Issues: Group I (failure to follow instructions), Group II (failure to follow instructions), Group II (failure to follow instructions), Suspension, Leave Without Pay, Transfer, Hostile Work Environment, and Retaliation; Hearing Date: 06/15/09; Decision Issued: 06/22/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9098, 9099, 9100, 9101; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 07/10/09; EDR Ruling #2010-2371 issued 01/19/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/07/09; DHRM Ruling issued 02/02/10; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9098 / 9099 / 9100 / 9101

Hearing Date: June 15, 2009
Decision Issued: June 22, 2009

PROCEDURAL HISTORY

Grievant filed a grievance on September 15, 2008 seeking removal of adverse documentation, removal of a leave restriction, reverse leave without pay, and a lateral transfer. On September 30, 2008, Grievant received a Group I Written Notice for failing to report to work as instructed. On November 21, 2008, Grievant received a Group II Written Notice with a two day suspension for failure to obtain prior approval for an absence. On December 11, 2008, Grievant received a Group II Written Notice with a five work day suspension for failure to report to work as scheduled as a repeat offense.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On April 8, 2009, the EDR Director issued Rulings 2009-2242 and 2009-2268 qualifying and consolidating the matters for grievance. On May 14, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 15, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 the Agency failed to comply with State policy?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievant has the burden of proof to show that the relief she seeks should be granted. 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 Corrections employs Grievant as a Probation Officer at one of its facilities. The purpose of her position is: "Supervise adult offenders, conduct investigations, and document activity."[1]

Grievant has chronic breathing problems. She has asthma. She requires the use of a breathing inhaler. Agency managers were aware of Grievant's breathing condition and permitted her to use her breathing inhaler without restriction.

Grievant's medical provider completed the Certification of Health Care Provider form for Family and Medical Leave Act of 1993. The medical provider described the

[1] Agency Exhibit 5.

medical facts regarding certification as "asthma". The form was completed as of June 20, 2008. The medical provider added in a separate note, "She is not disabled."

On July 1, 2008, the Benefits Managers sent Grievant and e-mail stating, in part:

> If your medical condition is affecting your ability to come to work and perform the duties of your position, then you are correct to contact [the Third Party Administrator]. The problem seems to be that your doctor has already decided that you are not disabled. Perhaps it may be better for the doctor to submit the medical information to the [Third Party Administrator] so they can make a decision.

On July 25, 2008, the Benefits Manager sent Grievant a letter indicating that:

> This is a follow-up to our conversation on July 19, 2008. As we discussed, you have used over 140 hours of leave this year, and your remaining leave balances are considerably low. This puts you in a very serious situation as further absences may subject you to the disciplinary action process.
>
> As I explained, it was my intention to assist you by certifying your absence is related to your medical condition as Family and Medical Leave; however, your medical provider has indicated clearly that you are not incapacitated and that the frequency of future episodes is unknown. In addition, you will not qualify for short-term disability because your medical provider has clearly indicated that you are not disabled.
>
> State leave policies allow the use of leave time for income replacement at the discretion of the agency. Notifying management of your desire to use leave does not mean it will automatically be approved. In addition, absences related to medical conditions must be documented. You will be asked to provide a doctor's note in the future when you are absent due to a medical condition. As we discussed, the doctor's note must stipulate that you are being treated for a condition that makes you unable to come to work, and provide the duration of the condition. The use of leave time for absences that are not pre-approved will not be allowed except in extreme and extenuating circumstances.
>
> This situation is critical for you and for [the Facility]. Your attendance is necessary in order for you to be a contributor to the agency's public safety mission. This letter is to notify you that [you] have been placed on leave restriction for the remainder of the current year, ending on January 9, 2009. Leave restriction means that you will only be allowed to use annual leave, overtime leave, or compensatory leave that was approved by management prior to the implementation of this restriction.

