Issue: Group III Written Notice with termination (absence in excess of 3 days without authorization); Hearing Date: 01/08/08; Decision Issued: 02/06/08; Agency: DGS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8764; Outcome: No Relief – Agency Upheld In Full; **Administrative Review: AHO Reconsideration Request received 02/20/08; Reconsideration Decision issued 03/03/08; Outcome: Original Decision Affirmed; Administrative Review: EDR Ruling Request received 02/21/08; Outcome pending; Administrative Review: DHRM Ruling Request received 02/20/08; DHRM Ruling issued 03/20/08; Outcome: Decision Affirmed.**

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8764**

Hearing Date: January 8, 2008
Decision Issued: February 6, 2008

## PROCEDURAL HISTORY

On September 20, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three days without proper authorization.

On September 24, 2007, 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 December 11, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 8, 2008, a hearing was held at the Agency's regional office.

## APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

## ISSUES

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 `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 General Services employed Grievant as a Scientist at its Facility until her removal effective September 20, 2007. She had been employed by the Agency for approximately 23 years. The purpose of her position was:

> Performs moderately complex and routine testing and may train the testing by others. Perform some method adaptation and validation. Confers with customers and gives technical guidance to others.[1]

Grievant had prior active disciplinary action. On July 20, 2007, Grievant was issued a Group II Written Notice for leaving the work site during work hours without permission.[2]

Grievant stopped reporting to work on July 24, 2007. Grievant called her Supervisor on July 24, 2007 and said she had an appointment with a counselor on August 1, 2007 and would not return to work until after that appointment. The Supervisor told Grievant that Grievant did not have any available leave and would need to submit written documentation of the reasons for her absence.

[1] Agency Exhibit 2.

[2] Agency Exhibit 18.

The Deputy Director sent Grievant a letter dated July 26, 2007 stating:

> This letter is to notify you of important facts concerning your employment. In the absence of supporting documentation, your failure to report to work constitutes a violation of DHRM policy 1.60, Standards of Conduct, "absence in excess of three days without proper authorization or a satisfactory reason".
>
> There have been multiple attempts to contact you by telephone that have been unsuccessful. You have been advised of this in writing via certified mail to make every attempt to contact you. Unwillingness or failure to work without adequate, acceptable explanation is a serious situation that may require the agency to consider your employment status. Failure to report to work as scheduled without proper notice to your supervisor, insubordination, failure to follow a supervisor's instructions and leaving the work site during work hours without permission are all unacceptable behaviors that may directly impact your employment status.
>
> If you think this information is incorrect or you wish to provide supporting documentation that would support and explain your absence, please contact me immediately [telephone number]. In the absence of such documentation, it is our intent to issue you a Group II notice, which would normally result in termination. In order to protect your employment status, please contact me within 24 hours of receipt of this letter and provide an extenuating or supporting reason as to why we should re-consider taking this action.[3]

Grievant spoke with the Deputy Director on July 30, 2007 and told him that she had a note from her doctor.

On August 2, 2007, Dr. K drafted a note regarding Grievant saying that, "[Grievant] [w]as seen in the office today and should be excused from [work] from 7/24/07 to unknown."[4]

On August 3, 2007, the Human Resources Generalist sent Grievant a letter with the subject line entitled "Important Notice Regarding Family and Medical Leave (FML)". This letter stated, in part:

> The Human Resources Office has been notified of your need to take family and medical leave due to a serious health condition that makes you unable to perform the essential functions of your job. This leave began on July 24, 2007. ***

[3] Agency Exhibit 3.

[4] Agency Exhibit 4.

