Issues: Group II Written Notice (failure to report to work and excessive tardiness) and Termination (due to accumulation); Hearing Date: 02/22/10; Decision Issued: 02/25/10; Agency: VEC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9271; Outcome: No relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9271

Hearing Date: February 22, 2010
Decision Issued: February 25, 2010

PROCEDURAL HISTORY

On November 2, 2009, Grievant, a hearing officer for the Employment Commission ("Agency") was issued a Group II Written Notice and terminated from employment based on the accumulation of active Written Notices. The basis of the Written Notice was failure to report to work without notice and excess tardiness. Agency Exh. 4. The Agency issued the prior, active Group II Written Notice on September 6, 2007, for failure to report to work as scheduled without proper notice to the supervisor. Agency Exh. 6.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the expedited resolution steps was not satisfactory to the Grievant and she requested a hearing. On January 19, 2010, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution ("EDR"). A pre-hearing conference was held by telephone on January 27, 2010. The hearing was scheduled at the first date available between the parties and the hearing officer, Monday, February 22, 2010, on which date the grievance hearing was held, at the Agency's headquarters facility.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The Grievant did not submit any additional documentation. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Representative/Advocate for Agency
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 the Grievant's conduct was improperly disciplined under FMLA or applicable legal excuse.
5. 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?

The Grievant requests rescission of the Group II Written Notice (and termination based on cumulative effect of two Group II Written Notices), an alternative lesser sanction, reinstatement, back pay, and attorney's fees.

BURDEN OF PROOF

The *Grievance Procedure Manual* does not expressly address the burdens of the parties in a case such as this where the agency disciplines an employee for excessive unexcused tardiness and the employee challenges the discipline based on protection provided by FMLA. With "disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances." On the other hand, the *Grievance Procedure Manual* states, "in all other actions, the employee must present his evidence first and must prove [his] claim by a preponderance of the evidence." Grievance Procedure Manual ("GPM") § 5.8. The *Grievance Procedure Manual* does not expressly address how these two provisions interact in this sort of situation but the EDR Director has instructed on this issue, finding the Federal Merit System Protection Board (MSPB) law instructive. Under MSPB law, when a disciplined employee asserts that the discipline was issued for an improper reason, the employee is deemed to be raising an affirmative defense and it is the employee's burden to prove the affirmative defense. Under MSPB law, the agency has no burden to disprove the affirmative defense. The EDR Director has held that this is an appropriate model for cases under the grievance procedure as well. *See* EDR Ruling No. 2009-2300 (July 20, 2009). Accordingly, the grievant must establish by a preponderance of the evidence that the agency's actions violated the FMLA. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate

grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The applicable Standards of Conduct defines Group II offenses to include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly affect business operations and/or constitute neglect of duty, insubordination, abuse of state resources, violations of policies, procedures, or laws. Agency Exh. 1, DHRM Policy 1.60.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a hearing officer, with approximately 33 years of service with the Agency. Aside from the prior Group II Written Notice, the Agency produced no evidence of other disciplinary measures or deficient work history.

The Agency's branch manager testified that he detected that the Grievant was excessively tardy for work on 13 consecutive business days starting on September 29, 2009, and ending on October 16, 2009. The Grievant did not call or notify her supervisor on any of the occasions of her tardiness, and the Grievant stipulates to the facts of her record of tardiness. On the days in question, the Grievant sought no authorization and presented no excuses for her tardiness other than that she could not get out of the house on time and experienced some traffic delays during her commute. The Agency computed the average length of time for her late arrivals for this period was 28.6 minutes. On several of these days, the Grievant arrived at work after hearings were scheduled to start, delaying the workload, disrupting the work, and adversely affecting the claimants and employers.

The Grievant's manager met with her on October 22, 2009, and informed her of his proposed disciplinary action of a Group II Written Notice and termination. The manager gave the Grievant an administrative leave day to allow her to present mitigating circumstances. On October 23, 2009, the Grievant presented the letter she obtained from her primary physician, dated October 22, 2009, that states the Grievant "is under my medical care for Severe Neurasthenia and Stress Anxiety. She would not be able to return to work for the next 4 weeks."

Agency Exh. 3. In response, the manager extended to October 30, 2009, the deadline for the Grievant to present her mitigating information. The Grievant presented nothing further.

The manager proceeded to consider the seriousness of the offense, the impact of the offense on the Agency, the Grievant's job performance, her prior conduct, her length of service and issued the Group II Written Notice and termination on November 2, 2009.

During the grievance process, the Grievant has advanced the reason for her misconduct as exhaustion from her heavy workload of cases because of the economic downturn and the required overtime to keep up with the workload. All agency hearing officers at the time were under heavy workload conditions. The Grievant admitted that she did not attempt to address her concerns, stress, or anxiety to her supervisors or manager. The Grievant had no explanation for why she did not notify supervision except she was not comfortable doing so.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant committed the offenses of tardiness and failed to notify her supervisor on all occasions that formed the bases for the disciplinary termination.

Failure to comply with written policy, leaving work without permission, and failure to report to work without proper notice are examples of Group II offenses. The Agency, thus, has shown that the Grievant's conduct is *prima facie* misbehavior appropriately deemed a Group II offense, and one similar in nature to the prior, active Group II Written Notice. Thus, under applicable policy, termination is appropriate unless the Grievant shows that she is shielded from discipline under the Family Medical Leave Act ("FMLA") or other applicable protection.

