Issues: Group I Written Notice (unsatisfactory attendance), Group II Written Notice (failure to follow instructions), Termination, Assignment of Duties, Harassment, Retaliation; Hearing Date: 08/04/08; Decision Issued: 11/05/08; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8779, 8783, 8784; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: DHRM Admin Review Request received 11/20/08; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8779 / 8783 / 8784

Hearing Date: August 4, 2008
Decision Issued: November 5, 2008

PROCEDURAL HISTORY

On July 25, 2007, Grievant timely filed a grievance to challenge the Agency's reassignment of her to another position.

On October 11, 2007, Grievant received a Group I Written Notice of disciplinary action for accumulation of unplanned leave. On October 11, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. Grievant was removed from employment based on the accumulation of disciplinary action. On October 26, 2007, Grievant timely filed grievances to challenge the Agency's disciplinary actions against her.

The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On February 19, 2008, the EDR Director issued EDR Ruling Number 2008-1932, 2008-1933, and 2008-1934 consolidating these grievances for a single hearing. On June 2, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 4, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Witnesses

ISSUES

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 Grievant's temporary reassignment was intended as punishment?

6. Whether the Agency harassed and 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 to show that the Agency retaliated, harassed, and disciplined her by moving her temporarily to another position. 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 Licensed Practical Nurse (LPN) at one of its facilities. Grievant had been employed by the Agency for approximately six years prior to her removal effective October 11, 2007. Other than the facts giving rise to disciplinary action, Grievant's work performance was satisfactory to the Agency.

Grievant had prior active disciplinary action. On February 5, 2007, Grievant received a Group I Written Notice for having unplanned leave. On February 7, 2007,

Grievant received a Group I Written notice for using non-therapeutic language in the workplace.

On March 20, 2007, Grievant's doctor completed a "Certification of Health Care Provider (Family and Medical Leave Act of 1993)" form indicating that Grievant had a chronic medical condition relating to depression whose probable duration was "unknown".[1]

In April 2007, Grievant was asked by the Agency to submit a list of the medications she was taking. She provided a list on April 9, 2007. Agency managers were concerned that Grievant was not taking on a daily basis medication that her doctor had prescribed for her to take on a daily basis. The Agency expected an employee who was a LPN and was involved in the treatment of patients to take medication as prescribed. Agency managers were concerned about how her work performance may be affected by her failure to take medication as prescribed. As a result, the Agency instructed Grievant to participate in an Employee Assistance Program and transferred her to another position in administrative support with the same base salary and benefits but without the responsibility to work with patients.[2] Because Grievant was no longer working in a building housing patients and providing services to those patients, she was not eligible to receive a shift differential. Once the Agency was confident in Grievant's ability to provide services to patients, she was moved to a building with patients and restored her responsibility to provide patient care. This move occurred June 21, 2007.

On July 5, 2007, the Agency notified Grievant that she was qualified for FMLA leave beginning on March 30, 2007 with leave on an intermittent basis and ending on an "unknown" end date. The memorandum to Grievant stated that,

> You will be required to furnish medical certification of a serious health condition. If required, you must furnish certification … as required by your supervisor (must be at least 15 days after you are notified of this requirement) or we may delay the commencement of your leave until the certification is submitted.
> ***
> You will be required to furnish recertification relating to a serious health condition. (Explain below, if necessary, including the interval between certifications as prescribed in § 825.308 of the FMLA regulations). As required by your supervisor.[3]

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[1] Grievant Exhibit 1, pages 14 through 16.

[2] The Agency argued it entered into an agreement with Grievant regarding certain terms of her behavior. Grievant denies entering into an agreement. Although she signed the document, she contends it was not pursuant to her consent. The Hearing Officer construes the document not as an agreement but rather as a management instruction to Grievant. Grievant was obligated to comply with the terms of the document regardless of whether it was a contract or merely an instruction.

[3] Agency Exhibit 16.

DHRM Policy 4.20 defines serious health condition 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.

The Agency had a leave policy requiring employees to obtain doctor's excuses to justify their use of sick leave. If Grievant presented a doctor's note for an absence, the absence would not be counted by the Agency in determining whether Grievant's absences from work were excessive. On some occasions, Grievant was absent from work for reasons not relating to her intermittent depression. For example, she was involved in an automobile collision that may have resulted in some absences from work. The Supervisor wanted to determine those instances for which Grievant was claiming sick leave for intermittent depression under the FMLA or for reasons other than FMLA qualifying leave. The Supervisor spoke with Grievant to describe the information she needed and also sent Grievant memoranda supplementing her oral instructions for information.