> You will be required to furnish medical certification of a serious health condition. If you initiate a VSDP claim (which may be done by calling [Third Party Administrator] at [telephone number], your physician must provide medical certification to [Third Party Administrator], which will fulfill this requirement. If you do not submit a VSDP claim, or your claim is not approved by [Third Party Administrator], you will be required to provide medical certification to the agency. **If medical certification is not provided to the agency within 14 days of the date your leave begins, you will be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal.** (Emphasis Added). ***
>
> While on leave, you will be required to contact your supervisor periodically to provide information regarding your status and intent to return to work. If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you should contact your supervisor immediately to schedule your return date. If you are on disability leave, your physician needs to provide medical certification to [Third Party Administrator].
>
> You will be required to furnish re-certification relating to a serious health condition if circumstances described by the previous certification change (such as duration of absence or severity of the condition) or if you are still on leave 30 days from the previous certification. If you are on disability leave, your physician needs to provide re-certification to [Third Party Administrator] which will fulfill this requirement.[5]

Attached to the August 3, 2007 letter was a form entitled “Certification of Health Care Provider” which is also known as OMB NO. 1215-0181.

On August 13, 2007, Dr. K completed an "Attending Physician Statement" requested by the Third Party Administrator. Dr. K wrote about Grievant that she had, "Depression causing problems [with] concentration, productivity."[6] On August 29, 2007, Dr. K completed a "Return to Work Certification" required by the Department of General Services. Dr. K wrote about Grievant, "I certify that on 8/29/07, I examined [Grievant], and on the basis of my examination, this employee is able to return to full-time work and is able to perform the functions of his/her position with no restrictions, effective 9/4/07.[7]

On August 21, 2007, the Human Resources Director sent Grievant a letter stating:

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[5] Agency Exhibit 5.

[6] Agency Exhibit 7.

[7] Agency Exhibit 7.

> You were advised by certified mail dated August 3, 2007 that if your Virginia Sickness and Disability Plan (VSDP) claim was not approved by [Third Party Administrator], you were required to provide medical certification to the agency. Additionally, you were advised that if medical certification was not provided to the agency within 14 days of the date you leave began, you'll be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal. It has been 28 days since the date your leave began, and it has been 18 days since you were notified of your responsibilities under the Family and Medical Leave (FML) Act. This is the final request for medical certification that you will receive.
>
> Unless acceptable FML certification or VSDP authorization is received in our office by close of business, August 29, 2007, it is our intent to issue a Group II Written Notice for unauthorized absence. Because of previous disciplinary actions, upon the issuance of the Group II, your employment will be terminated, in accordance with DHRM Standards of Conduct Policy 1.60. If you do supply the required certifications and authorizations by this deadline, you will be eligible to return to work only after we receive a Return To Work certification from your treating physician.

Grievant called the Supervisor on August 29, 2007. She asked him if she was scheduled to work on September 3, 2007 which was Labor Day. He told her "no". Grievant responded that she would return to work on September 4, 2007.

On August 29, 2007, Grievant traveled to the Agency's building and went to the Human Resource office. She spoke with HR Generalist C and presented the completed Return to Work Certification signed by Dr. K authorizing Grievant to return to work effective September 4, 2007. HR Generalist C told Grievant that she was not sure if the document satisfied the requirements stated in the letter Grievant had received since the HR Generalist C was not involved with Grievant's claim. Grievant said she would be back to work on September 4, 2007. Grievant failed to bring the Certification of Health Care Provider form that the Agency mailed to her and expected her to return to the Agency.

Grievant did not return to work on September 4, 2007 as she had stated she would do. Grievant called her Supervisor and informed him that she would not be at work that day and that she would try to schedule a doctor's appointment. On September 5, 2007, Grievant called the Supervisor and left a message on his answering machine saying that she was unable to get a doctor's appointment on September 4, 2007 but that she had an appointment on September 5, 2007, and that she would contact staff in the Human Resource division to update them. Grievant also said that she will report to work on September 6, 2007.

