Issue: Group I Written Notice (absence in excess of three days without authorization or satisfactory reason); Hearing Date: 01/25/06; Decision Issued: 01/26/06; Agency: VPI&SU; AHO: David J. Latham, Esq.; Case No. 8245; Outcome: Employee granted full relief

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8245

Hearing Date: January 25, 2006
Decision Issued: January 26, 2006

PROCEDURAL ISSUE

Grievant requested as part of her relief that she receive an apology. A hearing officer does not have authority to require the issuance of an apology.[1] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant
Director of Business Technology and Services
Attorney for Agency
Two witnesses for Agency

[1] § 5.9(b)6 & 7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

ISSUES

Was the grievant's conduct such as to warrant action under the *Standards of Conduct*? What is the appropriate level of discipline?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group I Written Notice for an absence in excess of three days without proper authorization or satisfactory reason.[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] Virginia Polytechnic Institute and State University (Hereinafter referred to as "agency") has employed grievant as an accounts receivable technician for one year.

Grievant and her supervisor had not been getting along well during 2005.[4] After grievant had been absent without permission during the afternoon of May 25, 2005, the supervisor met with grievant to discuss the unauthorized leave.[5] The supervisor formally counseled grievant about the need to receive, in advance, permission from the supervisor for leave time.[6]

On June 9, 2005, grievant began a period of extended leave under the aegis of the Virginia Sickness and Disability Program (VSDP) due to a health condition. The VSDP policy requires employees to "Understand the requirement for notifying your supervisor …" and "Ensure that the supervisor is kept informed regarding disability claim and any changes that occur to return to work date; and any restrictions."[7] A human resources assistant sent to grievant a standard letter with instructions for compliance with VSDP requirements. The letter particularly highlighted (in italics) a paragraph that reads, *"It is your responsibility to keep your supervisor updated on how long you will be away from work, your next medical appointment, your expected return to work date and if you have any medical restrictions. Failure to do so may result in disciplinary action."*[8]

On July 4, 2005, grievant submitted a physician's excuse extending her medical leave through August 4, 2005.[9] On August 2, 2005, grievant telephoned her supervisor and advised that her physician had extended the sick leave indefinitely, and that she was going to a specialist in two weeks to have a

[2] Agency Exhibit 15. Group III Written Notice, issued October 13, 2005.
[3] Agency Exhibit 15. Grievance Form A, filed October 22, 2005.
[4] Established by grievant's testimony and written grievance, as well as the supervisor's testimony that she and grievant have had contentious times and, that grievant had requested mediation. The agency did not dispute this evidence.
[5] Agency Exhibit 1. E-mail from supervisor to Director, June 1, 2005.
[6] Agency Exhibit 3. Memorandum from supervisor to grievant, June 6, 2005.
[7] Grievant Exhibit 7. DHRM Policy 4.57, *Virginia Sickness and Disability Program*, effective January 1, 1999.
[8] Agency Exhibit 5. Letter from human resources assistant to grievant, June 13, 2005.
[9] Agency Exhibit 6. E-mail from supervisor to Director, July 1, 2005.

procedure performed. The supervisor ended the telephone call somewhat abruptly by telling grievant that if she had anything to say, she should call the Director. Grievant faxed in a copy of a sick certificate from her physician and the supervisor obtained a copy from human resources. The certificate states, "Off work from 8/1/2005 to 8/15/2005. Resume 8/16/2005."[10] The supervisor notified the Director about the apparent conflict between grievant's telephone call and the physician's certificate.[11]

On August 16, 2005, grievant underwent an outpatient procedure at the hospital. She had complications, had to return to the hospital the following day, and was admitted overnight. She returned home from the hospital on August 18, 2005. On August 19, 2005, the Director sent to grievant a letter advising that she intended to terminate grievant's employment for failing either to work on August 16, 2005 or to contact the agency.[12] Grievant responded to the Director via e-mail informing her that she had kept her supervisor informed of her status and that she was still unable to determine when she would be able to return to work.[13]

