Issues: Retaliation and discrimination, Group I Written Notice (excessive accumulation of unplanned leave), and Group I Written Notice with termination (due to accumulation (excessive accumulation of unplanned leave); Hearing Date: 07/17/06; Decision Issued: 07/26/06; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8336, 8358, 8383; Outcome: Employee received partial relief; **Administrative Review: HO Reconsideration Request received 08/02/06; Reconsideration Decision issued 08/07/06; Outcome: Original decision upheld; Administrative Review: DHRM Ruling Request received 08/02/06; DHRM Ruling issued 01/09/07; Outcome; HO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8336 / 8358 / 8383

Hearing Date: July 17, 2006
Decision Issued: July 26, 2006

PROCEDURAL HISTORY

On August 9, 2005, Grievant filed a grievance alleging retaliation and discrimination against the Agency. On March 10, 2006, Grievant was issued a Group I Written Notice of disciplinary action for excessive accumulation of unplanned leave. On March 27, 2006, Grievant timely filed a grievance to challenge the Agency first Group I Written Notice. On April 18, 2006, Grievant was issued a Group I Written Notice of disciplinary action for excessive accumulation of unplanned leave. Based on the accumulation of disciplinary action, Grievant was removed from employment effective April 18, 2006. On April 28, 2006, Grievant timely filed a grievance to challenge the Agency's second Group I Written Notice and her removal.

The outcomes of the Third Resolution Step for these grievances were not satisfactory to the Grievant and she requested a hearing. On April 21, 2006, the Director of the Department of Employment Dispute Resolution issued Ruling No. 2006-1241 qualifying the matter for hearing. On June 12, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 17, 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 Notices?

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?

5. Whether the Agency retaliated against Grievant?

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. Grievant has the burden of proof with respect to her claim of retaliation and any misapplication of policy. 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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Registered Nurse II at one of its Facilities until her removal effective April 18, 2006.

Grievant began working for the Agency on November 25, 2002 as a Registered Nurse II. Her position was hourly.[1] Effective January 10, 2003, she began working as a

[1] Grievant Exhibit 3.

Registered Nurse II/ Baylor Plan. Her hours were 7 a.m. to 7:30 p.m., Saturday, Sunday, and Monday.[2] She was no longer an hourly employee, she received a salary. On November 7, 2003, the Facility suspended the Baylor Plan and Grievant was placed into another position.[3] Grievant should have begun working a schedule of eight hour shifts over five workdays. Instead, she began working sixteen hour shifts on Saturdays and Sundays with an eight hour shift on Mondays (hereinafter "alternative work schedule").[4] Grievant's Supervisor at the time permitted her to work this alternative schedule. Most nurses did not wish to work on weekends. Grievant's preference to work on weekends was routinely granted by her former Supervisor.[5] Grievant worked primarily in Building 2.

In July 2004, Grievant was moved to Building 26. She continued to work her alternative work schedule. She was not the only nurse working an alternative work schedule.

Grievant has two minor children, ages 9 and 12.[6] She preferred to work on weekends so that she would be with her children on weekdays and not have to place them in daycare. On July 15, 2005, a local Circuit Court ruled regarding custody and visitation of Grievant's children. Grievant was given physical custody of her minor children from Tuesday after school until Friday.[7] On July 24, 2005, Grievant notified her supervisor at the time of her custody arrangement and that she did not wish to work when she had custody of her children.

Beginning May 9, 2005 Grievant was absent from work due to short term disability.[8] She returned to work on July 24, 2005. In July 2005, she was elected President of a union active at the Facility.

During Grievant's absence from work, the Agency managers realized that Grievant was routinely working Saturdays, Sundays and Mondays instead of the five eight hour shifts. Agency managers expected Grievant and her former Supervisor to implement a five workday schedule once the Baylor Plan was eliminated. Upon

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[2] Grievant Exhibit 4. Under this schedule, Grievant worked 36 hours but was paid as if she worked 40 hours. The Agency adopted this compensation schedule in order to recruit nurses to the Facility.

[3] Grievant Exhibit 5.

[4] Grievant was paid for 40 hours of work per week and she was actually working 40 hours per week.

[5] The Facility Director described Grievant's former Supervisor as being negligent in stopping the Baylor Plan for Grievant when the Plan was stopped for other employees. See, Third Step Response of Facility Director written on September 16, 2005.

[6] She has a third child who is an adult.