Grievant was hospitalized from September 6, 2007 until September 11, 2007.[8] Grievant's daughter called the Human Resource Manager and told her that Grievant had been hospitalized. In response to the daughter's call, the Human Resource Generalist sent Grievant a letter on September 7, 2007. The letter stated:

> The Human Resources Office has been notified of your need to take family and medical leave due to a serious health condition that makes you unable to perform the essential functions of your job. This leave began on September 4, 2007.
>
> You will be required to furnish medical certification of a serious health condition. If you initiate a VSDP claim (which may be done by calling [Third Party Administrator] at [telephone number], your physician must provide medical certification to [Third Party Administrator], which will fulfill this requirement. If you do not submit a VSDP claim, or your claim is not approved by [Third Party Administrator], you will be required to provide medical certification to the agency. **If medical certification is not provided to the agency within 14 days of the date your leave begins, you will be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal.** (Emphasis Added). ***
>
> While on leave, you will be required to contact your supervisor periodically to provide information regarding your status and intent to return to work. If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you should contact your supervisor immediately to schedule your return date. If you are on disability leave, your physician needs to provide medical certification to [Third Party Administrator].
>
> You will be required to furnish re-certification relating to a serious health condition if circumstances described by the previous certification change (such as duration of absence or severity of the condition) or if you are still on leave 30 days from the previous certification. If you are on disability leave, your physician needs to provide re-certification to [Third Party Administrator] which will fulfill this requirement.

Attached to the September 7, 2007 letter was a form entitled "Certification of Health Care Provider" which is also known as OMB NO. 1215-0181.

Grievant called the Human Resource Manager on September 17, 2007 at approximately 9 a.m. and said that she had a doctor's appointment that day and intended to return to work the following day. The Human Resource Manager told Grievant she had to have a Return to Work Certification form and a FML Certification

[8] Grievant did not provide the Agency with any documents showing she was hospitalized.

form completed in order for her absence from September 4, 2007 to be authorized. The Human Resource Manager told Grievant that these forms were mailed to her on September 7, 2007. Grievant said that she had not received the forms but that she would look around and let the Human Resource Manager know if she could not find them. The Human Resource Manager offered to fax the forms to Grievant's doctor's office so that the doctor would be able to complete the forms while Grievant was at her appointment later that day.

Grievant called the Human Resource Manager later in the day on September 17, 2007. Grievant said she did not receive the FML certification form nor the Return to Work form that was mailed to Grievant on September 7, 2007. The Human Resource Manager again offered to send the forms to Grievant's doctor's office directly and Grievant said "no" because the doctor's office staff said the doctor was out of the office until September 24 and the doctor was the only one who could complete the forms. The Human Resource Manager confirmed that Grievant was talking about Dr. K. The Human Resource Manager told Grievant that whatever doctor she was seeing that day could at least complete the Return to Work form. Grievant said "no" my appointment today is with a different doctor. Grievant stated that she would come to Agency's Human Resource office around 2 p.m. to pick up the forms. Grievant did not go to the Agency's offices to pick up the forms.

On September 17, 2007, the Human Resources Director sent Grievant a letter stating:

> You were advised in a letter dated September 7, 2007 that you were required to furnish medical certification of your serious health condition on the FML Certification form for your absence that began on September 4, 2007. Additionally, you were advised that if medical certification was not provided to the agency within 14 days of the date your leave began, you would be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal.
>
> If VSDP authorization or Family & Medical Leave Certification (using the U.S. Department of Labor FML Certification form) is not received in our office by 5 p.m. on Wednesday, September 19 (15 days since your leave began) certifying your absence beginning September 4 through the return date, it is our intent issue you a Group III Written Notice for absence in excess of three days without proper authorization. Because of previous disciplinary actions, upon the issuance of the written notice, your employment will be terminated, in accordance with DHRM Standards of Conduct Policy 1.60.

On September 20, 2007, Grievant's Supervisor sent her a letter stating:

> You were advised in a letter dated September 17, 2007 that if VSDP authorization or Family & Medical Leave Certification (using the U.S.

> Department of Labor FML Certification form) was not received in our office by 5 p.m. on Wednesday, September 19 (15 days since your leave began) certifying your absence beginning September 4, 2007 you would be issued a Group III Written Notice for absence in excess of three days without proper authorization and that because of previous disciplinary actions, upon issuance of the written notice, your employment will be terminated, in accordance with DHRM Standards of Conduct Policy 1.60.
>
> You were also asked to provide any other information that the agency should consider regarding the contents of that correspondence. Since you have not contacted management in [the Division] nor Human Resources with additional information to be considered, your employment is being terminated effective September 20, 2007. ***

On September 21, 2007, Grievant called the Supervisor and asked if he had a confidential letter for her. He said "no" and Grievant hung up the telephone.

