Issue: Group II Written Notice with Suspension (repeated unsatisfactory performance); Hearing Date: 06/21/10; Decision Issued: 07/21/10; Agency: VDACS; AHO: William S. Davidson, Esq.; Case No. 9351; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 08/05/10; EDR Ruling No. 2011-2726 issued 10/19/10; Outcome: Remanded to AHO; Remand Decision issued 11/02/10; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 08/05/10; DHRM letter issued 11/19/10; Outcome: No Ruling – declined to review.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9351

Hearing Date: June 21, 2010
Decision Issued: July 21, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group II Written Notice on April 9, 2010 for:

> On 12/9/09 you received a written notice due to your performance. Since that time, I have counseled with you regarding your attention to detail, meeting deadlines, attendance and excessive personal phone calls. Your performance has continued to be unsatisfactory and I am issuing you another Written Notice with a 5 day suspension. [1]

Pursuant to the Group II Written Notice, the Grievant was suspended from April 12, 2010 through April 16, 2010. [2] On April 21, 2010, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On June 1, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On June 16, 2010, a hearing was held at the Agency's location. Pursuant to the Hearing Officer's previously scheduled vacation, both the Agency and the Grievant agreed to this Decision be issued outside of the ordinary time frame.

APPEARANCES

Agency Representative
Grievant
Witnesses

ISSUE

Did the Grievant fail to meet deadlines, make excessive personal phone calls, have attendance issues and generally have poor performance in her assigned duties?

AUTHORITY OF HEARING OFFICER

[1] Agency Exhibit 1, Tab 2, Page 1
[2] Agency Exhibit 1, Tab 2, Page 1
[3] Agency Exhibit 1, Tab 1, Page 1

Code Section 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 Section 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 independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [4] However, proof must go beyond conjecture. [5] In other words, there must be more than a possibility or a mere speculation. [6]

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 Agency provided the Hearing Officer with a notebook containing thirteen (13) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing seven (7) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The issue before the Hearing Officer in this matter is not whether or not the Grievant made mistakes, was on the phone excessively with personal phone calls at the office, used the

[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

office phone to make long distance phone calls, or was away from the office too much. The Grievant, in her testimony, admitted that she had done all of the things that the Agency alleged that she had done and that the Agency included in the Written Notice that prompted this hearing. The issue before the Hearing Officer is whether or not the Agency provided the Grievant with proper due process.

On March 24, 2010, a meeting took place between the Grievant, her immediate superior and the Director of Finance. The Grievant's immediate superior testified that, during the course of this meeting, the Director of Finance told the Grievant that this was a meeting pursuant to a disciplinary matter. The Director of Finance testified that she told the Grievant that this was a disciplinary meeting and that a Written Notice was going to be issued. The Grievant's testimony was that she could not remember the Director of Finance making those statements.

The Standards of Conduct require that a Grievant be given oral or written notification of an offense and an explanation of an Agency's evidence in support of a charge and a reasonable opportunity to respond. [7] It appears to this Hearing Officer that the Agency gave the Grievant sufficient notice to comply with its due process requirements.

The reason it took from March 24, 2010, which was the date of the meeting, until April 9, 2010, which was the date the Written Notice was issued, was that the various management parties were discussing it amongst themselves and discussing it with Human Resources. It was determined if the Agency waited until that date, it would only effect one (1) pay period and that would be beneficial to the Grievant. The benefit comes in that one does not accrue leave in a pay period when one has been suspended. By waiting until that date, it only effected a single pay period and not two (2).

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." [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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

[7] Agency Exhibit 1, Tab 5, Page 15
[8] Va. Code § 2.2-3005

This Grievant has a prior active Group II Written Notice that was issued on December 9, 2009. Two (2) Group II Written Notices are sufficient under the Standards of Conduct to allow the Agency to terminate employment. The Agency took into consideration the difficult family situation that the Grievant was dealing with at the time of this Written Notice. Pursuant to that, the Agency mitigated its position from that of termination to a five (5) day suspension. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph as well as any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that no further mitigation is required in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof regarding this matter.

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 Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[9] 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]

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William S. Davidson
Hearing Officer

[9]An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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

DECISION OF HEARING OFFICER
In re:

Case No: 9351

Hearing Date:	June 21, 2010
Decision Issued:	July 21, 2010
EDR Reconsideration Request Received:	October 19, 2010
Response to Reconsideration:	November 2, 2010

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. 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. [11]

OPINION

The Grievant on August 19, 2010 requested of EDR a review of the Hearing Officer's Decision dated July 21, 2010. In an Administrative Review of Director, dated October 19, 2010, the Hearing Officer was directed as follows:

> The grievant contends that the agency should have granted her leave under the Family and Medical Leave Act (FMLA). The grievant raised this issue of the FMLA in both her grievance and at hearing. Accordingly, the hearing decision should have addressed the grievant's FMLA argument but it is silent as to the issue. Thus, the decision is remanded to the hearing officer to address the grievant's FMLA concerns. [12]

