

Issues: Group II Written Notice (failure to follow instructions), Group I Written Notice (excessive absences), and Termination (due to accumulation); Hearing Date: 05/06/08; Decision Issued: 05/23/08; Agency: ABC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8844; Outcome: Partial Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8844**

Hearing Date: May 6, 2008  
Decision Issued: May 23, 2008

**PROCEDURAL HISTORY**

On February 1, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to produce FMLA paperwork to support her absences. On February 1, 2008, Grievant was issued a Group I Written Notice for excessive absences. Grievant was removed from employment based on the accumulation of disciplinary action.

On February 21, 2008, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 7, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 6, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 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 Virginia Department of Alcoholic Beverage Control employed Grievant as a Clerk at one of its Facilities until her removal effective February 1, 2008. Grievant did not elect to participate in the Virginia Sickness and Disability program. Grievant had prior active disciplinary action. On June 29, 2007, Grievant received a Group I Written Notice. On December 18, 2007, Grievant received a Group I Written Notice.

Grievant was absent from work from April 2, 2007 to May 29, 2007, from October 15, 2007 to November 19, 2007, and from November 26, 2007 to December 10, 2007.

On April 30, 2007, the Benefits Administrator sent Grievant a letter stating:

Our office was recently notified that you have been absent from work due to an illness or injury. According to the policy the time that you are absent will be counted towards your Family and Medical Leave entitlement for this year. We are requesting that you submit the enclosed Family and Medical Leave application and the Certificate of Health Care Provider for completion. It is a policy requirement that your leave is 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, and other appropriate facts as detailed in the enclosed Commonwealth of Virginia Family and Medical Leave Policy, Section VIII Certification of Need for Leave. **These forms need to be completed and returned to the Human Resource office within five days.**

On October 26, 2007, the Benefits Administrators sent Grievant a letter to Grievant's Post Office Box stating:

Our office was recently notified that you have been absent from work due to an illness or injury. According to the policy the time that you are absent will be counted towards your Family and Medical Leave entitlement for this year. We are requesting that you submit the enclosed Family and Medical Leave application and the Certificate of Health Care Provider for completion. It is a policy requirement that your leave is 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, and other appropriate facts as detailed in the enclosed Commonwealth of Virginia Family and Medical Leave Policy, Section VIII Certification of Need for Leave. These forms need to be completed and returned to the Human Resource office within five days.

On November 13, 2007, the Agency received a note from Doctor F dated October 29, 2007 stating:

This is to certify that [Grievant] was admitted to [locality] Psychiatric Center under my care on 10/19/07. Tentative date of discharge is 10/29/07. Patient may resume work on 11/5/07.

On November 13, 2007, the Agency received a note from Doctor G dated November 8, 2007 stating, "[Grievant] is able to return to work in one week."

On November 21, 2007, the United States Post Office returned the October 26, 2007 letter to the Agency. On November 30, 2007, the October 26, 2007 letter was resent to Grievant.

On December 13, 2007, the Agency received a note from Medical Provider P dated December 12, 2007 stating:

[Grievant] may return to work 12/13/07 without restrictions. She has been out due to medical problems from 11/27/07 to present.

On December 17, 2007, the Benefits Administrator sent Grievant a letter stating:

Our office was notified October 20, 2007 that you have been absent from work for an illness. On October 26, 2007, a FMLA packet (certified mail)

was mailed to your post office box. The packet was returned to us on November 21, 2007 due to the box been closed. After receiving the return packet, I spoke with you via phone and asked was there another address where I could resend your packet. You advise me that the post office box had been reopened and I should resend a packet to that address. I mailed (certified) another FMLA packet to you on November 30, 2007. As of today, you stated that you have not received the FMLA packet. It has been decided that your Regional Manager [name] will hand-deliver the FMLA packet to you on December 18, 2007.

According to policy, the time that you are absent will be counted towards your Family and Medical Leave entitlement for this year. We are requesting that you submit the enclosed Family and Medical Leave application and the Certification of Health Care Provider for completion. It is a policy requirement that your leave is supported by a health care provider's certification of the medical condition of the person affected to include the date when a serious condition began, the probable duration of the condition, and other appropriate facts as detailed in the enclosed Commonwealth of Virginia Family and Medical Leave Policy, Section VIII, Certification of Need for Leave. These forms need to be completed and returned to the Human Resource office within 15 days.

On December 18, 2007, Grievant signed a statement stating, "I, [Grievant], hereby a knowledge that I received a packet of FMLA paperwork on 12-18-07, ... to be completed and returned to the VABC Human Resources Department within 15 days."

On December 18, 2007, the Regional Manager met with Grievant and provided Grievant with a formal counseling letter stating, in part:

Failure to properly notify Supervisor of absences and work status:

Per the standards of conduct:

Employee should report to work as scheduled should arrange planned absences in advance to include late arrivals and/or leaving early.

Report unexpected absences as promptly as poss.

Failure to comply with instructions:

Any instructions issued by Direct Supervisor(s), Regional Managers, HR, or other representatives of the Agency.

Failure to provide documentation as requested by the Agency:

Requested documentation for FMLA has not been received for absences dating from Oct 15-Dec 13.

Doctor's notes covering absences are not submitted accurately and in a timely fashion.<sup>1</sup>

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<sup>1</sup> Hearing Officer Exhibit 1.

On January 8, 2008, the Director of Human Resources sent Grievant a letter stating:

It has come to my attention that during calendar year 2007, you were absent from work on three separate occasions, to include the following periods of time:

April 24th through May 29th (24 days)  
October 15th through November 19th (26 days)  
November 26th through December 10th (10 days)

For each period of absence, you were issued, and received, a FMLA packet, which included a letter from my staff [names] instructing you to complete and return the Medical Certification form within 15 days of receipt. The first letter, dated April 30, 2007, was mailed to you certified, and signed by you on May 25. The second letter, dated October 26, was returned by the post office, resent after [Benefits Administrator] spoke with you on the phone on November 30, and then hand-delivered to you on December 18 by your Regional Manager, [name]. As of today, we have not received the requested medical certifications, nor have we received appropriate notes from your physician(s). We have only received one physician note dated December 12, 2007, which does not provide sufficient information for us to determine if your absence from November 26 through December 10 was covered under the Family and Medical Leave Act (FMLA) of 1993. In order to determine if all three periods of absence were approved under the FMLA, we must receive the medical certifications and supporting physician notes by 3 p.m. Wednesday, January 16, 2008. If we are unable to qualify your absences as approved, you will be subject to disciplinary action, up to and including termination, for excessive absenteeism.

On January 16, 2008, the Agency received one of Grievant's Certification of Health Care Provider forms. The form was filled out by Medical Provider P. It did not mention any of the dates of Grievant's absences.

### **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."<sup>2</sup> Group II offenses "include acts and behavior which are more severe in nature

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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.”

### Excessive Absences

“Unsatisfactory attendance” is a Group I offense. Grievant was absent from work in excess of 60 work days in 2007. Such absence is excessive because it may adversely affect the Agency’s ability to conduct its operations. Although Grievant had sufficient sick leave to prevent her from being placed on leave without pay, her absences were unsatisfactory. Even though Grievant’s absences may have been excused because they resulted from illness beyond her control, this fact does not render her absence immune from being considered excessive or unsatisfactory. Grievant did not seek any of the protection that might be afforded under the Family Medical Leave Policy.<sup>3</sup> The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

### Failure to Follow Instructions

“Failure to follow a supervisor’s instructions” is a Group II offense. The Agency contends Grievant failed to comply with a supervisor’s instruction because she failed to provide the FMLA paperwork within established deadlines and did not provide all the requested information. The Agency has not established a Group II level offense. In this case, Grievant ultimately complied with the instruction that she have her doctor provide the Certificate of Health Care Provider. Grievant had no control over what information the doctor wrote in the certificate and cannot be disciplined for the doctor’s failure to fully complete the form. Grievant can be disciplined, however, for the length of time she took to see that the form was properly presented to her medical provider. Grievant testified that she did not understand the FMLA and did not intend to seek benefits under the FMLA. She intended to rely upon her existing sick leave and annual leave to excuse her absences from work. Grievant did not attach any material significance to the Agency’s request until sometime in December 2007 or possibly when she received the Director of Human Resources January 8, 2008 letter threatening disciplinary action for failure to produce the FMLA certification form. Grievant was able to have her medical providers draft doctor’s notes but she neglected to have them complete the FMLA certification form. Grievant was first provided with the FMLA paperwork in April 2007. She returned to work on May 29, 2007 and continued to work until October 15, 2007. During that approximately four and a half month period, Grievant made little effort to provide the Agency with the FMLA certification form. Grievant made no effort to inform the Agency that she did not intend to claim FMLA leave and that she believed the form was unnecessary. When Grievant return to work in November 2007, she was able to have her medical providers submit notes excusing her absence. She offers no explanation why she was not also able to have her medical providers submit the FMLA

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<sup>3</sup> Indeed, Grievant specifically rejects the benefits available under the FMLA.

certification form that she had received from the Agency. In short, Grievant should have more timely responded to the Agency's request for the FMLA certification form. Her failure to do so was inadequate or unsatisfactory job performance. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

This case raises the question of whether an agency may require an employee to comply with an instruction even though that instruction may not be necessary. Grievant testified that she did not understand FMLA and did not wish to apply for FMLA benefits. Grievant had adequate sick and annual leave balances to enable her to avoid being placed on leave without pay status. As long as the instruction is not contrary to law or policy or in furtherance of some improper motive, an agency may instruct an employee to perform duties or actions that might not be necessary or logical under the circumstances. In this case, the Agency instructed Grievant to present a form to her medical providers for completion. Agency managers were motivated by the belief that they needed the form to properly administer the DHRM Family Medical Leave Policy. Grievant should have immediately complied with the first instruction or explained to the Agency why the instruction was not necessary. She did neither. It was reasonable for the Agency to expect Grievant to immediately comply with its instruction under the facts of this case. Grievant failed to do so thereby justify the issuance of disciplinary action against her.

#### Accumulation of Written Notices

Upon the accumulation of four active Group I Written Notices, an employee may be removed from employment. In this case, Grievant has accumulated Four Active Group I Written Notices. The Agency's decision to remove her from employment must be upheld.

#### 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...."<sup>4</sup> 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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<sup>4</sup> *Va. Code § 2.2-3005.*



## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for excessive absences is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice for failure to produce FMLA paperwork is **reduced** to a Group I Written Notice. Based on the accumulation of disciplinary action, Grievant's removal from employment 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>5</sup>

[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

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.