On September 24, 2007, Grievant called the Human Resources Director and said "I got the letter this morning." Grievant was referring to the September 20, 2007 letter from the Supervisor informing Grievant that her employment was terminated.[9]

Grievant's last day of work was July 24, 2007. She did not report to work on any day prior to her removal from employment effective September 20, 2007.

On October 31, 2007, Grievant met with the Second Step Respondent as part of her grievance. She presented to him a form entitled "Certification of Health Care Provider" which is also known as OMB NO. 1215-0181. Dr. K completed the form on August 29, 2007. She did not deliver the form to the Agency when she went to the Human Resource office and spoke with the Human Resource Generalist C on August 29, 2007. She forgot to take the form with her.

## 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."[10] 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

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[9] In her second step response, Grievant stated that the letter to which she was referring was a letter from the Supervisor informing her that she was removed from employment.

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

State employees are obligated to request approval for leave.[11] If the employee's agency does not approve the employee's request, the employee's absence is not authorized and the employee may be subject to disciplinary action.

"Absence in excess of three days without proper authorization or a satisfactory reason" is a Group III offense. As of September 20, 2007, Grievant have been absent from work more than three days without proper authorization and without a satisfactory reason.[12] Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, removal from employment is authorized. The Agency's removal of Grievant from employment must be upheld.

An agency's discretion to deny approval for leave can be affected by the Virginia Sickness and Disability Program, DHRM Policy 4.20, *Family and Medical Leave,* and the American's with Disabilities Act.[13]

*VSDP.* Grievant participated in the Virginia Sickness and Disability Program. Under this program, Grievant was responsible for: (1) "[m]aintaining communication with your supervisor while receiving disability benefits" and (2) "[r]eporting any changes in your disability to your agency's human resource officer and [Third Party Administrator] immediately."[14] Grievant's benefits under the VSDP ended when the Third Party Administrator closed her case effective August 28, 2007.[15]

*FMLA*. DHRM Policy 4.20, *Family and Medical Leave* provides:

> It is the Commonwealth's objective to provide eligible employees with up to 12 weeks of unpaid family or medical leave because of the birth of a child or the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes him or her unable to do his or her job.

Family and medical leave is defined as:

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[11] See DHRM Policy 4.30.

[12] The Agency's decision was based in part on a document from Grievant's doctor saying agreement to return to work on September 4, 2007.

[13] The Agency satisfied the worksite posting requirements for Family and Medical Leave as expected under 29 CFR 825.304(c).

[14] Agency Exhibit 15.

[15] Agency Exhibit 14. In any event, Grievant's short-term disability benefits would have ended upon Grievant's removal from employment.

A leave without pay (or use of an employee's accrued leave) for up to 12 workweeks during a calendar year for the reasons specified in this policy in conformance with the federal Family and Medical Leave Act (FMLA) of 1993.

Eligible full-time employees may take up to 12 workweeks (60 workdays; 480 work hours) of unpaid family and medical leave per calendar year for the following reasons:

1. the birth of a child (to be taken within 12 months of the child's birth);
2. the placement of a child with the employee for adoption or foster care (to be taken within 12 months of date of placement);
3. in order to care for a child, a dependent son or daughter over 18 years of age who is incapable of self-care because of a mental or physical disability, a spouse, or a parent who has a serious health condition that involves:
    a. in-patient care in a hospital, hospice, or residential medical care facility; or
    b. continuing treatment by a health care provider.
4. because of a serious personal health condition that renders the employee unable to perform the functions of his or her position. Agencies may request certification that the employee is unable to work at all or is unable to perform any of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act. Also, an employee who goes on leave without pay - workers' compensation may have that time counted towards his or her 12 weeks of FMLA.

A serious health condition is defined by DHRM Policy 4.20(II)(J) as:

An illness, injury, impairment or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuing treatment by a health care provider.