[7] Grievant Exhibit 7.

[8] Grievant had surgery resulting in her absence from work.

Grievant's return to the Facility, she was told her schedule would be changed to five eight hour workdays. She requested to be returned to her alternative work schedule.

On August 5, 2005, the Assistant Chief Nurse Executive (ACNE) denied Grievant's request to work sixteen hours on Saturdays and Sundays and eight hours on Mondays. The ACNE wrote, "[y]our current work schedule has generated overtime, and during your recent absence we were unable to cover your shifts without utilizing overtime."[9] When Grievant was absent due to her medical condition, the Agency found it more difficult to find someone to work a sixteen hour shift. The result was the Agency had to pay some staff overtime.

On August 9, 2005, Grievant filed a grievance to have the Agency change her work schedule. During the Step Process, she met with the Facility Director. During that meeting she proposed the Agency adopt a Self-Scheduling model of shift assignment. Under this model, nurses would be able to sign up for their preferred shifts with some mechanism to resolve gaps or conflicts in shift assignments. If the Agency adopted the Self-Scheduling model, Grievant likely would be able to work Saturdays, Sundays and Mondays as she preferred because most nurses did not wish to work on weekends. The Agency took Grievant's recommendation and began a pilot program. On April 14, 2006, the Acting Registered Nurse Coordinator sent a memorandum to Facility's Committee on Self-Scheduling informing them that the Self-Scheduling Pilot had been approved for May 2006. She noted that "the self-scheduling pilot is a work in progress and changes may be needed to meet the needs of the unit and to delivery of safe patient care."[10]

Although Grievant's request to work an alternative schedule was denied, the Agency continued to permit some of its nurses to work schedules similar to Grievant's preferred weekend schedule. For example, a nurse in Building 34 worked evening and night shifts on Saturday, September 10, 2005; evening and night shifts on Sunday, September 11, 2005, and night shift on Monday, September 12, 2005. She repeated this schedule on September 24 through 25, 2005. An LPN working in Building 34 had a similar schedule in September 2005. In October 2005, an RN in Building 34 regularly worked sixteen hours on Saturdays and Sundays but her eight hour shift was not on Mondays. In addition, an LPN in Building 34 regularly worked sixteen hours on Saturdays and Sundays and usually but not always worked eight hours on Mondays. In Building 26 where Grievant usually worked, several RNs and LPNs worked sixteen hour shifts on Saturdays and Sundays, although only on occasion did a nurse also work an eight hour shift on Mondays.[11]

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[9] Grievant Exhibit 8.

[10] Grievant Exhibit 32.

[11] See Grievant Exhibit 11.

Grievant's most recent supervisor, the Acting Registered Nurse Coordinator, began supervising Grievant in December 2005. She did not know Grievant was involved in the union or that Grievant was away from work on family medical leave.

The Agency permitted nurses to exchange shifts among themselves so long as the change was documented and agreed to by each nurse. On December 6, 2005, the RNMI sent staff in Building 26 a memorandum stating in part, "[e]ffective immediately, no changes to the schedule will be honored unless there are initials from either [another employee] or myself. *** We will make comments on the leave slips you submitted, and feel free to switch days off or exchange with your peers, as long as the necessary documentation is turned in and signed by both parties. This also requires a signature on the schedule."[12]

On December 5, 2005, the Assistant Chief Nurse Executive[13] sent Grievant a certified letter informing her, "[t]his is a 30-day notice informing you that as of January 5, 2006, you will work five (5) days a week within a Sunday through Saturday period. In other words, this means you will follow the monthly schedules as approved by me."[14]

On December 16, 2005, the Registered Nurse Coordinator sent nursing staff in Building 26 a memorandum stating, "[e]ffective immediately, there are to be NO changes made on the posted monthly time schedules unless approved by me or my designee. Failure to comply may result in disciplinary action. In addition, you may not be compensated for hours worked."[15]

On December 26, 2005, Grievant submitted a written request to the Acting Registered Nurse Coordinator for a permanent shift rotation effective January 2006. Grievant sought to change her shift to sixteen hours on Saturdays and Sundays and eight hours on Mondays. She attached a copy of her custody order to the request.[16] Her request was denied.