> Absences that may qualify under the family and Medical Leave Act and/or the Virginia Sickness and Disability Program should be discussed with the Human Resources Office. If you have any questions please contact me ….[2]

On September 8, 2008, Grievant called the Deputy Chief and indicated she would not be at work. Grievant was absent from work because her mother's house had been burglarized and Grievant was providing assistance to her mother. Because Grievant had not received prior approval for leave on September 8, 2008, the Agency considered her on leave without pay status for missing eight hours of work scheduled for September 8, 2008. Grievant received a formal written counseling advising her of the Agency's expectation "to be at work as scheduled and to request leave approval prior to taking leave."

On September 26, 2008, Grievant attended training at a location away from her main office. Although the training was scheduled to last or the entire day, it ended at noon. At 1:57 p.m., the Chief spoke with the Trainer who confirmed that the training had ended at noon. At 2:26 p.m., Grievant called the Chief. She told the Chief she had taken her scheduled lunch break from noon to 1 p.m. and her vehicle was stuck in traffic. The Chief instructed Grievant to report to the office. Grievant repeated that her vehicle was stuck in traffic. The Chief again instructed Grievant to report the office.

At approximately 2:54 p.m., Grievant called the Deputy Chief and left a voice message that she was trying to get to the office after training but due to traffic at the Tunnel she had to take a different route to work. She added that due to the time of day, it was not beneficial for her to drive all the way to the Office and then leave to go home. She indicated she would be using leave and going home. Grievant did not report to the Office that day. She was not authorized or approved to use leave.

Grievant was late to work on October 29, 2008. She was counseled in writing by the Deputy Chief that the, "next time you arrive late, the actual time will be accounted for as leave without pay."[3]

On November 12, 2008, Grievant called at 6:15 a.m. and left a voice message on the Deputy Chief's telephone extension. Grievant stated:

> This is [Grievant]. Just a reminder in case you forgot, I won't be in today. I'll make sure I'll bring you the MD's note from [the hospital], just in case you forgot."

The Deputy Chief attempted to contact Grievant at her home and on her cell phone. Grievant did not answer the calls so they Deputy Chief left messages asking

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[2] Grievant Exhibit 5.

[3] Grievant Exhibit 22.

Grievant to contact him. Grievant did not respond on November 12, 2008. Contrary to Grievant's assertion, she had not given the Deputy Chief prior notice that she would not be at work on November 12, 2008. She had not requested to take leave on that day and had not been authorized or approved to use leave on November 12, 2008.

On November 13, 2008, Grievant presented a doctor's note to the Deputy Chief stating, "[Grievant] was at the [hospital] 11-12-08 with her brother who had surgery."

On November 13, 2008, Grievant reported to work 30 minutes late because she had a flat tire on her vehicle. On November 14, 2008, she presented a statement from the repair shop showing that she paid to have her flat tire repaired.

The Agency placed Grievant on leave without pay for eight hours on November 12, 2008 and 1/2 hour on November 13, 2008.

On November 19, 2008, Grievant met with the Deputy Chief and another manager. After the meeting ended, Grievant returned to her office. The Deputy Chief heard yelling and screaming coming from Grievant's office and walked to her office. He observed Grievant crying and upset. The Deputy Chief asked Grievant, "Are you going to be okay?". Grievant responded in a loud voice, "You all don't understand the amount of stress I'm under!" The Deputy Chief told Grievant she would be allowed to leave the office for the remainder of the day. Grievant left around 12:30 p.m.

On November 20, 2008, at approximately 7:15 a.m., Grievant called the Deputy Director and informed him that she was still upset about the meeting held on November 19, 2008. She stated that she would not be reporting to work and was going to seek help by way of the Employee Assistance Program. The Deputy Chief authorized Grievant to attend the EAP for two hours.[4] Grievant made no further contact with the Deputy Chief on November 20, 2008 and did not report to work that day.

On November 21, 2008, Grievant reported to work and presented a note from a medical provider regarding her appointment with the EAP. She also presented a note from her asthma doctor indicating that she was seen in the doctor's office on November 20, 2008.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."[5] Group II offenses "include acts and behavior that are more severe in

[4] The Agency allowed Grievant one half hour to drive to the appointment, one hour for the appointment, and one half hour to drive from the appointment location to the office.

