

Issues: Group III Written Notice (absence in excess of 3 days without authorization) and Suspension; Hearing Date: 07/01/09; Decision Issued: 07/02/09; Agency: NSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9114; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 07/17/09; Reconsideration Decision issued 07/28/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 07/17/09; EDR Ruling #2010-2375 issued 09/18/09; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 07/17/09; DHRM Ruling issued 09/24/09; Outcome: AHO’s decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9114**

Hearing Date: July 1, 2009  
Decision Issued: July 2, 2009

**PROCEDURAL HISTORY**

On April 9, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for absence in excess of three days without approved authorization. During the Second Step of the grievance process, the Agency reduced the disciplinary action to a Group III Written Notice with a 30 workday suspension.

On April 15, 2009, 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 June 2, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 1, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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:

Norfolk State University employs Grievant as a Tutorial/Supplemental Instruction Coordinator at its Facility. She reports to the Interim Director.<sup>1</sup>

On March 6, 2009, the Interim Director held a staff meeting attended by Grievant in which the Interim Director told staff that the Agency expected an increase in demand from students for academic support services following spring break which was scheduled to end March 15, 2009. The Interim Director told staff that with the exception of emergencies, staff would not be permitted to take "extended leave" for several weeks after spring break. Several staff altered their prior leave requests to accommodate the Interim Director's announcement.

Grievant's family members planned and paid for a cruise without first consulting Grievant. They intended the cruise to be a surprise gift to Grievant for her upcoming birthday. The tickets were nonrefundable. Grievant desired to travel with her family rather than letting them celebrate her birthday without her. Grievant learned of her family's gift on the weekend of March 14, 2009.

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<sup>1</sup> Grievant argued that she reported to Ms. M. The Hearing Officer finds that Grievant reported to the Interim Director based on the evidence presented. Grievant's Employee Work Profile shows that she reports to the Interim Director. Ms. M testified she did not perform Grievant's performance evaluations and did not approve Grievant's leave requests.

On March 16, 2009 at 8:59 p.m., Grievant sent the Interim Director an e-mail stating:

I will be out next week, March 23-27, 2009. I understand it is short notice. However, I was informed this weekend that a cruise had been planned and paid for me during that time. I will secure the Tutorial Center .... I will adequately post ALL pertinent information for faculty, staff, and students needed for the continuation of services, in my absence. [Ms. M] is prepared to be the point of contact for ensuring there is not a gap in tutorial services. I will also make sure any projects that are due to be completed are prepared prior to my absence. I will also fill out a leave reporting form this week.

I do, sincerely, apologize for the short notice, especially with the difficulties we are experiencing in staffing. This is just no way to reschedule the trip or to get a refund for the money spent.<sup>2</sup>

The Interim Director consulted with the Vice Provost and the Human Resource Generalist regarding how to respond to Grievant's request. The Interim Director told Grievant he could not approve her leave request because of the implications for other staff who had been told they could not take leave during the time period Grievant would be absent. The Interim Director told Grievant she could contact the Human Resource Generalist. The Interim Director had already spoken with the Human Resource Generalist and told her he had not approved the Grievant's leave request.

On March 20, 2009, Grievant called the Human Resource Generalist and spoke with her about Grievant's request for leave. The Human Resource Generalist told Grievant that the Interim Director had not approved Grievant's leave request and that if she was absent from work, she could receive disciplinary action up to and including removal.

Grievant was absent from work for March 23, 2009 through March 27, 2009.

## **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>3</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

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<sup>2</sup> Agency Exhibit 2.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

DHRM Policy 2.30(III)(A) 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 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.

Although Grievant's request for leave was a special circumstance, the Agency had the discretion whether to approve Grievant's request. The Agency has demonstrated that it was essential for staff to take only minimal leave beginning when students returned from spring break on March 16, 2009. Staff were needed to be in

attendance in Grievant's work unit because the demand for services from students increased dramatically after spring break and students had received their initial grades.

Absence in excess of three workdays without authorization is a Group III offense.<sup>4</sup> Grievant was absent from work from March 23, 2009 through March 27, 2009. Grievant was not authorized by the Agency to be absent from work. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment. In this case, the Agency mitigated the disciplinary action to a Group III Written Notice with a 30 workday suspension.