Grievant has a serious health condition relating to her mental health. Her condition commenced on July 24, 2007 with a probable lifelong duration.[16] She was hospitalized in September 2007. She received continuing treatment from her doctor for several months for her serious health condition.

Although the FMLA may affect the Agency's ability to determine whether to authorize Grievant's leave, it does not grant an employee immunity from disciplinary action. Employees qualifying for FMLA leave remain obligated to keep their employers informed of their status.

DHRM Policy 4.20(VIII)(a) provides:

[16] Grievant learned on August 1, 2007 that she suffered from posttraumatic stress disorder.

> The agency may require that a request for family and medical leave be supported by a health care provider's certification of the medical condition of the person affected to include the date when the serious condition began, the probable duration of the condition ….

DHRM Policy 4.20(VIII)(c) provides:

> Agencies may require an employee to report periodically during the leave period on his or her leave status and intention to return to work, and to provide subsequent re-certifications on a reasonable basis.

In Lochridge v. City of Winston-Salem, 388 F. Supp. 2d 618 (M.D.N.C. 2005), an employee submitted an untimely request for FMLA leave four days after she was suspended pending termination. She was seeking intermittent FMLA leave to begin, retroactively prior to her suspension. The employee had been terminated for violation of the City's attendance policy. The City denied the employee's FMLA request because the request was untimely and because the employee had already been suspended pending termination when she submitted the request.

Lochridge alleged that "in December 2003 and January 2004, Defendant . . . denied Plaintiff additional Family and Medical Leave time" and "failed to allow Plaintiff to complete documents for Family and Medical Leave." The Court held:

> It is well settled, however, that an employee who requests leave under the FMLA is not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." *29 U.S.C. § 2614(a)(3)(B)*; *see also 29 C.F.R. § 825.216(a)* ("An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period."). **In other words, the FMLA does not insulate employees from legitimate disciplinary action by the employer.** (Emphasis added).

The Court discussed that the employee's request for FMLA leave and the accompanying medical certification was not submitted until four days after the City suspended her pending termination due to her chronic absenteeism and her resulting poor work performance. The employee's request for FMLA leave was, therefore, not considered in the decision to terminate her since she did not make the request until after the termination process had already begun.

The Court held:

> Plaintiff's request for FMLA leave, submitted only after the City had suspended her, did not [*629] require the City to discontinue its termination proceedings against her or to afford her additional unpaid leave under the FMLA. [Citation omitted] *See, e.g., Throneberry v. McGehee Desha County Hosp., 403 F.3d 972, 978 (8th Cir. 2005)* (stating

that "the FMLA's plain language and structure dictates that, if an employer were authorized to discharge an employee if the employee were not on FMLA leave, the FMLA does not shield an employee on FMLA leave from the same, lawful discharge"); *Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 877 (10th Cir. 2004)* (stating that "if dismissal would have occurred regardless of the request for an FMLA leave, however, an employee may be dismissed even if dismissal prevents her exercise of her right to an FMLA leave"). In sum, Plaintiff has failed to raise a genuine issue of fact as to whether Defendant wrongfully denied her leave under the FMLA.

The Court also addressed the effect of an untimely submission of the necessary paperwork to request FMLA leave. The Court held:

> Alternatively, the court agrees with Defendant that Defendant was entitled to deny Plaintiffs' request for leave under the FMLA because she did not timely file her FMLA request. Plaintiff received the paperwork necessary to request FMLA leave on December 22, 2003. [Citation omitted]. This documentation included a form titled "Rights and Obligations under the Family and Medical Leave Act," which stated, among other things:
>
> > An employee requesting FMLA leave due to his/her own serious health condition . . . is required to complete a Certification of Health Care Provider Form, (hereinafter certification) as provided in the handbook under sick leave and/or FMLA leave. Final approval of FMLA leave under these circumstances is contingent upon confirmation of eligibility and proper certification, and failure to provide such certification *within 15 days of receipt of the form may jeopardize an employee's FMLA rights.*
>
> [Citation omitted] (emphasis added). Thus, even if Plaintiff had not already been placed on suspension pending termination when she requested FMLA leave, Defendant was entitled to deny Plaintiff's request for FMLA leave in light of [**28] Plaintiff's untimely request.

