under that statute, and if not, whether the grievant could be disciplined for failing to comply with that requirement. The hearing officer is therefore ordered to reconsider his decision to address these questions.

Grievant did not apply for leave under the Family Medical Leave Act. No evidence was presented in the original or the reopened hearing suggesting the Agency failed to follow the requirements of the Family Medical Leave Act. Neither Grievant nor the Agency raised this issue in the original hearing. The issue was created by the EDR Director. A copy of the EDR Ruling was sent to the Grievant. The Hearing Officer was prepared to receive evidence from the Grievant regarding the FMLA. Grievant did not present any evidence regarding the FMLA.[23] Grievant did not present any argument alleging the Agency failed to comply with FMLA. There is no evidence upon which the Hearing Officer can conclude the Agency failed to comply with the FMLA. The FMLA has no bearing or relevance to this case and does not affect its outcome.

APPEAL RIGHTS

The parties should consult immediately the Grievance Procedure Manual, the Rules for Conducting Grievance Hearings, and speak with an EDR Consultant (888-232-3842) or other knowledgeable advisor to determine their appeal rights.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

[22] The EDR Director's Ruling did not mention the Americans with Disabilities Act.

[23] The Hearing Officer cannot determine whether Grievant was covered by the FMLA and whether her illness was a serious health condition.