Issue: Group I Written Notice (unsatisfactory attendance); Hearing Date: 03/01/10; Decision Issued: 03/08/10; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 9265; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9265

Hearing Date: March 1, 2010
Decision Issued: March 8, 2010

PROCEDURAL HISTORY

On September 4, 2009, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory attendance and exhausting annual and sick leave allotments.[1]

On September 30, 2009, Grievant timely filed a grievance to challenge the Agency's action, and alleging retaliation and workplace harassment. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 2, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 1, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

[1] The Agency's Written Notice is poorly worded. It mentions that Grievant "exhausted annual and sick leave allotments". The thrust of the Agency's Written Notice is also that Grievant's attendance was unsatisfactory. During the Step Process the Agency clarified the basis for taking disciplinary action. For example, the Third Step Responded stated, "This issue is that your attendance is unsatisfactory."

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?

5. Whether the Agency retaliated against Grievant?

6. Whether the Agency engaged in workplace harassment of 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 retaliation and workplace harassment. 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 Motor Vehicles employs Grievant as a Program Support Technician Senior at one of its Facilities. Agency managers sometimes refer to Grievant as an "Agent". The purpose of her position is:

> Responds to telephone inquiries statewide from general public, branch offices, license agents, courts, attorneys, insurance companies and other parties on complex issues unresolved by an automated voice processing equipment. Provides comprehensive information related to customer questions as well as detailed specific information related to driver and vehicle files. Responses are in accordance with the Motor Vehicle Code of Virginia, DMV rules and regulations, and the Privacy Protection Act and

> Freedom of Information Act and performed in a customer service oriented manner. Position requires assessment of case and independent corrections/updates to DMV records as determined through customer contact and research.[2]

Grievant's Employee Work profile effective September 17, 2007 provided that Grievant would be evaluated based upon her attendance. The measure used to determine whether Grievant's attendance was satisfactory was referred to as an "occurrence". For example, if Grievant was absent for an entire day contrary to Agency policy, her absence will be counted as one occurrence. If she received 7.95 or more occurrences, her performance with respect to attendance would be considered "Below Contributor".

The Agency changed its practice regarding how it measured unsatisfactory attendance. Instead of calculating occurrences, it began calculating the number of hours of unplanned leave. Grievant's Employee Work Profile dated December 29, 2008 states:

> An Agent who accumulates more than 96 hours of unplanned leave anytime during the 2008 - 2009 EWP year may result in the agency completing a Group I Standards of Conduct disciplinary action under Policy 1.60.

Grievant signed this EWP in April 2009.

Grievant had 106.14 hours of unplanned absences from November 1, 2008 through August 31, 2009. Grievant was absent from work while on Short Term Disability for approximately 5 months during that time period. The Agency did not consider Grievant's absences while on Short Term Disability when considering the disciplinary action against her. In accordance with State policy, Grievant's Short Term Disability benefits ran concurrently with her Family Medical Leave. Grievant exhausted her Family Medical Leave effective June 26, 2009. Grievant exhausted all of her annual and sick leave balances and entered Leave Without Pay status.

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."[3] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

[2] Agency Exhibit 3.

[3] 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 1.25 provides that, "[e]mployees are expected to adhere to their assigned work schedules."

DHRM Policy 4.10 provides:

> **Unapproved Leave**
> When an employee takes leave time that was requested but not approved, the employee will be subject to the following agency actions:
> - 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.

Poor attendance is a Group I offense.[4] Grievant's attendance was unsatisfactory to the Agency. Grievant had unplanned absences exceeding 96 hours during her performance cycle beginning November 2008 through August 2009. Grievant entered leave without pay status after exhausting her available leave balances. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

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…."[5] 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 that the disciplinary action should be mitigated because she had notes from her doctor excusing her absences due to illness that was beyond her control. The Agency properly excluded from consideration Grievant's absences while

[4] See, Attachment A, DHRM Policy 1.60.

[5] *Va. Code § 2.2-3005.*

on Short Term Disability and Family Medical Leave. This leave is protected and may not be considered by an agency. Other than absences protected by law or policy, an agency need not consider the reason why an employee is absent when determining whether an employee's attendance is poor. The focus of disciplinary action for poor attendance is the impact on the Agency in terms of obtaining adequate staff to conduct Agency business. In this case, Grievant's absences adversely affected the Agency's ability to adequately provide services to the public. The fact that Grievant's absences were due to real and unfortunate medical circumstances does not mitigate the appropriateness of disciplinary action for poor attendance.

Grievant contends the disciplinary action should be mitigated because she did not have adequate notice of the Agency's practice that unplanned absences in excess of 96 hours would result in disciplinary action. There is a difference between knowing that one may be disciplined for poor attendance and knowing the method by which an agency measures whether that attendance is poor. In this case, it is clear that Grievant had adequate notice that her attendance was important to the Agency and that her poor attendance would result in disciplinary action. Grievant's attendance was sufficiently important that it was consistently mentioned in her Employee Work Profiles beginning in 2007. Agency managers stressed the importance of attendance to Grievant in staff meetings. Grievant knew or should have known that DHRM Policy 1.60 subjects employees to disciplinary action for their poor attendance. DHRM Policy 1.60 is routinely distributed to employees during orientation and is available for review on the DHRM website.

One method of measuring the adequacy of Grievant's attendance was whether she had 96 hours of unplanned absences. Grievant had adequate notice of this method because she signed her EWP in April 2009 and that EWP specifically expressed the 96 hour standard. In addition, on May 11, 2009, Grievant was given a "Performance Summary" containing a comment informing her that she had "unplanned absences year to date 59.72."[6] Although it would have been a better management practice for the Agency to have more timely issued the EWP to Grievant, the question is whether Grievant knew prior to reaching 96 hours of unplanned absences that doing so would result in disciplinary action. It is clear that Grievant knew this several months prior to her exceeding the 96 hour standard.

Another method of measuring the adequacy of Grievant's attendance is the fact that she entered leave without pay status. The Commonwealth of Virginia under the Virginia Sickness and Disability Program provides employees with leave balances. These leave balances are deemed to be adequate under the standards set forth by the Department of Human Resource Management. An employee who exceeds those leave balances enters into leave without pay status. Grievant entered leave without pay status thereby demonstrating for poor attendance. Grievant had adequate notice of this measure through DHRM Policies available through the DHRM website.

[6] Agency Exhibit 3.

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

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[7] (2) suffered a materially adverse action[8]; 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.[9]

Grievant contends the Agency retaliated against her. Grievant engaged in protected activity because she filed a grievance to challenge a prior action by the Agency. Grievant has suffered a materially adverse action because she has received a Group I Written Notice. Grievant has not presented any credible evidence that would establish a connection between the protected activity and the materially adverse action. The Agency did not retaliate against Grievant or engage in behavior that was a mere pretext for retaliation. Accordingly, Grievant's request for relief for retaliation is denied.

DHRM Policy 2.30 defines Workplace Harassment as:

> Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

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[7] *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.

[8] 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.

[9] 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).

Grievant contends that the Agency engaged in workplace harassment against her. Grievant has not presented any credible evidence that the Agency took action against her on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Accordingly, Grievant's request for relief from workplace harassment is denied.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's request for relief for retaliation and workplace harassment are **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.[10]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

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