Once grievant responded, and further information was obtained to support the necessity for grievant's ongoing absence, the Director decided to delay taking corrective action until such time as grievant either returned to work or was sufficiently recovered from her medical condition. The VSDP ended grievant's coverage under the short-term disability provision on October 6, 2005, because her physician indicated she could return to work with restrictions.[14] At this point, the Director decided that grievant was sufficiently recovered to issue disciplinary action and issued the Written Notice to grievant on October 13, 2005. However, after review by grievant's department and human resources, the agency determined that it could not accommodate the physician-imposed restrictions.[15] The agency allowed grievant to continue in a leave-without-pay (LWOP) status for a period of two weeks. The physician then released grievant to return to work without restrictions effective October 19, 2005.[16]

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

[10] Agency Exhibit 7. Sick certificate, August 1, 2005.
[11] Agency Exhibit 8. E-mail from supervisor to Director, August 2, 2005.
[12] Agency Exhibit 12. Letter from Director to grievant, August 19, 2005.
[13] Agency Exhibit 13. E-mail from grievant to Director, August 23, 2005.
[14] Grievant Exhibit 3. Physician notes, September 26, 2005.
[15] Grievant Exhibit 3. Letter from Director to grievant, October 14, 2005.
[16] Grievant Exhibit 3. Physician note, October 19, 2005.

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.[17]

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* provides 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 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.[18] An absence in excess of three days without proper authorization or satisfactory reason is one example of a Group III offense. The agency version of this policy appears in the agency's *Classified Employee Handbook*.[19]

Grievant cites the above *Standards of Conduct* example as partial justification for her absence, noting that she had a surgical procedure and was in the hospital on August 16, 17, & 18, 2005. She suggests that her hospitalization is a "satisfactory reason" as that term is used in the Group III example offense. Grievant's interpretation of the *Standards of Conduct* is incorrect. The term "satisfactory reason" refers to having a satisfactory reason for not obtaining proper authorization. For example, if an employee failed to notify their supervisor

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[17] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective August 30, 2004.
[18] DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[19] Agency Exhibit 16. *Classified Employee Handbook.*

of an extended absence because they had a severe accident resulting in hospitalization due to a coma, the coma would constitute a satisfactory reason for failure to notify the supervisor because the employee is physically unable to contact anyone.

Grievant points out that the VSDP policy requires the agency to "communicate with employee during absence if employee is physically able." While the agency is required to communicate, this statement must be considered in the context of the entire policy. The policy specifically makes the employee responsible for keeping the supervisor informed regarding the disability and any changes regarding the return-to-work date. Accordingly, the primary responsibility rests with the employee to keep her supervisor regularly and fully informed; the supervisor is not responsible to contact the employee to ferret out information that the employee is required to provide.

Grievant objects to the fact that the agency issued disciplinary action approximately two months after the period of unauthorized absence cited in the written notice. The Standards of Conduct requires that disciplinary action should be issued as soon as possible after commission of an offense. However, extenuating circumstances may constitute good cause for delaying disciplinary action. In this case, the agency felt that it would be inappropriate to issue discipline during the pendency of grievant's disability because it did not want to cause grievant any added stress. The agency's decision to delay issuance of the discipline to avoid aggravating grievant's medical condition is a reasonable extenuating circumstance.

Grievant believes the agency violated policy by not giving her advance notice of the disciplinary action. The *Standards of Conduct* policy requires advance notice *only* in cases involving dismissal, suspension, demotion, and or lateral transfer.[20] A Group I disciplinary action does not include any of these sanctions and therefore, advance notice is not required.

Grievant alleges that the agency's intent has been to terminate her employment. That allegation is not supported by the evidence. If the agency had wanted to terminate, it could have issued a Group III Written Notice, which normally results in removal from employment. Alternatively, when grievant's STD benefits ended on October 7, 2005, the agency was not required to grant her leave without pay; it could have removed her from employment at that time. Accordingly, the agency had two possible opportunities to terminate employment but chose not to do so. Therefore, there is no basis to conclude that the agency was engaged in an attempt to remove grievant from employment.

