Issue: Group I Written Notice with suspension (unsatisfactory attendance); Hearing Date: 02/27/07; Decision Issued: 02/28/07; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8524; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8524

Hearing Date: February 27, 2007
Decision Issued: February 28, 2007

APPEARANCES

Grievant
Human Resource Manager
Representative for Agency
Two witnesses for Agency

ISSUES

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group I Written Notice for unsatisfactory attendance.[1] As part of the disciplinary action, grievant was suspended for three days. Following failure of the parties to resolve the

[1] Agency Exhibit 2. Group I Written Notice, issued December 12, 2006.

grievance at the third resolution step, the agency head qualified the grievance for hearing.[2] The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") has employed grievant for ten years as a forensic mental health technician. Grievant has two prior active disciplinary actions – both are Group I Written Notices for unsatisfactory attendance.[3]

The agency has a no-fault attendance policy that provides for corrective action after an employee exceeds eight occurrences of unscheduled time away from work within a 12-month period.[4] Employees are not charged with an occurrence if the absence meets the criteria for a scheduled absence, is specifically covered by the Family Medical Leave Act (FMLA), or is due to the death of a family member. Employees are verbally counseled when they reach six occurrences in a moving 12-month period and given written counseling when they reach eight occurrences.

During 2005, the agency determined that grievant was entitled to FMLA leave for that year. Grievant exhausted her 12 weeks of 2005 FMLA leave by August 22, 2005.[5] In 2006, the agency again found grievant to be entitled to FMLA leave which she used for various family problems; she exhausted the 12 weeks of entitlement by September 21, 2006.[6] Separate and apart from the multiple absences for which she was covered by FMLA, grievant incurred 11.5 additional occurrences for various unscheduled absences totaling 36 days between December 24, 2005 and November 26, 2006.[7]

Grievant had been verbally counseled when she reached six occurrences and was given written counseling when she reached eight occurrences. When she exceeded eight occurrences, she was notified that disciplinary action was being considered. Grievant offered documentation for some of her absences to show that she had seen a physician on some dates of absence. The agency evaluated grievant's proffered documentation and determined that she still had in excess of eight occurrences. Accordingly, the agency issued a Written Notice with three days suspension.

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

[2] Agency Exhibit 1. *Grievance Form A*, filed December 12, 2006.
[3] Agency Exhibit 3. Group I Written Notices, issued March 29, 2005 and, August 2005.
[4] Agency Exhibit 7. Policy HR-05c, *Attendance/Call-Ins*, January 10, 2005.
[5] Agency Exhibit 5. FMLA Hours Used – Calendar Year 2005.
[6] Agency Exhibit 5. FMLA Hours Used – Calendar Year 2006.
[7] Agency Exhibit 2. Individual Occurrences for Grievant. See also Agency Exhibit 4, Timecard detail for 2006.

procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the grievant must present her evidence first and prove her claim by a preponderance of the evidence.[8]

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 effective September 16, 1993. The *Standards* provide a set of rules governing the professional and personal conduct and acceptable standards for 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 I offenses are the least severe.[9] Unsatisfactory attendance is an example of a Group I offense.

The agency has demonstrated by a preponderance of evidence that grievant exceeded the agency's threshold level (more than 8 occurrences) of absence occurrences that warrants disciplinary action. When the written notice was issued grievant had 11.5 occurrences totaling 36 days of absence. Accordingly, the agency acted in compliance with its attendance policy when it issued a Group I Written Notice.

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[8] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[9] Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, September 16, 1993.

Grievant asserts that the occurrence charged on June 20, 2006 was a justifiable absence. Agency records reflect that grievant's first request for her absence on that date resulted from grievant calling in to her supervisor on the morning of June 20, 2006.[10] However, because she had not requested leave in advance for this absence, it nevertheless counted as an occurrence. Grievant contended that she had requested leave in advance but did not have a leave request or any other evidence to corroborate her contention. She proffered a letter dated February 14, 2007 which avers that grievant met with her attorney on June 20, 2006. The letter does not corroborate grievant's assertion that she had to go to court.

Grievant argues that her absences should have been covered under FMLA. However, the agency produced extensive documentation showing that grievant had fully exhausted all available FMLA leave of more than 60 days of absence during calendar year 2006. Grievant's 11.5 occurrences were for 36 additional days of absence beyond the available FMLA leave.

Grievant also argues that the agency policy is unfair. However, other than disagreeing with the negative outcome from excessive absenteeism, grievant did not offer any evidence to show that the agency had done anything other than apply its policy fairly and uniformly.

Grievant further contends that the agency did not "work with her enough" regarding her absences due to family illnesses. However, a preponderance of evidence reflects that the agency accepted all of grievant's physician excuses without question and, granted all of her request for leave time to attend to her own illness and the illnesses of her family members. During calendar year 2006, grievant was absent for a total of 96 days (FMLA + other absences) – an extraordinary amount of time away from work. There is no more that the agency could have done within the allowable bounds of policy.

Mitigation

The normal disciplinary action for a Group I offense is a Written Notice. The normal disciplinary action for a third active Group I offense is a Written Notice and suspension of up to five days. The Standards of Conduct policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has long service and otherwise satisfactory performance. However, grievant's attendance record during the past two years has been consistently substandard, resulting in the issuance of two other written notices for unsatisfactory attendance. The agency took all of these factors into consideration when it

[10] Agency Exhibit 2. Leave request form, June 20, 2006.

issued the disciplinary action. Based on the totality of the evidence, the hearing officer concludes that the agency's decision was within the tolerable limits of reasonableness.[11]

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice and three-day suspension are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

[11] *Cf.* Davis v. Dept. of Treasury, 8 M.S.P.R. 317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[12] 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.[13] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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

[12] 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).

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