[5] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

nature and are such that an accumulation of two Group II offenses normally should warrant removal."[6] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[7]

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…."[8] 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.

DHRM Policy 4.30 provides:

> **A. Agency approval necessary for all leaves of absence**
> Before taking a leave of absence from work, whether with or without pay, employees should request and receive their agencies' approval of the desired leave.
>
> **B. Employee requests for leave**
> 1. Procedure for requests
> a. Employees should request leaves of absence as far in advance of the desired leave as practicable.
> b. Employees also should submit requests for leaves of absence in accordance with the specific requirements set forth in the respective leave policies, and which may be set forth in their agencies' procedures for requesting leaves.
>
> 2. Special circumstances
> If an employee could not have anticipated the need for a leave of absence, the employee should request approval for the leave as soon as possible after leave begins. In reviewing the request for approval, the agency should consider, among other things, the circumstances

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[6] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[7] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

[8] *Va. Code § 2.2-3005.*

necessitating leave and whether the employee could have anticipated the need.

C. Agency action on requests for leaves of absence

1. When practicable, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for a leave of absence for the time requested by the employee, except that compensatory and overtime leave may be scheduled by the agency at a time convenient to agency operations.

2. If the time requested for a leave of absence conflicts with agency operations, the agency has the discretion to approve the employee's request for an alternate time.

D. Sufficient accrued leave

1. Agencies may not approve paid leaves of absence to be taken in a pay period in which an employee does not have sufficient accrued leave to cover the absence.

2. Employees are responsible for knowing the amount of accrued leave to which they are entitled and that they have earned. Employees will be required to reimburse their agencies for time taken off from work if they did not have sufficient accrued leave to cover such time off. Reimbursement may be in the form of money or annual, sick, compensatory, or overtime leave.

E. If agency denies request for leave of absence

If an agency does not approve an employee's request for leave, but the employee still takes the requested time off from work, the employee may be subject to the actions listed below.

• the absence will be designated as unauthorized;

• the employee will not be paid for the time missed;

• because the employee has experienced Leave Without Pay, he or she will not accrue annual or traditional sick leave for the pay period(s) when the absence occurred; and

• the agency may also take disciplinary action under Policy 1.60, Standards of Conduct.

DHRM Policy 4.57 provides, **"**Employees should request [sick leave], when feasible, prior to its use in accordance with agency procedures." This policy also provides, "Employees should request the use of [Family Personal] leave in accordance with agency procedures prior to its use. Supervisors should approve the leave unless agency work demands require the employee to work during the requested time."

Group I Written Notice

Failure to follow a supervisor's instruction and failure to follow written policy are Group II offenses. The Chief was a supervisor of Grievant. The Chief instructed Grievant to report to the Office. Grievant understood the instruction but chose not to comply with that instruction. Instead of charging Grievant with a Group II offense, the Agency issued her a Group I Written Notice. The Agency has presented sufficient evidence to support the issuance of that written notice.

Grievant argues that the traffic delay was justification to disregard the Chief's instruction. The Agency presented evidence of another employee who attended the training with Grievant. That employee also encountered traffic delays but was able to return to the office. Grievant's decision to disregard the Chief's instruction was for her own convenience and not because of a necessity or special circumstance. There is no basis to mitigate the disciplinary action.

Group II Written Notice Issued November 21, 2008

Grievant was absent from work on November 12, 2008. She went to the hospital to be with her brother who was having surgery. No evidence was presented to suggest Grievant's absence resulted from her brother needing emergency surgery. The record suggests Grievant was aware of her brother's need for surgery as early as October 2008 although she may not have been aware of the date for the surgery. Grievant did not obtain prior approval from the Deputy Chief to be absent from work. Grievant failed to comply with a supervisor's instruction and written policy to obtain approval prior to being absent from work. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, the Agency may impose a suspension of up to 10 workdays. In this case, Grievant received a two workday suspension which must be upheld. No mitigating circumstances exist to reduce the disciplinary action.