[11] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[12] Administrative Review of Director, Dated October 19, 2010, Ruling No. 2011-2726

In order to qualify for the use of FMLA, an employee must be suffering from a serious health condition which makes her unable to perform the functions of her position. [13] A serious health condition is one which requires inpatient care in a hospital, hospice, or a residential medical care facility or continuing treatment by a health care provider. [14]

In order to benefit from the protections of the statute, an employee must provide her employer with enough information to show that she may need FMLA leave. Although the employee need not name the statute, she must provide information to suggest that her health condition could be serious. **Employees thus have an affirmative duty to indicate both the need and the reason for the leave, and must let employers know when they anticipate returning to their position.** [15] (Emphasis added)

The FMLA also requires that an employee's notice be timely in order for her leave to be covered by the Act. The statute demands such notice as is practicable unless the need for medical leave is foreseeable, when thirty days advance notice must be given. [16]

A claim under the FMLA cannot succeed unless the plaintiff can show that she gave her employer adequate and timely notice of her need for leave, and an employer has the right to request supporting information from the employee. [17]

In the Hearing Officer's original Decision, he pointed out that there was no dispute as to whether or not the Grievant had used the phone excessively with personal phone calls, used the office phone to make long distance phone calls or been away from the office too much. On March 24, 2010, there was a meeting between the Grievant and her immediate supervisor and the Director of Finance. At this time, the Grievant was told that this meeting of March 24, 2010 was a disciplinary meeting and that a Written Notice was going to be issued. As it turned out, for reasons set forth in the Hearing Officer's original Decision, the Agency did not issue Written Notice until April 9, 2010, some sixteen (16) days after the disciplinary meeting. During the March 24, 2010 meeting, it was suggested to the Grievant that she go to Human Resources and inquire as to any and all benefits that may be available to her. Indeed, in her own testimony, the Grievant stated that she was fully aware that she could go to the Human Resources Department whenever she wanted and that she did not need an invitation from a supervisor to seek out any benefits that may be available to her. Further, the Grievant testified that if she were to stay home, she would have nothing to do and she preferred being at work and that she had to stay busy.

In order for a Grievant to possibly claim the use of FMLA, she must first establish that she has a serious medical condition and then she must notify her employee of that condition and of her need to use the FMLA. While it is true that she does not have to use the magic word "FMLA," she must provide timely notice of a need for leave. This Grievant presented none of this before the Hearing Officer at the hearing. Prior to the meeting of March 24, 2010, and in the sixteen (16) day period between that meeting and the issuance of the Written Notice, the Grievant did not in any way notify the Agency of her need to utilize FMLA.

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[13] 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.114(a)(2)(i)
[14] 29 U.S.C. § 2611(11)
[15] Woods v. Daimlerchrysler Corporation, 409F.3d 984, 990 (8th Cir.) 2005
[16] 29 U.S.C. § 2612(e)(2)(B); 29 C.F.R. § 825.303(a)
[17] Carter v. Ford Motor Co., 121 F. 3d 1146, 1148 (8th Cir. 1997)

No one at this Agency was informed by the Grievant that she had a serious medical condition. While it is true that the Grievant testified that she had mentioned to the Agency when she was hired of prior mental issues, that reference to a mental condition did not constitute the requisite notice of an intent to invoke FMLA leave. [18]

Accordingly, the Hearing Officer finds that this Grievant did not establish any violation of FMLA in this matter.

DECISION

The Hearing Officer, having considered the Administrative Review of Director, concludes that there is no reason to set aside his original Decision in this matter.

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. [19]

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William S. Davidson
Hearing Officer

[18] Seamen v. CSTH, Inc. 179 Fed. 3d 297, 302 (5th Cir.) 1999

[19] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law,* and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

August 19, 2010

RE: **Grievance of [Grievant] v. Department of Agriculture & Consumer Services**
Case No. 9351

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your 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 decision was issued if any of the following apply:

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

2. If either party believes the hearing decision is inconsistent with state policy or agency policy, that party may request the Director of the Department of Human Resource Management (DHRM) to review the decision. That challenge must refer to the specific policy and explain why it is believed the decision is inconsistent with that policy.

3. If either party believes that the hearing decision does not comply with the grievance procedure, that party may request the Director of EDR to review the decision. The party must state the specific portion of the grievance procedure with which 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 our opinion, your request does not identify any such policy. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and the resulting decision he made based on that assessment. For example, according to the hearing decision, you admitted that you were having an attendance problem and your work performance had deteriorated, for which the agency issued to you disciplinary action. In addition, you stated that you were not told that the meeting you were called to was a pre-disciplinary meeting. Please be advised that this represents a due process issue, not a policy issue, and that was addressed in the hearing officer's decision.

We must therefore respectfully decline to honor your request to conduct an administrative review.

Sincerely,

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services