When Grievant failed to arrive at work as scheduled on Tuesdays, Wednesdays, and Thursdays after January 1, 2006, the Agency began applying accrued leave to offset her absences. The Agency did so even though Grievant continued to be called into work for sixteen hour shifts on Saturdays and Sundays. In other words, even though Grievant may have worked 40 hours in a week at the Agency's request, the Agency reduced her accrued leave balances to account for her missed time on

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[12] Grievant Exhibit 15.

[13] Grievant construed the letter from the Assistant Chief Nurse Executive to override the memorandum from the RNMI because the RNMI reported to the Assistant Chief Nurse Executive.

[14] Grievant Exhibit 16.

[15] Grievant Exhibit 17.

[16] Grievant Exhibit 20.

Tuesdays, Wednesdays, and Thursdays.[17] The Agency continued this practice until Grievant exhausted her leave. Then the Agency began deducing amounts from her payroll check to account for the days she was absent on Tuesdays, Wednesdays, and Thursdays. Beginning on March 10, 2006, Grievant was in "docked status" for 7.2 hours on March 21, 2006 and eight hours per day on March 22, 23, 28, 29, 30, and April 4, 5, 2006.[18]

As of March 10, 2006, Grievant accumulated 168 hours of unplanned leave. As of March 31, 2006, Grievant accumulated 264 hours of unplanned leave. These calculations were reviewed by the Human Resource office staff. Grievant was counseled prior to receiving Written Notices for having excessive accumulated unplanned leave.

Grievant had prior active disciplinary action. On June 28, 2004, Grievant received a Group II Written Notice for engaging in an inappropriate non-therapeutic interaction with a patient she was not assigned responsibility. On October 28, 2004, Grievant received a Group I Written Notice for unsatisfactory work performance.

In October 2004, Grievant was removed from employment but reinstated after filing a grievance to challenge the Agency's action.

CONCLUSIONS OF POLICY

Work Schedule

A Standard Workweek is the "regular workweek for full-time positions, which consists of a five-day, 40-hour per week schedule for every seven calendar-day period." "Management reserves the right to establish and adjust the work schedules of employees in the agency, being mindful of the hours of public need."[19]

As part of Grievant's September 2005 grievance, she sought to have the Agency change her permanent work schedule to sixteen hours on Saturdays and Sundays and eight hours on Mondays. Setting Grievant's permanent work schedule is solely within the Agency's discretion so long as the Agency acts in furtherance of its legitimate business reasons, in accordance with policy, and free from unlawful discrimination. The Agency originally changed Grievant's schedule in November 2003. There is no reason to believe the decision to change Grievant's schedule was for any reason other than legitimate business reasons. Accordingly, Grievant's request to have her permanent schedule changed is denied.

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[17] Grievant Exhibit 21.

[18] Grievant Exhibit 25.

[19] DHRM Policy 1.25, *Hours of Work*.

Group I Written Notices

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). 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).

"Unsatisfactory attendance" is a Group I offense. In order to determine when attendance is unsatisfactory, the Agency has adopted a policy measuring unplanned leave. Agency policy HR 053-19[20] defines unplanned leave as, "[t]ime an employee is scheduled to work but is absent without a signed leave slip approved in advance (no later than the end of the employee's last work shift the preceding day of absence)." Unacceptable attendance is defined as "accumulation of more than 64 hours of unplanned leave." "At the accumulation of 65 hours of unplanned leave, the employee may be issued a Group I Written Notice …." As of March 10, 2006, Grievant accumulated 168 hours of unplanned leave. As of March 31, 2006, Grievant accumulated 264 hours of unplanned leave.

Grievant argues the Agency incorrectly calculated her unplanned leave. For example, she contends she was charged unplanned leave for a day she actually had leave approved in advance. If the Hearing Officer assumes for the sake of argument that Grievant has correctly identified several days for which the Agency has incorrectly calculated her unplanned leave, the number of days Grievant has identified would not be sufficient to lower her unplanned leave hours below 65. In other words, any miscalculation in the number of unplanned leave would not affect the outcome of this hearing.

Mitigation of Disciplinary Actions

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

[20] Grievant received a copy of this policy on November 25, 2002. See Agency Exhibit 8.

[21] *Va. Code § 2.2-3005.*

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."