Grievant contends she gave the Deputy Chief notice of the need to take leave. Grievant did not testify at the hearing. The Deputy Chief testified credibly that he had not received any notice from Grievant. Grievant's assertion fails.

Grievant's tardiness on November 13, 2008 is a special circumstance in which Grievant could not have anticipated the need for a leave of absence. It is unreasonable to expect Grievant to jeopardize her safety and drive to work with a flat tire. The Agency's denial of one half hour of leave on November 13, 2008 must be reversed.[9]

Group II Written Notice Issued December 11, 2008

[9] The record suggests Grievant had 14.3 hours of available annual leave as of November 9, 2008.

Grievant was absent from work on November 20, 2008. She obtained approval to be absent for two hours that day. She did not obtain approval to be absent for the other six hours of her work schedule. No evidence was presented to explain whether her appointment with the asthma doctor was the result of an emergency. It was not unusual for Grievant to visit the doctor for asthma. No evidence was presented to describe the length of her appointment with the asthma doctor and what she did during the six hours not devoted to the EAP visit. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. No mitigating circumstances exist to reduce the disciplinary action.

Family Medical Leave

Grievant contends that the Agency failed to comply with the Family Medical Leave Act by taking disciplinary action against her. Grievant's argument fails. Grievant was not disciplined for taking medically-necessary leave. Grievant was disciplined for failing to follow the Agency's procedures to obtain approval to take medically-necessary or other leave. The Family Medical Leave Act does not prohibit the Agency from enforcing its policies and procedures governing the approval of leave requests. No evidence was presented showing that Grievant's medical condition rendered her incapable of complying with the Agency's expectations of notification to take leave.

Leave Restriction

Grievant contends the Agency should not have placed her on leave restriction. This issue did not qualify for hearing. Grievant contends the Agency lacked a written policy entitled “Leave Restriction” and, thus, it could not discipline Grievant for failing to comply with a nonexistent policy. This argument fails. The Agency’s leave restriction is actually nothing more than notifying Grievant that it will fully enforce DHRM policies governing the taking of leave. The Agency required Grievant to obtain prior approval for leave. This is consistent with DHRM Policies governing leave. The Agency's leave restriction, however, must be in accordance with State policy such as accounting for “special circumstances” when prior notice may not be a reasonable expectation.

Absence on September 8, 2008.

Grievant was placed on leave without pay status because she was absent from work on September 8, 2008 without having obtained prior approval from a supervisor. The reason Grievant was absent from work was because her mother's house was burglarized and Grievant wished to provide assistance to her mother.

Grievant had an annual leave balance of approximately 30.7 hours as of September 8, 2008. Grievant's absence from work on September 8, 2008 was a special circumstance in which Grievant "could not have anticipated the need for a leave of absence." As such she was only obligated to notify the agency of the need for leave "as soon as possible after leave begins". Grievant did so thereby complying with DHRM

Policy 4.30. The Agency's denial of Grievant's leave on September 8, 2008, must be reversed. The Agency must adjust Grievant's leave records to show approval for leave taken on September 8, 2008 and reverse her leave without pay status for that pay period.

Reasonable Accommodation

Grievant contends she is a qualified individual with a disability under the Americans with Disability Act. She seeks a flexible work schedule.

One of the first questions to be answered is whether a person has a disability. 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. Under the first option, "[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity."[10] "Major life activities[11] mean functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[12] An individual must also show that the limitation on a major life activity is substantial.[13] "[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term." The existence of a disability must be determined on a case-by-case basis.[14]

An agency must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the Agency can demonstrate that the accommodation would impose an undue hardship on the operation of its business.[15]

Although as it is conceivable that Grievant's asthma could be considered a disability, the record is insufficient for the Hearing Officer to make that determination. Grievant did not testify at the hearing. The extent to which her asthma limits a major life

[10] Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

[11] Other major life activities include, but are not limited to, sitting, standing, lifting, and reaching. 29 CFR § 1630.2(h)(Appendix).