Notwithstanding the above, the agency has not borne the burden of proof in this case. First, the counseling of June 6, 2005 did not address the specific issue that was disciplined; it addressed only the need to request leave in advance when the employee knows that she will be taking leave. It did not

[20] Agency Exhibit 16. p. 35, *Classified Employee Handbook*.

address the requirement to keep a supervisor informed during an extended period of disability. Accordingly, the agency has not shown that this counseling was on point. (However, the letter of June 13, 2005 from human resources to grievant was directly on point and, therefore, grievant was aware of the requirement to notify and keep her supervisor informed.)

Secondly, the evidence is preponderant that grievant did make efforts during the disability period to keep her supervisor informed. Moreover, grievant called her supervisor on August 2, 2005 and told her that (i) her leave had been extended indefinitely, (ii) she was scheduled to see a specialist on August 16, 2005 and, (iii) she was going to have a procedure performed on August 16, 2005. The supervisor testified that grievant told her about the indefinite extension of leave and about seeing a specialist on August 16th. Based on this information, the supervisor knew, or reasonably should have known, that grievant would not be at work on August 16th. Therefore, the conclusion must be that grievant met the requirement to inform the supervisor of her situation, as she knew it at that time.

The crux of the problem in this case occurred shortly thereafter when the supervisor received a copy of the physician's sick certificate which included the notation, "Resume 8/16/2005." The supervisor made a reasonable assumption that this meant grievant could resume work on August 16, 2005. The supervisor was obviously puzzled by the apparent contradiction between the note and what grievant had just told her, and so stated in her e-mail to the Director. However, neither the supervisor, the Director, nor anyone else made an attempt to resolve this apparent contradiction. Grievant had made an effort to comply with the requirements by notifying her supervisor and apparently did not recognize that the sick certificate provided conflicting information. The agency, however, *did* recognize the apparent conflict. At this point, because the information received was conflicting, the burden of resolving the conflicting information shifted to the agency.

As noted above, the employee has the *primary* responsibility for keeping the supervisor informed. However, as the Director acknowledged during the hearing, communication between employee and supervisor is a two-way street. When an employee provides two apparently conflicting pieces of information, the agency is obligated to resolve that conflict before arbitrarily deciding to rely on one or the other. The Director testified that the department "Needed grievant and we were frantic to have her back." The agency could have called grievant back and asked for more information to resolve the conflicting information. Instead, the agency chose to ignore what grievant said during the phone call and relied solely on its interpretation of the sick certificate. Generally, it is reasonable to give considerable weight and credence to a written doctor's certificate. However, in this case, grievant had provided verbal information that contradicted the "Resume 8/16/05" notation. While the agency may have felt its decision was logical and reasonable, it turned out that its interpretation was incorrect and that, just as grievant had said, she did see a specialist and did have a procedure

performed on August 16, 2005. Therefore, the agency has not shown that grievant committed an offense warranting discipline.

As Strother Martin said in the movie classic *Cool Hand Luke*, "What we've got here is failure to communicate." The responsibility for the failure in this case is shared. Grievant and her supervisor had been at loggerheads for some time. At one point, grievant had requested mediation between her and the supervisor. However, the second-step respondent in this grievance had asked grievant to drop her request so that she (the second-step respondent) could handle it. When grievant called on August 2, 2005, the supervisor listened to grievant but ended the conversation as quickly as possible and told grievant to call the Director if she had anything to say. From all of the evidence, it would appear that grievant's request to have mediation was a good faith effort to resolve problems and to develop an effective working relationship with her supervisor. The agency may wish to revisit this issue and consider whether mediation might ultimately be to everyone's benefit.[21]

DECISION

The disciplinary action of the agency is reversed.

The Group I Written Notice issued on October 13, 2005 is hereby RESCINDED.

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

[21] The Department of Employment Dispute Resolution (EDR) is ready to assist and facilitate the mediation process should the parties want to participate. Information regarding EDR's mediation services is available at www.edr.virginia.gov or call 1-888-232-3842.

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.[22] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[23]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer

[22] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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