The disciplinary actions against Grievant should be mitigated and removed for three reasons. First, the purpose of Agency Policy 0053-19 is to "ensure that services are provided to our patients by applying a written and uniform attendance policy to all employees." Grievant testified that during each of the weeks she did not work on Tuesday through Thursday, she was called by a supervisor and asked if she would work on Saturday and Sunday. She agreed and worked approximately 40 hours per week beginning in October 2005. By working 40 hours per week, Grievant demonstrated that she was helping the Facility ensure that services were provided to its patients. In other words, the objective of the policy was consistently met during the period of time Grievant refused to work on Tuesdays through Thursdays.[22]

Second, Grievant was treated differently from other registered nurses without the existence of a legitimate business reason for the different treatment. For example, registered nurses were permitted to switch their shifts with other registered nurses, except for Grievant. Thus, some nurses were working sixteen hour shifts, if they were able to find other nurses to switch with them. Grievant had no difficulty finding registered nurses to switch shifts with her because Grievant wanted to work on weekends and many nurses did not wish to work on weekends.[23] The Agency prevented Grievant from finding and voluntarily switching with other registered nurses. Although the Agency is free to set Grievant's permanent work schedule as five eight hour days during the week[24], it is not free to permit other nurses to switch shifts while denying Grievant the same freedom.[25] Grievant's skills as a registered nurse were no different from the skills of another registered nurse. There is no reason to believe the Agency needed Grievant to work five eight hour days during the week because she possessed some unique medical training that could not be obtained from another registered nurse working in Grievant's place.[26]

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[22] Another factor to consider is that prior to October 2005, Grievant had not accumulated any unplanned leave. She was diligently coming to work and performing her duties.

[23] For example, Grievant testified she regularly switched shifts with at least five nurses who did not wish to work on the weekends.

[24] See above discussion and DHRM Policy 1.25, *Hours of Work.*

[25] If the Agency wished to permit any registered nurses from changing shifts, it should have set Grievant's work schedule as it believed was appropriate and then permit Grievant to switch shifts with any other registered nurse working in Building 26. Only if Grievant was not able to find another nurse to work in her place, could the agency determine her absence from work was unplanned leave. Instead of this practice, the Agency permitted other nurses in Building 26 to switch shifts but prevented Grievant from doing so.

[26] The Agency argues there were not sufficient numbers of registered nurses working in Building 26 with whom Grievant could switch shifts. Grievant testified she always attempted to switch shifts with registered nurses in Building 26 and that she had little difficulty finding nurses wishing to switch with her.

Third, shortly after Grievant was removed from employment, the Agency adopted a "self-scheduling" model for nurses.[27] Grievant proposed this method of setting schedules during her grievance Step meeting with the Facility Director in October 2005. Under this method, nurses would be able to propose their own work schedules and if feasible, the Agency would adopt the nurse's schedules. If the Agency has a "self-scheduling" model in placed beginning in October 2005, Grievant would not have accumulated unplanned leave.

Retaliation

Grievant contends the Agency retaliated against her by forcing her to work eight hour shifts five days a week during the week. She contends the Agency retaliated against her for filing a grievance in October 2004, taking short term disability in 2005, and being elected President of the local union.

Grievant's argument fails because there is no connection between the Agency's decision to change her shift to eight hour shifts over five workdays and her protected activities. The Agency decided to change Grievant's work shift in November 2003. This was prior to Grievant engaging in any protected activities. The only reason Grievant was not placed on a standard work week and kept on that schedule was because of mistakes made by Grievant's supervisors. If Grievant had not been absent due to STD, Agency managers would not have realized she had been working an alternative work schedule. The fact that Agency managers had not previously realized Grievant was working an alternative work schedule and then attempted to correct the prior error is not retaliation. Grievant's union activities did not result in retaliation against her. The Acting Registered Nurse Coordinator did not know of Grievant's union activities. Several of Grievant's witnesses employed by the union testified that the union has a good working relationship with the Facility Director.[28] No evidence exists to suggest the Agency retaliated against Grievant because of her union status. There was no credible evidence suggesting the Agency retaliated against Grievant because she filed a grievance in October 2004.

DECISION

Based on Grievant's longstanding practice of finding other nurses with whom to change shifts, Grievant's testimony is the most credible.

[27] Several nurses chose to work two sixteen hour days followed by an eight hour day. A registered nurse in Building 26 chose to work sixteen hours on Saturday May 6 and Sunday May 7 followed by eight hours on Monday May 8, 2006. An LPN worked sixteen hours on Saturdays and Sundays and eight hours on Mondays for May 6 through 8, May 13 to 15, May 20 to 22, and May 27 to May 29, 2006. See Grievant Exhibit 33.

[28] In light of the number of emails between the Facility Director and a union representative, there is no reason to believe the Facility Director or other Agency managers are ignoring or disregarding the union.

For the reasons stated herein, the Agency's issuance to the Grievant on March 10, 2006 of a Group I Written Notice of disciplinary action is **rescinded.** The Agency's issuance to the Grievant on April 18, 2006 of a Group I Written Notice of disciplinary action is **rescinded.** The Agency is ordered to reinstate Grievant to her former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for annual and sick leave that the employee did not otherwise accrue.[29]

Grievant's request for relief with respect to her change of work schedule and her request regarding retaliation is **denied**.[30]

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

[29] Upon reinstatement, an employee may be entitled to receive attorney's fees for services rendered by an attorney licensed to practice law in Virginia. Grievant's counsel was a Staff Attorney for the local union. It is not clear whether he is licensed to practice law in Virginia and how he was compensated for his services. Accordingly, Grievant and her Counsel should review EDR's *Rules for Conducting Grievance Hearings* and determine whether to submit a petition for attorney's fees. A petition should be submitted within 15 calendar days of the date of this decision.

[30] Grievant testified that beginning in March 2006, she would work 40 hours but be paid for an amount less than 40 hours per week because the Agency had placed her in "docked status." There is insufficient evidence upon which the Hearing Officer can use to verify Grievant's assertion and then determine by what amount of compensation Grievant is due. No State policy permits an Agency to reduce an employee's salary for days actually worked by the employee.

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.[31]

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

[31] 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: 8336 / 8358 / 8383-R

Reconsideration Decision Issued: August 7, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

The Agency seeks reconsideration of the Hearing Officer's decision to mitigate the disciplinary action against Grievant. The purpose of Agency Policy 0053-19 is to "ensure that services are provided to our patients by applying a written and uniform attendance policy to all employees." The Agency disagrees with the Hearing Officer's conclusion that the purpose of the policy was being met.

The purpose of the policy does not describe scheduling of shifts; it describes the provision of services to patients. At the Agency's request, Grievant provided services to patients every week during which the Agency asserts Grievant failed to work her prescribed schedule. Grievant behaved consistently with the objective of the policy. She is not one of the employees for whom the policy was intended to sanction.

The Agency contends that Grievant's refusal to work her assigned schedule impacted Agency operations. To the contrary, the Hearing Officer finds that there was no material impact on Agency operations because of Grievant's failure to work her assigned shift. The evidence showed that most employees did not wish to work on weekends and preferred to work on weekdays. No credible evidence was presented to show that the Agency had any difficulty finding employees to cover Grievant's weekday shifts. To be sure, the evidence showed that the Agency had difficulty finding

employees to cover her weekend shifts when she was absent from work in the Summer of 2005.[32]

The Agency contends that there were aggravating circumstances that would counter the mitigating circumstances offered by Grievant. The Agency argues aggravating circumstances include Grievant's accumulation of prior Written Notices where the Agency mitigated the disciplinary action. The Agency's argument fails because aggravating circumstances must directly relate to the disciplinary action. Prior disciplinary action is considered for the purpose of the accumulation of disciplinary action, but for no other purpose. The purpose of the grievance hearing held on July 17, 2006 was not to re-litigate prior disciplinary actions. Very little information about the prior disciplinary actions was presented during the July 17, 2006 hearing because only the existence of prior disciplinary action was relevant to the Written Notices before the Hearing Officer.

The Agency contends Grievant was not timely in presenting the self-scheduling proposal to the Facility Director and, thus, it could not serve as a mitigating circumstance. The timing of the proposal and implementation of the self-scheduling model, however, is not of great significance in this case. By adopting a self-scheduling model (regardless of who proposed the model), the Agency has undermined its assertion that it must rigorously control employee schedules otherwise patient care will be impacted.