The Lochridge decision is consistent with the majority view of case law governing enforcement of employer “no call, no show” policies. The case of Heltzel v. Dutchman Mfg. Inc., 2007 U.S. Dist. LEXIS 93682 (N.D. In. 2007) provides another example of a court’s view of disciplinary action and the FMLA. The Court held:

> The notice requirements of the FMLA are not onerous; indeed, an employee need not expressly mention **[*23]** the FMLA in his leave request or otherwise invoke any of its provisions. *See Phillips v. Quebecor World RAI, Inc.,* 450 F.3d 308, 311 (7th Cir. 2006) (citing 29 C.F.R. § 825.303(b)). However, FMLA regulations also provide that "[a]n employer may … require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.302(d). Thus, **the FMLA does not prohibit employers from**

> **terminating employees who do not comply with an internal company policy that requires employees to call-in when they will be absent. "The fact that the absence might be related to a FMLA qualifying event does not abrogate the right of employers to know whether their employees will be coming to work on a particular day. "** *Knox v. Cessna Aircraft Co.,* 2007 U.S. Dist. LEXIS 71528, 2007 WL 2874228, *5 (M.D.Ga.,2007). And, as is the case here, "an employer's policy that requires employees to call in to work when they will be absent is clearly consistent with FMLA and its regulations because the regulations themselves require that employees give notice of the need for unforeseeable leave as soon as practicable." *Id. See Spraggins v. Knauf Fiber Glass GmbH, Inc.,* 401 F.Supp.2d 1235, 1239-40 (M.D.Ala.2005) **[*24]** (holding that FMLA allows an employer to require notice one hour before the employee's shift begins, as long as it is reasonable to expect the employee, under the individual circumstances, to give such notice). (Emphasis added).

The FMLA does not provide a basis to reverse the disciplinary action against Grievant in this case. The Agency sent Grievant several letters advising her of her obligation to inform her supervisor of her leave status. The Agency sent Grievant several letters advising her that if she did not provide medical certification to the agency within 14 days of the date her leave began, she would be considered absent without proper authorization and be subject to disciplinary action, up to and including dismissal. Grievant did not fully inform her supervisor or the Third Party Administrator of her leave status. She did not provide the Third Party Administrator with all of the necessary documents to continue her VSDP short term disability benefits. Grievant did not provide either the Agency or the Third Party Administrator with the necessary medical certification to enable her to obtain FMLA leave prior to her removal. In short, Grievant did not comply with the State requirements under the VSDP program and FMLA policy.

*Americans with Disabilities Act*. In certain circumstances, qualified individual with a disability may be able to receive relief under the Americans with Disabilities Act. An individual is considered to have a disability if that individual either (1) has a physical or mental impairment which substantially limits one or more of his or her major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. A qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirement of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."[17]

Grievant is not a qualified individual with a disability. At the time of the hearing, Grievant had not been released by her doctor to return to work. Grievant's mental health concerns were ongoing. She continues to take prescription medication as part of her treatment. Based on the evidence presented, there is no reason to believe Grievant

[17] 29 CFR § 1630.2(m).

could perform the duties of her former position or any other position at the Agency.[18] A reasonable accommodation would not enable Grievant to perform the essential functions of the position with the Agency. The Americans with Disabilities Act does not provide a basis to grant relief to Grievant in this case.

*Mitigation. 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…."[19] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. Grievant contends she did not receive several of the letters[20] from the Agency informing her of her obligations under the FML Policy. Grievant testified that her daughter lived with her for a period of time and then moved to another residence. The daughter's mail was forwarded to that other residence. Several of the Agency's letters addressed to Grievant must have been accidentally forwarded to the daughter's residence and, thus, Grievant not timely receive those letters. Although Grievant's possible delay of the receipt of some letters from the Agency may serve as a mitigating circumstance, there exist aggravating circumstances as well. On September 17, 2007, Grievant called the Human Resource Manager. The Human Resource Manager offered to fax the medical certification forms directly to Grievant's doctor. Grievant declined that offer. Grievant told the Human Resource Manager that she would come to the Agency's office to pick up the forms. Grievant did not go to the Agency's office to pick up the forms. In short, the Agency gave Grievant every opportunity to obtain the necessary forms to enable her to obtain Family and Medical leave. Grievant's failure to take advantage of those opportunities is an aggravating circumstance that would counter any mitigating circumstances in this case.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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[18] Grievant testified that she desired to return to work.

