Issues: Group I Written Notice (excessive absenteeism) and Termination (due to accumulation); Hearing Date: 08/02/07; Decision Date: 08/20/07; Agency: VPI&SU; AHO: Thomas J. McCarthy, Jr., Esq.; Case Number: 8654; Outcome: No Relief – Agency Upheld in Full.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8654

Hearing Date: **August 2, 2007**
Decision Issued: **August 20, 2007**

APPEARANCES

Grievant
Agency Cousnel
Recorder
3 Witnesses for Agency
1 Witness for Grievant

ISSUE

1. "Was the termination appropriate in this situation?"

FINDINGS OF FACTS

The Grievant filed a timely appeal from a fourth Group I written notice with termination issued on May 1, 2007. Following a denial of relief at the second resolution step in the grievance procedure, the matter was qualified for a hearing by the agency head.

At all times relative, Grievant worked as a member of the housekeeping staff for the agency. She received her first relevant Group I notice for excessive absenteeism on September 13, 2006. She received subsequent Group I notices for excessive absenteeism on November 21, 2006, and December 8, 2006. Grievances were not filed on any of the above mentioned Group I notices. On May 1, 2007, Grievant received a fourth Group I notice for "excessive absenteeism – no demonstrated improvement since first written notice date of December 9, 2006. Failure to communicate unexpected absences as outlined in the Department's leave procedure."

Grievant was counseled informally about unexcused absences. She was given counseling cards about unexcused absences and showed no improvement before each Group I notice was given for excessive absenteeism.

Grievant flatly refused to follow call-in procedures which required an early morning call to notify housekeeping that she would not report for her shift followed by a later, during her assigned shift, call to her supervisor to explain her absence. She told her supervisor that the second call required was "stupid" and since it involved a long distance call, she was not going to spend her money for such When the call-in procedure for absences was implemented in January, 2007, it was explained to Grievant. She did not grieve the policy change.

The Director of Housekeeping for the buildings in which Grievant worked testified that he had reviewed the first two Group I notices and had found each to be justified. He reviewed the third Group I notice which called for a period of suspension without pay. He talked to Grievant about the seriousness of her situation. She appeared to understand, so he waived the suspension without pay.

Grievant's supervisors waited five months before the fourth Group I notice. Grievant showed no improvement. Her job was labor intensive. Absences on short notice called for other housekeeping employees to do her work.

Grievant asked for no accommodation. Her medical excuses showed acute diagnoses, not chronic conditions.

Grievant testified she thought she should be covered under the Americans with Disabilities Act. She had medical excuse for her absences. Her doctor's reports showed acute problem diagnoses, not chronic.

Grievant was terminated fourteen days before her tenth anniversary as an agency employee.

Grievant received four Group I Notices for excessive absenteeism with the final Group I Notice also citing failure to communicate as outlined in the Department Leave Procedure.

APPLICABLE LAW AND POLICY

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to the 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 legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and the workplace." Murray v. Stokes, 237 Va. 653, 656 (1989).

Code Section 2.2-3000 et seq. sets forth the Commonwealth's grievance procedure and provides, in 2.2-3000A:

> 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 Section 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.

Section V of VPI's Classified Employee Handbook, Standards of Conduct and Performance sets forth disciplinary action as formal corrective measures based on violations of established STANDARDS OF CONDUCT and PERFORMANCE.

Unacceptable Standards of Conduct (Offenses) are grouped by severity dependant on specific facts and circumstances and may be cumulative. Unsatisfactory attendance is a Group I offense. Group I notices remain active for two years from the date issued. A fourth active Group I Written Notice normally results in dismissal unless mitigating circumstances apply.

DECISION

Grievant received four active Written Notices in less than one year. She had been counseled about the seriousness of her absentee situation. She did not respond. She did not have medical reports citing a "chronic" disability, injury or disease. She openly and verbally refused to abide by the agency's notification policy. The Agency supervisory personnel followed its Standards of Conduct and Performance and the Grievance Procedure properly.

No convincing evidence for mitigation was presented.

The termination upon the fourth Group I Written Notice was proper, and is hereby sustained.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia, 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia, 23219 or faxes to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is

rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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.

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Thomas J. McCarthy, Jr., Esquire
Hearing Officer

August 20, 2007