Issue: Group I Written Notice with termination (due to accumulation) (unscheduled absences); Hearing Date: 04/28/06; Decision Issued: 05/12/06; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8320; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8320

Hearing Date: April 28, 2006
Decision Issued: May 12, 2006

PROCEDURAL HISTORY

On February 23, 2006, Grievant was issued a Group I Written Notice of disciplinary action for accumulating 8.5 occurrences of unscheduled absences. Grievant was removed from employment based on the accumulation of disciplinary action. On February 24, 2006, 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 April 4, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 28, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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:

Grievant began working for the Department of Mental Health Mental Retardation and Substance Abuse in October 2004 as a VSDP/Workers Compensation-RTW Coordinator. The purpose of her position included, "[p]rovides guidance to internal and external customers as a member of the Employee Services Team with respect to employee service, FMLA, and leave policies and procedures."[1] Grievant's Core Responsibility with respect to VSDP-Administers the Virginia Sickness and Disability Program amounted to 25 percent of her time. A measure of this responsibility included, "[p]rovides consultation to employees and managers out on work/non-work related medical leave, to include FMLA." Grievant's Core Responsibility with respect to Workers Compensation Program amounted to 25 percent of her time. A measure of this responsibility included, "[r]eviews and consults with Managers regarding employees out of work related to medical leave to include monitoring and tracking FMLA." Grievant's Core Responsibility with respect to Medical Records amounted to 20 percent of her time. A measure of this responsibility included, "[r]eviews and consult with

[1] Agency Exhibit 5.

managers regarding employees out on medical leave to include monitoring and tracking FMLA requests."[2]

When an employee applied for FMLA leave, Grievant would make sure the employee worked for the Agency long enough to be entitled to relief under the FMLA. She would write a letter to the HRO recommending whether an employee's request for FMLA leave should be approved.

Grievant received orientation training during which she was informed of the Family Medical Leave Act.

On April 26, 2005, Grievant transferred within the Facility to the position of Office Services Specialist. She began reporting to the Supervisor and continued to do so until November 2005.

On June 3, 2005, June 16, 2005, and July 5 2005, Grievant was absent from work due to a migraine headache. On July 6, 2005, Grievant missed one half day of work due to having a migraine headache. On July 7, 2005, Grievant's minor child was involved in an auto accident which resulted in the child being taken to the emergency room. On September 21, 2005 and November 3, 2005, Grievant was ill and did not report to work. On January 6, 2006 and February 15, 2006, Grievant was sick with a virus and did not report to work.

Grievant has Chronic Migraines and Fibromyalgia.[3] Grievant mistakenly believed she was not eligible for FMLA leave because her doctor could not predict in the time that she would miss from work. She chose not to apply for relief under the FMLA. Grievant had sought and received approval for FMLA leave at the agency were she worked prior to joining the Facility.

On July 12, 2005, the Supervisor met with Grievant to counsel Grievant regarding her unsatisfactory attendance. The Supervisor asked Grievant if she had any documentation justifying her absences. The Supervisor told Grievant she had accumulated 6.5 unscheduled absences since 5/16/05 and that if Grievant received more than eight occurrences, Grievant may face disciplinary action. The Supervisor told Grievant to fill out the FMLA paperwork so that future unscheduled absences would not count as occurrences. Grievant told the Supervisor she had migraine headaches and that it did not make sense to go to the doctor each time she had a headache because she already had necessary medication at her home.[4] She considered it a waste of time to go to the doctor and pay a $35 fee.

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[2] Agency Exhibit 5.

[3] Grievant's husband testified that Grievant has suffered from migraine headaches for at least 18 years. She has been hospitalized after having migraines. She sometimes experiences slurred speech and a tingling feeling in her hands because of migraines.

[4] Grievant first told the Supervisor about Grievant suffering migraine headaches sometime between April and July 2005.

Grievant was removed from employment effective February 23, 2006 because of the accumulation of active disciplinary action. She received disciplinary action including: a Group II Written Notice on February 17, 2005, a Group I Written Notice on February 17, 2005, and a Group II Written Notice on April 19, 2005.[5]

Grievant did not provide any doctor's excuses or FMLA paperwork until after she was removed from employment.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[6] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

The Agency has a "no fault" attendance policy. "Once an employee exceeds eight (8) whole occurrences within any twelve (12) consecutive month period or eight (8) half occurrences within a six (6) consecutive month period, he/she should normally receive disciplinary action in the form of a Group I Written Notice for Unsatisfactory Attendance." An occurrence is defined as, "[a]n unscheduled absence from work that does not meet the criteria defining a scheduled absence, to include, leaving work early (citing reasons that cannot reasonably be denied by supervision); or calling-in to request time off without having requested to leave before the end of the shift the last workday preceding the planned a one absence." "An employee will not be credited with an occurrence (whole or half) if the absence: … is leave specifically covered by the Family Medical Leave Act (FMLA) with authorization on file for which has been approved in short term disability under the Virginia Sickness and Disability Program (VSDP)."[7]

Grievant obtained 8.5 occurrences thereby justifying the issuance of a Group I Written Notice for unsatisfactory attendance.[8] Based on the accumulation of

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[5] Agency Exhibit 6.

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

[7] Facility Policy No. 3.