[19] *Va. Code § 2.2-3005.*

[20] In particular, Grievant contends she did not timely receive the Agency's letters dated September 7, 2007 and September 17, 2007. Grievant testified that she received the September 7, 2007 letter on September 13, 2007.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III 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 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.[21]

[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*

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Carl Wilson Schmidt, Esq.
Hearing Officer

[21] 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: 8764-R**

Reconsideration Decision Issued: March 3, 2008

**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.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant offers as new evidence an Attending Physician Statement dated August 13, 2007 and a Certification of Health Care Provider dated August 29, 2007. These documents were either submitted as exhibits in the original hearing and/or discussed as part of the evidence in the original hearing. They are not newly discovered after the date of the hearing decision and, thus, are not new evidence. Grievant's assertion that she forgot to take one of the documents to the Human Resource office, but was told she did not need to return to her car to get the document she forgot is contrary to the Agency's credible evidence.

Grievant submitted a statement, dated February 12, 2008, from an Administrative Assistant to Dr. C. The statement indicates that Grievant contacted Dr. C's office "the week of September 17 to request the completion of Attending Physician forms; however, [Dr. C] was on vacation and not available." Grievant testified to this fact during the original hearing and, thus, the statement is cumulative. The statement is not material.

Grievant submitted documents from LPC, Dr. K, and Dr. C indicating that her medical condition as of February 18 and February 19, 2008 would not prevent her from returning to work. Grievant's medical condition in February 2008 is not at issue in this grievance. On the day of the hearing, Grievant testified that she had not been released by her medical professionals to return to work and did not indicate she was able to do so at that time. Grievant's medical condition in February 2008 is not material. At most, her evidence may raise an issue with respect to the Americans with Disabilities Act. The ADA sets forth a basis for accommodation for qualified individuals with a disability. The ADA does not prohibit employers from enforcing conduct rules.[22] Assuming for the sake of argument that Grievant was a qualified individual with a disability as of the date of her removal and as of the date of the hearing, the outcome of this case would not change.

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

## 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.

[22] See, Pence v. Tenneco Auto. Operating Co, 169 Fed. Appx. 808, 2006 U. S. App. LEXIS 5734 (4th Cir. 2006). The Court held:

> Just as "the law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability," *Jones* v. *American Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999), it also follows that the ADA is not violated when an employer discharges an employee because of a mistaken perception of misconduct, even if the misconduct would have been related to a disability.

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

March 20, 2008

RE: **Grievance of Grievant v. Department of General Services**
**Case No. 8764**

Dear Grievant:

The Agency head, Ms. Sara R. Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, as advised on page 15 of the hearing decision and in the Grievance Procedure Manual, either party to the grievance may file for an administrative review within 15 calendar days from the date the decision was issued, if at least one of the following applies:

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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of the Department of Employment Dispute Resolution (EDR) to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

In the instant case, you asked the hearing officer to reconsider the decision because you had new evidence to present. The hearing officer rejected your request to modify his decision on the basis that the documents you submitted as new evidence were either submitted as exhibits in the original hearing and/or discussed as part of the evidence in the original hearing. You have not identified any Department of Human Resource Management human resource policy or UNUM Provident policy or procedure with which the hearing officer's decision is inconsistent or violates. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and what weight he placed on that evidence. The authority of DHRM is restricted to reviewing issues related to the application and interpretation of policy. Because you have not identified how any DHRM human resource policy, UNUM Provident or Department of General

Services policy was either violated or misapplied by the hearing officer in making his decision, this Agency has no basis to interfere with the application of this decision.

If you have any questions regarding this correspondence, please contact me at (804) 225-2136.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services