The Agency was within its exclusive right to set Grievant's schedule as five eight hours shifts including one day on the weekend. The Agency was within its exclusive right to permit registered nurses to exchange their shifts with other registered nurses in the same building subject to a supervisor's approval. The Agency was <u>not</u> within its exclusive right to permit all registered nurses at the Facility to exchange their shifts with other nurses with one exception – Grievant. In other words, the Agency had no right to single out Grievant and deny her the opportunity to exchange shifts. By denying Grievant the opportunity to exchange shifts, the Agency caused Grievant to accumulate unplanned leave that other registered nurses would not have accumulated. The primary reason for eliminating the disciplinary action against Grievant is because of the Agency's inconsistent treatment of one employee – Grievant.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied.**

[32] The Agency argues that when "employees do not report to work as scheduled, services are compromised and employees' lives are disrupted." No credible evidence was presented to support this conclusion. In fact, the contrary is more likely. Grievant took the place of employees who likely did not wish to work on weekends. Employees who wished to work on weekdays had additional options available to them because of Grievant's refusal to work on Tuesdays, Wednesdays, and Thursdays.

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.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of Mental Health
Mental Retardation and
Substance Abuse Services

January 9, 2007

The agency has requested an administrative review of the hearing officer's decision in Cases Nos. 8336, 8358 and 8383. The agency objects to the hearing decision because the hearing officer rescinded the disciplinary actions which resulted in the grievant being reinstated. The agency contends that the hearing officer's decision is inconsistent with state and agency policies. The agency head has asked that I respond to this request for an administrative review.

FACTS

The Department of Mental Health, Mental Retardation and Substance Abuse Services employed the grievant as a Registered Nurse at one of its facilities until she was terminated based on an accumulation of Written Notices. The grievant was on medical leave for a period of time after she had surgery. While she was out, management officials discovered that her work schedule was different from the one to which the majority of the other nurses were assigned. In fact, she was on a work schedule that management officials allegedly had discontinued. The evidence shows that she originally was on a Saturday – Sunday – Monday work week schedule. After she was told that she could no longer work on that schedule, she filed a grievance. Even though she was reassigned to a Monday through Friday work schedule with an occasional weekend day, she continued on the weekend schedule. Agency officials applied her accrued leave to cover her absenteeism when she did not work on any days she was assigned to work from Tuesday through Friday. After she exhausted her leave hours, her pay was docked. Eventually, she was disciplined because she accrued too many hours of unplanned leave. Agency officials issued to her two Group I Written Notices, on separate dates, with termination, for an accumulation of unplanned leave. She challenged the disciplinary actions by filing two grievances. The Department of Employment Dispute Resolution (EDR) consolidated the three grievances so the same hearing officer could hear them at one hearing.

In a decision dated July 26, 2006, the hearing officer rescinded the March 10, 2006, Group I Written Notice for accumulation of too many hours of unplanned leave. In addition, he rescinded the April 18, 2006, Group I Written Notice for accumulation of too many hours of unplanned leave. He directed that the grievant be reinstated to her position with benefits and backpay minus any interim earnings. He denied her relief with respect to her request for a schedule change and found that retaliation did not occur based on her use of leave under VSDP. In a reconsideration decision dated August 7, 2006, the hearing officer denied the agency's request to modify his decision.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

Concerning the March 10, 2006 Group I Written Notice and the April 18, 2006 Group I Written Notice, the hearing officer concluded in his original decision, "Although Grievant's request to work an alternative schedule was denied, the Agency continued to permit some of its nurses to work schedules similar to Grievant's preferred weekend schedule." In his Reconsideration Decision the hearing officer stated, "The Agency was within its exclusive right to set Grievant's schedule as five eight hours shifts including one day on the weekend. The Agency was within its exclusive right to permit registered nurses to exchange their shifts with other registered nurses in the same building subject to a supervisor's approval. The Agency was <u>not</u> within its exclusive right to permit all registered nurses at the Facility to exchange their shifts with other nurses with one exception – Grievant. In other words, the Agency had no right to single out Grievant and deny her the opportunity to exchange shifts. By denying Grievant the opportunity to exchange shifts, the Agency caused Grievant to accumulate unplanned leave that other registered nurses would not have accumulated. The primary reason for eliminating the disciplinary action against Grievant is because of the Agency's inconsistent treatment of one employee – Grievant." Summarily, while the evidence supports that the grievant had accumulated unplanned leave above the threshold to warrant disciplinary action, the Agency was inconsistent in how it treated the grievant as related to other registered nurses and shift assignments. Thus, he rescinded the disciplinary action.

Concerning the grievant's charge of retaliation because she took leave under VSDP, the hearing officer found no evidence to support that allegation, thus he offered her no relief. Based on the above, DHRM finds that the hearing officer was within his rights when he made the above decision and did not violate any policy in making his decision. Thus, this Agency has no basis to interfere with the application of the hearing officer's decision.

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