[12] 45 CFR § 84.3(j)(2)(ii). Congress drafted the Americans with Disabilities Act definition of disability almost verbatim from Section 706(8)(B) of the Rehabilitation Act. Thus, referencing relevant sections of Title 45 of the Code of Federal Regulation is appropriate.

[13] 42 U.S.C. § 12102(2)(A).

[14] Toyota Motor Manufacturing, Kentucky, Inc., v. Williams, 534 U.S. 184, 122 S.Ct. 681 (2002).

[15] 42 U.S.C. § 12112(b)(5)(A); 29 CFR § 1630.9(b).

activity is unknown by the Hearing Officer. The extent to which Grievant is prevented or severely restricted from doing activities that are of central importance is also unknown. The Agency did not consider Grievant disabled because her doctor wrote a note saying she was not disabled. The Agency permitted Grievant to use her inhaler as needed. The evidence presented does not support the need for a flexible schedule as a reasonable accommodation.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[16] (2) suffered a materially adverse action[17]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the 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.[18]

Grievant engaged in a protected activity by filing a request for reasonable accommodation and filing grievances. Grievant suffered a materially adverse action because she received disciplinary action and a denial of her leave request. Grievant has not established any causal link between her protected activity and the materially adverse actions she suffered. The Agency did not take action against Grievant as a pretext or excuse for retaliation.

Workplace Harassment

DHRM Policy 2.30 provides:

> The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of

[16] *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.

[17] 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.

[18] 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).

an individual's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability.

Grievant contends she was subject to a hostile work environment. No credible evidence was presented to show that the Agency took action against Grievant on the basis of her race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Accordingly, there is no basis to grant Grievant relief.

Transfer

Grievant requests a transfer. The Hearing Officer lacks the authority to grant a transfer under the circumstances of this case.

DECISION

For the reasons stated herein, the Agency's issuance on September 30, 2008 to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance on November 21, 2008 to the Grievant of a Group II Written Notice with two workday suspension is **upheld**. The Agency's issuance on December 11, 2008 to the Grievant of a Group II Written Notice with a five workday suspension is **upheld**.

Grievant's eight hour leave without pay status for September 8, 2008 must be **reversed**. The Agency is ordered to provide Grievant with paid leave for that day. Grievant's one half hour leave without pay status for November 13, 2008 is **reversed**. The Agency is ordered to provide Grievant with paid leave for one half hour that day. Grievant's request to have reversal of additional days of leave without pay is **denied**.

Grievant's request for reasonable accommodation is **denied**. Grievant's request for removal of a leave restriction and to be transferred is **denied**. Grievant's claim for retaliation is **denied**. Grievant's claim for relief from a hostile work environment 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
600 East Main St. STE 301
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.[19]

[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

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Corrections
February 2, 2010

The grievant has requested an administrative review of the hearing officer's decision in Case Numbers 9098, 9099, 9100, and 9101. The grievant objects to the hearing officer's decision on essentially three bases, listed herein. The Department of Human Resource Management (DHRM) agency head has requested that I respond to this administrative review request.

FACTS

The Department of Corrections employed the grievant as a Probation Officer at one of its facilities. According to the hearing officer's **Procedural History,** the following occurred:

> Grievant filed a grievance on September 15, 2008 seeking removal of adverse documentation, removal of a leave restriction, reverse leave without pay, and a lateral transfer. On September 30, 2008, Grievant received a Group I Written Notice for failing to report to work as instructed. On November 21, 2008, Grievant received a Group II Written Notice with a two-day suspension for failure to obtain prior approval for an absence. On December 11, 2008, Grievant received a Group II Written Notice with a five-work day suspension for failure to report to work as scheduled as a repeat offense.

In his **Findings of Fact**, the hearing officer stated, in part, the following:

> Grievant has chronic breathing problems. She has asthma. She requires the use of a breathing inhaler. Agency managers were aware of Grievant's breathing condition and permitted her to use her breathing inhaler without restriction.
>
> Grievant's medical provider completed the Certification of Health Care Provider form for Family and Medical Leave Act of 1993. The medical provider described the medical facts regarding certification as "asthma". The form was completed as of June 20, 2008. The medical provider added in a separate note, "She is <u>not</u> disabled."
>
> On July 1, 2008, the Benefits Managers sent Grievant and e-mail stating, in part:

If your medical condition is affecting your ability to come to work and perform the duties of your position, then you are correct to contact [the Third Party Administrator]. The problem seems to be that your doctor has already decided that you are not disabled. Perhaps it may be better for the doctor to submit the medical information to the [Third Party Administrator] so they can make a decision.

On July 25, 2008, the Benefits Manager sent Grievant a letter indicating that:
This is a follow-up to our conversation on July 19, 2008. As we discussed, you have used over 140 hours of leave this year, and your remaining leave balances are considerably low. This puts you in a very serious situation as further absences may subject you to the disciplinary action process.

As I explained, it was my intention to assist you by certifying your absence is related to your medical condition as Family and Medical Leave; however, your medical provider has indicated clearly that you are not incapacitated and that the frequency of future episodes is unknown. In addition, you will not qualify for short-term disability because your medical provider has clearly indicated that you are not disabled.

State leave policies allow the use of leave time for income replacement at the discretion of the agency. Notifying management of your desire to use leave does not mean it will automatically be approved. In addition, absences related to medical conditions must be documented. You will be asked to provide a doctor's note in the future when you are absent due to a medical condition. As we discussed, the doctor's note must stipulate that you are being treated for a condition that makes you unable to come to work, and provide the duration of the condition. The use of leave time for absences that are not pre-approved will not be allowed except in extreme and extenuating circumstances.

This situation is critical for you and for [the Facility]. Your attendance is necessary in order for you to be a contributor to the agency's public safety mission. This letter is to notify you that [you] have been placed on leave restriction for the remainder of the current year, ending on January 9, 2009. Leave restriction means that you will only be allowed to use annual leave, overtime leave, or compensatory leave that was approved by management prior to the implementation of this restriction.

Absences that may qualify under the family and Medical Leave Act and/or the Virginia Sickness and Disability Program should be discussed with the Human Resources Office. If you have any questions please contact me ….

On September 8, 2008, Grievant called the Deputy Chief and indicated she would not be at work. Grievant was absent from work because her mother's house had been burglarized and Grievant was providing assistance to her mother. Because Grievant had not received prior approval for leave on September 8, 2008, the Agency considered her on leave without pay status for missing eight hours of work scheduled for September 8, 2008. Grievant received a formal written counseling

advising her of the Agency's expectation "to be at work as scheduled and to request leave approval prior to taking leave."

On September 26, 2008, Grievant attended training at a location away from her main office. Although the training was scheduled to last for the entire day, it ended at noon. At 1:57 p.m., the Chief spoke with the Trainer who confirmed that the training had ended at noon. At 2:26 p.m., Grievant called the Chief. She told the Chief she had taken her scheduled lunch break from noon to 1 p.m. and her vehicle was stuck in traffic. The Chief instructed Grievant to report to the office. Grievant repeated that her vehicle was stuck in traffic. The Chief again instructed Grievant to report the office.

At approximately 2:54 p.m., Grievant called the Deputy Chief and left a voice message that she was trying to get to the office after training but due to traffic at the Tunnel she had to take a different route to work. She added that due to the time of day, it was not beneficial for her to drive all the way to the Office and then leave to go home. She indicated she would be using leave and going home. Grievant did not report to the Office that day. She was not authorized or approved to use leave.
Grievant was late to work on October 29, 2008. She was counseled in writing by the Deputy Chief that the, "next time you arrive late, the actual time will be accounted for as leave without pay."

On November 12, 2008, Grievant called at 6:15 a.m. and left a voice message on the Deputy Chief's telephone extension. Grievant stated:

This is [Grievant]. Just a reminder in case you forgot, I won't be in today. I'll make sure I'll bring you the MD’s note from [the hospital], just in case you forgot."
The Deputy Chief attempted to contact Grievant at her home and on her cell phone. Grievant did not answer the calls so they Deputy Chief left messages asking Grievant to contact him. Grievant did not respond on November 12, 2008. Contrary to Grievant's assertion, she had not given the Deputy Chief prior notice that she would not be at work on November 12, 2008. She had not requested to take leave on that day and had not been authorized or approved to use leave on November 12, 2008.

On November 13, 2008, Grievant presented a doctor’s note to the Deputy Chief stating, "[Grievant] was at the [hospital] 11-12-08 with her brother who had surgery."

On November 13, 2008, Grievant reported to work 30 minutes late because she had a flat tire on her vehicle. On November 14, 2008, she presented a statement from the repair shop showing that she paid to have her flat tire repaired.

The Agency placed Grievant on leave without pay for eight hours on November 12, 2008 and 1/2 hour on November 13, 2008.

> On November 19, 2008, Grievant met with the Deputy Chief and another manager. After the meeting ended, Grievant returned to her office. The Deputy Chief heard yelling and screaming coming from Grievant's office and walked to her office. He observed Grievant crying and upset. The Deputy Chief asked Grievant, "Are you going to be okay?". Grievant responded in a loud voice, "You all don't understand the amount of stress I'm under!" The Deputy Chief told Grievant she would be allowed to leave the office for the remainder of the day. Grievant left around 12:30 p.m.
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> On November 20, 2008, at approximately 7:15 a.m., Grievant called the Deputy Director and informed him that she was still upset about the meeting held on November 19, 2008. She stated that she would not be reporting to work and was going to seek help by way of the Employee Assistance Program. The Deputy Chief authorized Grievant to attend the EAP for two hours.[4] Grievant made no further contact with the Deputy Chief on November 20, 2008 and did not report to work that day.
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> On November 21, 2008, Grievant reported to work and presented a note from a medical provider regarding her appointment with the EAP. She also presented a note from her asthma doctor indicating that she was seen in the doctor's office on November 20, 2008.

Based on the above violations, on September 30, 2008, Grievant received a Group I Written Notice for failing to report to work as instructed. On November 21, 2008, Grievant received a Group II Written Notice with a two-day suspension for failure to obtain prior approval for an absence. On December 11, 2008, Grievant received a Group II Written Notice with a five-work day suspension for failure to report to work as scheduled as a repeat offense.

She filed a separate grievance to have each of the three disciplinary actions reversed and a fourth grievance for removal of adverse documentation, removal of a leave restriction, reverse leave without pay, and a lateral transfer. When she did not receive the relief she sought through the management steps of the grievance procedure, she asked for a hearing. The Department of Employment Dispute Resolution consolidated the four hearing requests so that the same hearing officer could hear the grievances at the same time. The hearing officer upheld all the disciplinary actions as related to the written notices and granted no relief on the fourth grievance. He did, however, reinstate eight hours of leave that had been taken from the grievant in an action that was not related to the three written notices.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted. Also, Section VIII (B) of DHRM's Policy No. 1.60 outlines the steps that agencies

should take in suspending employees, including the length of suspensions. In addition, DHRM Policy No. 4.30 and DHRM Policy 4.37 are applicable here.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In her appeal, the grievant raised the following challenges to the hearing officer's decision, one of which is policy-related and the two of which are law-related: (1) policy - the leave restriction imposed on the grievant, which required prior approval of leave and was the basis of the three Written Notices challenging in this hearing, is contrary to state policy; (2) law - the leave restriction, as applied to the grievant, violated applicable law (the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA)); and (3) law - the application of the leave restriction was in retaliation for the grievant's alleged request for a reasonable accommodation and her use of FMLA leave.

A ruling issued by the Director of the Department of Employment Dispute dated January 10, 2010, addressed the law – related challenges listed in (2) and (3) above. Concerning the policy – related challenge listed in (3) above, this Agency has determined that the hearing officer appropriately interpreted and applied the provisions of the cited human resource management policies. More specifically, management officials have the right to place reporting restrictions on employees who experience attendance and promptness problems. Therefore, this Agency has no bases to disturb the hearing decision.

Ernest G. Spratley