[8] The Agency permits employees to seek mitigation under the Facility policy for an "event or absence that deserves consideration due to the nature of the absence." Grievant did not seek mitigation under the policy for any occurrence upon her return to work.

disciplinary action against Grievant, the Agency's removal of Grievant from employment must be upheld.

Grievant knew or should have known of the provisions of the Agency's attendance policy.[9] In particular, she knew or should have known that the Agency did not count as occurrences any absences for which she asked the Agency to qualify under the FMLA. Grievant did not request FMLA leave for her migraine headaches. If she had done so, it is likely she would have qualified for FMLA leave and those absences would not have been counted as occurrences. Thus, she would have been able to delay or avoid receiving the Group I Written Notice which is the subject of this appeal.

29 CFR § 825.301(b)(1) provides:

> The employer shall also provide the employee with **written notice** detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see Sec. 825.300(c)). Such specific notice must include, as appropriate:
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> > (i) that the leave will be counted against the employee's annual FMLA leave entitlement (see Sec. 825.208);
> > (ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see Sec. 825.305);
> > (iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;
> > (iv) any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see Sec. 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);
> > (v) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (see Sec. 825.310);
> > (vi) the employee's status as a 'key employee' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see Sec. 825.218);

[9] As part of Grievant's orientation she received the DMHMRSAS Handbook. She signed a statement acknowledging, "[i]t is my responsibility to be aware of all policies and instructions, and to abide by the provisions of these policies while I am employed with [the Facility]." See, Agency Exhibit 8.

> (vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see Sec. Sec. 825.214 and 825.604); and,
> (viii) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see Sec. 825.213). (Emphasis added).

Subsection (c) states the FMLA written notice:

> must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee--within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

Under subsection (f):

> If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

29 CFR § 825.303 addresses the question of the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable. 29 CFR § 825.303(a) states, in part:

> When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case.

29 CFR § 825.303(b) states, in part:

> The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed.

Grievant notified the Agency of her need for leave. She informed the Agency that she would be absent from work due to migraine headaches. Although she did not expressly mention asserting rights under the FMLA, she was not obligated to do so. In response to Grievant's requests for leave due to migraine headaches, the Agency should have provided Grievant with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these

obligations. The Agency failed to comply with the regulations governing the FMLA because the Agency did not provide the required **written** notice.

Since the Agency failed to comply with the regulations governing the FMLA, the question becomes what should be the consequences of the Agency's oversight. The Hearing Officer finds that, under the facts of this particular case, the Agency's failure to comply with the written notice requirement of regulations governing FMLA is harmless error.

This conclusion is true for several reasons. First, Grievant had actual notice of the existence and rights under the FMLA. She was provided an employee handbook when she began working for the Agency. That handbook discussed the FMLA. As part of her duties as a VSDP/Workers Compensation – RTW Coordinator, Grievant was expected to provide guidance to other employees with respect to the FMLA and with respect to leave policies and procedures. She was expected to know the necessary procedure for an employee to request and receive benefits under the FMLA. Grievant knew that employees could ask the Agency for FMLA leave and then receive a packet of information describing the FMLA program. Grievant had given the Agency's packet of information regarding the FMLA program to employees who requested that information.[10] Second, Grievant's Supervisor told Grievant that Grievant should consider applying for FMLA. Grievant chose not to do so. Third, if the Agency had provided Grievant with the necessary written notice, there is no reason to believe Grievant's behavior would have changed in any respect. Grievant testified that she had a conversation with the Facility's Human Resource Officer regarding another employee's request for FMLA.[11] Grievant said the HRO mentioned that the employee's FMLA leave would not be granted because it did not extend for over three or four days per month.[12] No evidence was presented to suggest that the Agency's written notice would address the merits of Grievant's conversation with the HRO and persuade Grievant that the HRO's comments were incorrect. In other words, if the Agency had complied with the regulations governing the FMLA and provided Grievant with written notice as required, there is no reason to believe Grievant's behavior would have changed in any way.[13]

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[10] Grievant likely handled at least 35 original applications or re-certifications for FMLA benefits.

[11] The HRO was not available to testify on the day of the hearing due to a death in her family.

[12] "[I]t is well settled that the doctrine of estoppel does not apply to the rights of a State when acting in its sovereign or governmental capacity. This is so because the legislature alone has the authority to dispose of or dispense with such rights." Main v. Dept. of Highways, 206 Va. 143, 149 (1965). To the extent the HRO's comment about the rights of another employee under the FMLA was incorrect, Grievant may not rely on those comments to justify her failure to seek relief under the FMLA.

[13] This analysis is consistent with *Ragsdale v. Wolverine World Wide,* 535 U.S. 81 (2002). In *Ragsdale*, an employer failed to provide an employee with specific notice that part of the employee's absence would count as FMLA leave. The U.S. Supreme Court overturned a penalty regulation implementing the FMLA. The Court reasoned, "[t]he challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of providing any real impairment of their rights and resulting prejudice." *Id. a*t 91.

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 I Written Notice of disciplinary action with removal is **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. 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

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[14] *Va. Code § 2.2-3005.*

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 all of your appeals to the other party and to the EDR Director. 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.[15]

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

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Carl Wilson Schmidt, Esq.
Hearing Officer

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