On July 12, 2007, the Supervisor sent Grievant a memorandum stating:

> [Grievant] please complete leave slips today for the following dates. Please indicate on the leave slip any time called in under [Family Medical Leave].
>
> <u>April</u>
>
> 3 AT
> 5 FP
> 10 SP
> 13 CT
> 18 AT 2.0
>
> <u>May</u>
>
> 7 SP
> 11 AT 3.0
> 17 RT
>
> <u>June</u>
>
> 2 CT
> 3 AT
> 26 CT

Grievant did not respond to the Supervisor's memorandum.

On August 1, 2007, the Supervisor sent Grievant and memorandum stating:

[Grievant] as first requested July 12, 2007 please complete leave slips for the following dates. Please indicate on the leave slips any time you called in under the [Family Medical Leave Act].

April

3 AT
5 FP
10 SP
13 CT
18 AT 2.0

May

7 SP
11 AT 3.0
17 RT

June

2 CT
3 AT
26 CT

Additionally, please complete leave slips for the following dates in July. Again indicate on the leave slips any time that you called in under the [Family Medical Leave Act].

July

13 AT
16 AT
17 AT
26 CT (2 hours)
27 AT
30 AT
31 AT

Please provide all requested leave slips and any doctor's notes you have to me by 3:30 p.m. on August 3, 2007. This information is needed to substantiate your unplanned leave.

Grievant was presented with the August 1, 2007 memorandum but refused to sign it. Grievant did not provide the requested information.

On August 10, 2007, the Supervisor sent Grievant a memorandum stating:

> This correspondence is a follow-up to the meeting we had on July 12, 2007 and August 1, 2007. On these dates, I informed you that I had received notification that your Family Medical Leave (FML) was approved. I explained that I needed to substantiate your unplanned leave. I instructed you to provide me leave slips for all of the dates that you were claiming under FMLA. I gave you a list of dates.
>
> On July 12, 2007, I instructed you to provide the leave slips to me prior to leaving for your shift. You informed me that you would get the slips to me, but you wanted to check your records first.
>
> The following week I spoke with you on the telephone. I reminded you that I needed the requested documentation. You verbalized that you would get the requested documentation to me.
>
> On August 1, 2007, I instructed you to provide all the requested leave slips and any doctor's notes to me by 3:30 p.m. on August 3, 2007. As of today, I have not received the requested documentation.
>
> The expectation is that you will follow supervisor's instructions. I am affording you until August 16, 2007 at 3 p.m. to provide me with the requested information. Failure to provide the requested information will negatively impact your unplanned leave balance. Additionally, I will recommend a group II Standard of Conduct for failure to follow supervisor's instructions.
>
> If there is anything I can do for you, please do not hesitate to contact me.[4]

Grievant did not provide the Supervisor with the requested information.

On September 24, 2007, the Supervisor presented Grievant with a memorandum stating:

> This correspondence is to inform you that you are exhibiting an increased pattern of absence. This is a concern, in as much, I am responsible for the well-being of staff and patients. As a reminder when your family medical leave (FMLA) was approved, documentation as requested by your supervisor to validate your absences was a requirement. I have informed

[4] Agency Exhibit 15.

> you in previous meetings, I need all leave slips with identification of time used under FMLA for time/date missed in August and September 2007.
>
> Please provide me with documentation from your physician to validate usage of these absences under FMLA by September 28, 2007 @ 7 a.m. (notes and leave slips for time/dates missed under FMLA).
>
> My expectations are that you will follow supervisor's instructions. Failure to provide the requested information may negatively impact your unplanned leave balance. Additionally, failure to comply as requested may result in progressive disciplinary action in accordance with the standards of conduct.[5]

Grievant only brought in one doctor's note regarding her absences.[6] She did not indicate on her leave slips which absences were FMLA related. Grievant did not inform the Supervisor as to the reason why she did not produce doctor's notes as requested.

The Supervisor testified that she was aware Grievant did not need a doctor's note for every absence.

CONCLUSIONS OF POLICY

Grievant's job responsibilities were altered from working in a building providing direct care to patients to another building without patient care responsibilities. The Agency moved Grievant because of its concerns about her usage of medication and its concerns for patient safety. The Agency acted in accordance with its authority to dictate the duties of employees. The Agency did not move Grievant for any improper or prohibited purpose.

When Grievant was providing direct care to patients, she was entitled to receive a shift differential under Agency policy 054-05. When Grievant's job duties were changed so that she did not provide direct care to patients, she was no longer eligible under the Agency's policy for a shift differential. The Agency was not obligated to pay Grievant a shift differential under its policies. Grievant's request for relief must be denied.

Grievant contends the Agency improperly changed her job duties as a form of punishment and harassment.[7] Grievant offered no credible evidence to support her

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[5] Agency Exhibit 16.

[6] The Supervisor testified that Grievant brought in the note sometime in March 2007.

[7] Grievant asserted that she was moved by the Facility Director after she made certain comments to him that he interpreted as offensive. Grievant's assertion is not credible.

allegation.[8] The Agency's concerns regarding Grievant's ability to provide direct care services were appropriate. For example, Agency managers were concerned that Grievant was taking medication for her mental health that was supposed to be taken daily. Grievant was not taking her medication as prescribed and the Agency was concerned about Grievant's fitness to perform her duties. Also, Grievant was required to participate in the Employee Assistance Program. The Agency's decision to move Grievant was well within its management discretion and not intended as disciplinary action. Once Grievant demonstrated she was able to provide direct care services to patients, the Agency restored her direct care duties.

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."[9] 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."

Group I Written Notice for Unplanned Leave

Facility Policy 053-19 governs attendance at the Facility to ensure that services are provided to clients at the Facility by applying a uniform attendance policy to all employees. Unplanned leave is defined as a time when an employee is scheduled to work but is absent without a signed leave slip approved in advance.

An employee who wishes to use sick leave must comply with a management request for a physician's verification of the need to use sick leave. At the accumulation of 65 hours of unplanned leave, the employee may be issued a Group I Written Notice, after an audit is done by the Human Resource staff.

Grievant had accumulated 195.1 hours as of September 28, 2007 of unplanned leave thereby justifying the issuance of a Group I Written Notice.

Group II Written Notice for Failure to Follow Supervisor's Instructions

Failure to follow a supervisor's instructions is a Group II offense. Grievant was given several instructions by the Supervisor. The Supervisor had the authority to make several of those instructions. She did not have the authority under law to make at least one instruction. Grievant was only obligated to comply with the lawful instructions.

[8] For example, Grievant complained of receiving anonymous notes making inappropriate comments about her. No credible evidence was presented showing Agency managers participated or sanctioned such behavior. When the matter was brought to the Facility Director's attention, he sent a memorandum to staff reminding them of their obligation to remain professional in the workplace.

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

The Supervisor gave Grievant at least three instructions. First, Grievant was instructed to identify on her leave slips which leave Grievant claimed as FMLA leave. The Supervisor knew that FMLA leave could not be counted as unplanned leave under the Agency's attendance policy. The Supervisor needed to know what leave Grievant intended to claim as FMLA leave so that she could calculate Grievant's unplanned leave balances. Grievant did not comply with this instruction thereby justifying the issuance of a Group II Written Notice.[10]

Second, the Supervisor's instruction was for Grievant to submit doctor's notes (by August 3, 2007) for her absences other than those claimed by Grievant as FMLA leave. Although Grievant was certified for FMLA intermittent leave for depression, she was obligated to provide doctor's notes for absences (such as missing work due to flu) that did not related to her FMLA leave. The Supervisor explained this to Grievant during their conversations. The Supervisor referenced this instruction to Grievant in one of her memos to Grievant although the reference is not clearly delineated. Grievant failed to comply with this instruction. She did not provide doctor's excuses for any absence other than her absences for an FMLA protected reason.

Third, the Supervisor instructed Grievant to produce doctor's excuses to justify Grievant's absences for FMLA protected reasons. The Supervisor lacked the authority under law to ask for doctor's excuses for absences that would otherwise be protected under the FMLA. Grievant was not obligated to comply with this instruction and cannot be disciplined for failing to comply with that instruction.[11]

One of the functions of obtaining a medical certification for an intermittent medical illness is that it enables the employee to avoid having to obtain a doctor's note to excuse each absence under the FMLA. For example, an employee with depression may experience symptoms of depression that prevent him or her from going to work but not find it necessary to obtain medical treatment from a doctor in the doctor's office. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown.[12]

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[10] Grievant testified that she marked "FMLA" next to those times she was claiming the reason for absence related to FMLA. Grievant did not provide any leave slips to support this allegation. The Agency denies Grievant's assertion and that is why the Supervisor met with Grievant to ask for Grievant to identify the days she was claiming FMLA leave.

[11] The Agency presented evidence showing that during the Step Process the Facility Director instructed Grievant to obtain a medical recertification from her physician. The Facility Director specifically used the word "recertification". His instruction was clear, yet Grievant failed to comply with that instruction. At the time of that instruction, however, Grievant had already been removed from employment and thus that instruction would not form a basis for disciplinary action in this grievance.

[12] 29 CFR § 825.302(a).

There is a difference between asking an employee to obtain a doctor's excuse for a particular date of absence such as one relating to intermittent depression and for an FMLA medical recertification. The latter would involve an evaluation by a medical provider to establish continuing eligibility for benefits under the Family Medical Leave Act and possibly completing FMLA paperwork. An FMLA recertification would be prospective in nature and possibly contain an ending period. The former, an absence due to intermittent depression, may involve collecting information from a patient about what happened to the patient on a particular day prior to the appointment. This may not necessarily involve filling out required FMLA forms. In addition, under DHRM Policy 4.20, documents relating to a medical recertification must be maintained in separate files and treated as confidential medical records except that supervisors may be informed regarding necessary restrictions on work duties and necessary accommodations. Doctor's notes, however, may be given directly to a supervisor.

In this case, the Supervisor instructed Grievant to provide doctor's notes to justify her FMLA protected absences. In other words, she treated absences by Grievant for intermittent depression the same as absences for being sick for other reasons. Although the Supervisor testified she knew she could not require a doctor's note from Grievant for an FMLA qualifying absence, one of her written instructions appears to impose such a requirement. Because the Supervisor instructed Grievant to provide doctor's notes for her FMLA qualifying absences, Grievant was not obligated to follow that instruction.

Harassment and Retaliation

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, natural origin, age, sex, religion, disability, marital status or pregnancy." Grievant contends that she was subject to harassment by the Agency. No credible evidence was presented to suggest that the Agency took actions against Grievant because of her race, color, national origin, age, sex, religion, disability, marital status or pregnancy.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[13] (2) suffered a materially adverse action[14]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the

[13] *See* Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[14] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[15]

Grievant engaged in protected activities by filing grievances challenging her prior disciplinary actions. Grievant suffered a materially adverse action by being transferred to a new position and Grievant received two group notices. Grievant has not established a connection between her protected activities and the materially adverse actions. The Agency moved Grievant because of its concerns about the medications she was taking and whether she was complying with her doctor's instructions regarding medications. The Agency issued disciplinary action to Grievant because she accumulated excessive unplanned leave and failed to comply with her Supervisor's instructions.

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…."[16] 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. The Agency's evidence and in particulate the testimony of the Supervisor was confusing and sometimes contradictory. The Supervisor testified that she intended to have Grievant go to the doctor because she wished to know whether Grievant's medical condition remained the same. Thus, it would appear the Supervisor was asking Grievant to obtain a medical recertification under FMLA. None of the Supervisor's written requests, however, mention "recertification." Indeed, the Supervisor's memos to Grievant suggest

[15] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

[16] *Va. Code § 2.2-3005.*

the Supervisor is asking Grievant for a doctor's excuse for each day Grievant was absent while taking FMLA protected leave.

The Agency's written notice is also problematic. It states that Grievant is being disciplined for failure to follow supervisor's instructions. In parenthesis, however, it lists only one of the instructions Grievant failed to follow, namely, "(failed to provide requested documentation from your physician to validate your absences under the family medical leave act – FMLA)." The documents requested of Grievant were doctor's excuses. It is clear from the Supervisor's memos to Grievant that the Supervisor intended to discipline Grievant for failure to follow all of the Supervisor's instructions not just one of them. The written notice cannot be construed to exclude the other instructions Grievant failed to follow. Grievant had adequate notice that the Agency believed she should be disciplined for failing to identify FMLA leave on her leave slips.

When these factors are considered, there exists a sufficient basis to mitigate the disciplinary action from a Group II Written Notice to a Group I Written Notice for inadequate or unsatisfactory job performance.

Accumulation of Disciplinary Action

Upon the accumulation of four Group I Written Notices, an employee may be removed from employment under the Standards of Conduct. In this case, Grievant has four active Group I Written Notices and, thus, the Agency's removal must be upheld.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for the accumulation of unplanned leave is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice is **reduced** to a Group I Written Notice. Grievant's removal from employment based on the accumulation of disciplinary action is **upheld**. Grievant's request for relief regarding her temporary reassignment, and for harassment and retaliation is **denied**.

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.[17]

[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

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