Grievant contends that she asked for leave but did not receive a denial of her request for leave. This is a matter of semantics. Although it might have been a better management practice for the Interim Director to tell Grievant "your request for leave is denied", the Interim Director clearly told Grievant that her leave request was "not approved". Grievant knew or should have known that the Interim Director's statement that her leave request was not approved was the same as a denial of her leave request. On March 20, 2009, the Human Resource Generalist informed Grievant that the Interim Director had not approved her leave request and that if she was absent from work during the time she had requested, she could receive disciplinary action up to and including removal. With the knowledge that her leave request had not been approved by her supervisor and that she might face disciplinary action up to and including removal, Grievant chose to be absent from work for five work days. The Agency has established that Grievant was absent in excess of three days without authorization.

*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>5</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.

Grievant's desire to be with her family to celebrate her birthday is understandable. The dilemma she faced, however, is not a circumstance that renders the Agency's disciplinary action beyond the limits of reasonableness. In light of the

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<sup>4</sup> See Attachment A, DHRM Policy 1.60.

<sup>5</sup> *Va. Code § 2.2-3005.*

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

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a 30 workday suspension 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  
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.<sup>6</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.





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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 9114-R**

Reconsideration Decision Issued: July 28, 2009

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

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

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

Grievant has not presented newly discovered evidence. None of the documents submitted by Grievant as part of her request for reconsideration are material. They do not affect the outcome of this case. Grievant restates many of the arguments she made or could have made at the hearing.

Grievant has not established an error of law. Grievant contends the Agency acted contrary to Va. Code 2.2-3800 and the Family Educational Right and Privacy Act. These sections have no bearing on the merits of this grievance and do not affect the outcome of this case.

Grievant alleges the Agency failed to comply with the Grievance Procedure Manual. Any failure to comply with the Grievance Procedure Manual would not be a basis to grant relief to Grievant.

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

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

September 24, 2009

RE: **Grievant v. Norfolk State University**  
**Case No. 9114**

Dear Grievant:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the original decision was issued if any of the following applies:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

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

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In her challenge, the grievant submitted the following as applicable to her appeal:

DHRM Policy 2.30(III) (A); Norfolk State University First Year Experience Office Handbook and Manual; and, information to support her position that mitigating circumstances should have been applied. This Agency will address only the first two

items because whether or not mitigating circumstances are applicable is a matter to be addressed by the hearing officer.

### Findings of Fact

According to the hearing officer:

Norfolk State University employs the Grievant as a Tutorial/Supplemental Instruction Coordinator at its Facility. She reports to the Interim Director.

On March 6, 2009, the Interim Director held a staff meeting attended by Grievant in which the Interim Director told staff that the Agency expected an increase in demand from students for academic support services following spring break which was scheduled to end March 15, 2009. The Interim Director told staff that with the exception of emergencies, staff would not be permitted to take "extended leave" for several weeks after spring break. Several staff altered their prior leave requests to accommodate the Interim Director's announcement.

Grievant's family members planned and paid for a cruise without first consulting Grievant. They intended for the cruise to be a surprise gift to Grievant for her upcoming birthday. The tickets were nonrefundable. Grievant desired to travel with her family rather than letting them celebrate her birthday without her. Grievant learned of her family's gift on the weekend of March 14, 2009.

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The Interim Director consulted with the Vice Provost and the Human Resource Generalist regarding how to respond to Grievant's request. The Interim Director told Grievant he could not approve her leave request because of the implications for other staff who had been told they could not take leave during the time period Grievant would be absent. The Interim Director told Grievant she could contact the Human Resource Generalist. The Interim Director had already spoken with

the Human Resource Generalist and told her he had not approved the Grievant's leave request.

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Grievant was absent from work for March 23, 2009 through March 27, 2009.

## 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 exceeds the limits of reasonableness, 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.

While we agree that the provisions of DHRM Policy 2.30 and Norfolk State University First Year Experience Office Handbook and Manual are applicable, this Agency will not disturb the hearing decision for the following reasons.

DHRM Policy 2.30 provides the means and methods for requesting leave and leave approval. The evidence supports that the grievant's supervisor did not approve the grievant's request for leave. However, even though the supervisor did not approve the leave request, the grievant took the leave. Upon her return to work, her supervisor took disciplinary action, under the Standards of Conduct, DHRM Policy 1.60, which included issuing a Group III Written Notice with termination. She was charged with "3 days absent without approved authorization."

Please be note that the Department of Human Resource Management has the authority to rule on issues related to the application or interpretation of human resource policies promulgated by this Agency or by the agency in which the grievance is filed. In our opinion, it appears that the issues you raised are related to how the hearing officer assessed the evidence, how much weight he placed on that evidence, the credibility of the

witnesses and the outcome of the hearing decision. We can find no evidence that the hearing officer violated any of the relevant policies in making his decision. Therefore, this Agency has no basis to interfere with the application of this decision.

Sincerely,

Ernest G. Spratley