The Grievant offers the letter she obtained from her primary physician, dated October 22, 2009, that states the Grievant "is under my medical care for Severe Neurasthenia and Stress Anxiety. She would not be able to return to work for the next 4 weeks." Agency Exh. 3. The physician's specialty is unknown, and the Grievant presented no other medical evidence. The Grievant submits that this medical letter and her explanation of her stress and anxiety are

sufficient to explain her chronic tardiness and failure to report late arrivals or, alternatively, should mitigate in favor of a lesser sanction.

Family Medical Leave Act. While magic words are not necessary, an employee must do something to invoke protection under FMLA. While neither party specifically referred to the applicable policy, I have reviewed DHRM policy 4.20, the state's policy on FMLA.[1] The policy provides:

> An employee should submit a written request for family and medical leave at least 30 calendar days prior to the anticipated leave begin date or as soon as practicable in unforeseen circumstances. If an employee is not able to provide notice because of an illness or injury, notice may be given by a family member or a spokesperson as soon as practicable.

As held by the Fourth Circuit in *Dotson v. Pfizer*, 558 F.3d 284 (4th Cir. 2009), case law and federal regulations make it clear that employees do not need to invoke the FMLA in order to benefit from its protections. The regulations do not require the employee expressly to assert rights under the FMLA or even mention the FMLA; instead, the employee may only state that leave is needed for a potentially qualifying reason. After the employee makes such a statement, the responsibility falls on the employer to inquire further about whether the employee is seeking FMLA leave. *Id.* at 295. "In providing notice, the employee need not use any magic words." *Id., quoting Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d Cir. 2007). Here, however, the Grievant used no words at all to put the Agency on notice of even a hint that FMLA or other leave was being sought or requested.

In *Lochridge v. City of Winston-Salem*, 388 F. Supp. 2d 618 (M.D.N.C. 2005), an employee submitted an untimely request for FMLA leave four days after she was suspended pending termination. She was seeking intermittent FMLA leave to begin, retroactively prior to her suspension. The employee had been terminated for violation of the City's attendance policy. The City denied the employee's FMLA request because the request was untimely and because the employee had already been suspended pending termination when she submitted the request. The court held the FMLA does not insulate employees from legitimate disciplinary action by the employer.

The *Lochridge* court discussed that the employee did not request FMLA leave and submit accompanying medical certification until four days after the City suspended her pending termination due to her chronic absenteeism and her resulting poor work performance. The employee's request for FMLA leave was, therefore, not considered in the decision to terminate her since she did not make the request until after the termination process had already begun.

The *Lochridge* decision is consistent with the majority view of case law governing enforcement of employer "no call, no show" policies. The case of *Heltzel v. Dutchman Mfg. Inc.*, 2007 U.S. Dist. LEXIS 93682 (N.D. In. 2007) provides another example of a court's view of disciplinary action and the FMLA. The court held:

[1] DHRM Policy 4.20 is found at http://www.dhrm.virginia.gov/hrpolicy/policy/pol4_20FMLA.pdf.

> The notice requirements of the FMLA are not onerous; indeed, an employee need not expressly mention **[*23]** the FMLA in his leave request or otherwise invoke any of its provisions. *See Phillips v. Quebecor World RAI, Inc.*, 450 F.3d 308, 311 (7th Cir. 2006) (citing 29 C.F.R. § 825.303(b)). However, FMLA regulations also provide that "[a]n employer may … require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.302(d). Thus, **the FMLA does not prohibit employers from terminating employees who do not comply with an internal company policy that requires employees to call-in when they will be absent. "The fact that the absence might be related to a FMLA qualifying event does not abrogate the right of employers to know whether their employees will be coming to work on a particular day."** *Knox v. Cessna Aircraft Co.*, 2007 U.S. Dist. LEXIS 71528, 2007 WL 2874228, *5 (M.D.Ga., 2007). And, as is the case here, "an employer's policy that requires employees to call in to work when they will be absent is clearly consistent with FMLA and its regulations because the regulations themselves require that employees give notice of the need for unforeseeable leave as soon as practicable." *Id. See Spraggins v. Knauf Fiber Glass GmbH, Inc.*, 401 F.Supp.2d 1235, 1239-40 (M.D.Ala.2005) **[*24]** (holding that FMLA allows an employer to require notice one hour before the employee's shift begins, as long as it is reasonable to expect the employee, under the individual circumstances, to give such notice). (Emphasis added).

The Grievant has not shown that she can invoke any protections of FMLA retroactively. The FMLA does not provide a basis to reverse the disciplinary action against Grievant in this case. The Agency is entitled to have its hearing officers appear for work on time and not miss scheduled hearings. The prior, still active Group II Written Notice for similar misconduct provides the best notice to the Grievant and shows her knowledge of the Agency's expectations on this basic employment obligation.

Americans with Disabilities Act. In certain circumstances, a qualified individual with a disability may be able to receive relief under the Americans with Disabilities Act. 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. A qualified individual with a disability is one who "satisfies the requisite skill, experience, education and other job-related requirement of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 CFR § 1630.2(m). Grievant has not shown through the evidence provided that she is a qualified individual with a disability.

Based on the evidence presented, there is no demonstration that a disability has caused the discipline or that a reasonable accommodation would enable the Grievant to perform the essential functions of the position with the Agency. The Americans with Disabilities Act does not provide a basis to grant relief to Grievant in this case.

Mitigation. The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of termination. The Agency had the discretion to elect less

severe discipline. 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…." Va. Code § 2.2-3005. 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. Grievant contends her 33 years of service should provide enough consideration to mandate a lesser sanction than termination. However, length of service, alone, is insufficient for a hearing officer to overrule an agency's mitigation determination. EDR Ruling No. 2007-1518 (October 27, 2009) held:

> Both length of service and otherwise satisfactory work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become.

In light of the 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 II Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer