Issues: Group III Written Notice (excessive absenteeism and failure to follow policy), Group III Written Notice (violation of the drug/alcohol policy), and Termination; Hearing Date: 09/17/10; Decision Issued: 09/22/10; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 9365; Outcome: Partial Relief.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION, DIVISION OF HEARINGS

RE: DEDR CASE NO.: 9365

DECISION OF HEARING OFFICER

HEARING DATE: September 17, 2010
DECISION ISSUED: September 22, 2010

PROCEDURAL BACKGROUND

The grievant commenced this matter on March 23, 2010 by filing her grievance challenging two Group III Written Notices and her termination from employment by the Department of Corrections on March 1, 2010. The second step meeting occurred on May 18 with the response of the agency being issued on May 19. The Director of the agency qualified this matter for hearing on June 8. The Department of Employment Dispute Resolution appointed me as hearing officer on June 29. I conducted a telephonic pre-hearing conference on July 2 with counsel for the grievant and the agency advocate. I scheduled the hearing for July 30. On July 23, the attorney for the grievant requested a postponement of the hearing due to the grievant being hospitalized. She waived the decision deadlines. I granted the request. I subsequently scheduled the matter for hearing on September 17. I held the hearing on that date.

APPEARANCES

Agency Advocate

Agency Representative

Three Witnesses for the Agency, including the Agency Representative

Grievant

Counsel for Grievant

ISSUES

A. Whether the agency violated the procedural rights of the grievant by not providing a second step hearing in response within the time frames mandated by the grievance procedure?

B. Whether the agency acted appropriately in issuing a Group III Written Notice to the grievant and terminating her from employment for excessive absenteeism?

C. Whether the agency acted appropriately in issuing a Group III Written Notice to the grievant and terminating her from employment for having a breath alcohol content of 0.029 while at work?

FINDINGS OF FACT

In November 2009, the grievant was working for the Department of Corrections as a Case Management Counselor. She had worked at the same facility for approximately thirteen years. She always received evaluations of meeting or exceeding job expectations. Prior to her employment with the Department of Corrections, she had worked for the state mental health agency for six years and a local Social Services Agency for three years.

The agency issued to the grievant a written notice for being absent from work for three consecutive days between the dates of November 9, 2009 and November 17. The actions of the grievant (as far as relevant) are as follows:

November 9: Left work early for a family medical appointment; may have notified her supervisor or the secretary for the warden;

November 10: Worked 7.5 hours; scanned time records reflect only 3.7 hours but the agency had experienced numerous problems with the scanning system and the records are incorrect;

November 11: Veterans Day Holiday; the grievant was not scheduled to work;

November 12: Grievant was absent from work but contacted the secretary for the warden and advised that she would be in at some point during the day; she did not work at all that day;

November 13: Grievant failed to appear for work but left a voicemail on her supervisor's extension;

November 14 and 15: Weekend; grievant not scheduled to work;

November 16: Grievant failed to appear at work but left a voicemail on her supervisor's extension;

November 17: Grievant failed to appear for work but may have left a voicemail with the secretary for the warden.

The agency policy regarding unscheduled leave in effect at the time of these events called for an employee such as the grievant needing to miss work to notify her supervisor prior to the beginning of the normal working hours. The policy of the agency said that the employee "should" take that step and if the supervisor could not be contacted, then the supervisor of the supervisor should be contacted. The particular facility at which the grievant was working had a separate operating procedure, which specified that the employee "will notify his/her supervisor or the next level of supervision." The steps taken by the grievant in November 2009 were those, which she had previously taken when needing to be unexpectedly absent from work. She had not previously been corrected, counseled, or disciplined for merely leaving a voicemail message with her supervisor or a secretary.

On March 1, 2010 the agency also issued to the grievant a second Group III Written Notice with the discipline of termination from employment. This notice was based on her having a breath alcohol level of 0.029 percent on February 11, 2010 while at work. The grievant was

suffering from chest congestion on February 11 and in the days immediately prior. On February 10 she consumed three beers at a restaurant between the hours of 7:00 p.m. and 10:00 p.m. She had consumed other beers at home prior to leaving for the restaurant. In the early morning hours of February 11 she was having difficulty sleeping. At approximately 4:30 a.m. she took two doses of NyQuil with the hope that she could have a few hours of sleep prior to beginning work that morning.

The Human Resource Officer for the facility received a report at approximately at 10:45 a.m. on February 11 that the grievant was suspected to be under the influence of alcohol. An inmate and a nurse reported smelling alcohol on the grievant. The Human Resource Officer had the grievant escorted to her office and they traveled to the local hospital where breath tests were performed on the grievant. The screening test yielded a result of 0.029 percent breath alcohol level. That test was performed at 11:27 a.m. A confirmation test yielded a result of 0.021 percent. That test was performed at 11:43 a.m. A toxicology sample was collected at 12:05 p.m. The results of that test were negative.

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, Virginia Code Section 2.2-2900 *et seq.* establishes policies and procedures applicable to employment with the Commonwealth of Virginia. Chapter 30 of Title 2.2 of the Code of Virginia establishes a grievance procedure for state employees. Section 2.2-3003 of the Code of Virginia requires the Department of Employment Dispute Resolution to establish and maintain this procedure, which shall include the right to a formal hearing. That agency has developed the Grievance Procedure Manual ("GPM"). This hearing was conducted in accordance with that manual.

Because this case involves the termination of an employee as the result of a disciplinary action, the agency has the burden of going forward with the evidence and the burden of proving the allegations by a preponderance of the evidence. GPM Section 5.8 (2).

The Department of Employment Dispute Resolution has further developed the Rules for Conducting Grievance Hearings. Section VI (B) of the Rules sets forth the framework for determining whether the discipline was warranted and appropriate. The hearing officer shall determine: (I) whether the employee engaged in the behavior described in the Written Notice; (II) whether the behavior constituted misconduct; (III) whether the discipline was consistent with law and policy; and (IV) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and, if so, whether any aggravating circumstance existed that would overcome the mitigating circumstances.

The hearing officer is to give due deference to the right of the agency to exercise good faith business judgment in employment matters and its right to manage its operations. If the grievant is found to have engaged in the conduct, that the conduct violated an established policy, and that the discipline was consistent with law and policy, mitigation is not to occur unless the discipline exceeds the bounds of reasonableness.

A. Procedural Non-Compliance:

At the commencement of the hearing counsel for the grievant noted her objection to the proceeding based on the failure of the agency to promptly respond to the grievance. Section 3.2 of the Grievance Procedure Manual requires an agency to hold a fact-finding meeting with the grievant within five workdays of the receipt of the written grievance. The grievant submitted her grievance on March 23, 2010 and it was received by the agency on March 26. The required meeting was not conducted until May 18.

No evidence was presented as to why the meeting was not held within the required time. The burden would have been on the agency to establish good cause for the meeting not being held in the five workdays. Section 6.3 of the Grievance Procedure Manual required the grievant to notify the agency, in writing, of the non-compliance and give it an opportunity to correct the non-compliance. She wrote the agency on April 5 seeking a response. To accommodate the schedule of grievant's counsel, the meeting was set for May 18. The grievant signed a document on April 22 agreeing to the extension. To complain about the initial delay the grievant should have contacted the Department of Employment Dispute Resolution. That agency, not this hearing officer, was the proper source of relief for the grievant with regard to any procedural non-compliance. Because the grievant failed to follow the steps set out in GPM Section 6.3, her right to challenge the alleged non-compliance has been forfeited to the extent not expressly waived by her agreement of April 22.

B. Discipline for Absenteeism:

Operating Procedure 135.1 of the Virginia Department of Corrections established Standards of Conduct addressing, among other things, unacceptable behavior and conduct. It sets forth a progressive system of discipline depending on the nature of the offense. Group III offenses are those "acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

One type of offense specifically listed as a Group III offense is being absent in excess of three days without proper authorization or a satisfactory reason. The agency issued the Written Notice to the grievant for being absent on three consecutive days in November 2009. The evidence is uncontradicted that the grievant missed work on November 12, 13, 16, and 17. Those dates were four consecutive workdays. The evidence is also undisputed that the grievant

did not follow the established policy for notifying her supervisor prior to her absence on those dates. On none of the dates did her supervisor, or anyone in a higher position, provide proper authorization to her to be absent. Although it is also undisputed that the grievant has a history of medical problems, she presented no evidence of a documentary nature to establish a "satisfactory reason" for her absences on those four dates. Any testimonial evidence was also lacking. Therefore, I find that the grievant did commit the alleged acts, that the acts constituted a violation of established policy, and that the misbehavior was sufficient to constitute a Group III offense.

The grievant testified that prior to November 18, 2009 she had been allowed to be absent from work when she had followed the same practice of not obtaining prior authorization but by merely providing notice to her supervisor by leaving voice messages with him or the secretary for the treatment team or the warden. The agency did not dispute this evidence. I find that the actions of the agency in not enforcing its own procedure regarding unexpected absences to be a proper factor in mitigation of the discipline against the grievant. Section XI (B) (4) of Agency Operating Procedure 135.1 treats as a Group II offense failing to report to work without "proper notice." The distinction between "notice" and "authorization" is significant. Operating Procedure 110.1 of the facility speaks in terms of notice but does not specify what constitutes proper notice. On November 18, the supervisor of the grievant explained to her that she needed to speak with someone personally to provide this notice. The agency has failed to establish that the grievant had any prior reason to know that her established practice was not consistent with the written policy.

C. Working Under the Influence:

Operating Procedure 130.2 of the Department of Corrections sets forth the circumstances under which an employee is subject to drug or alcohol testing based on reasonable suspicion. If reasonable suspicion exists, an employee is to be taken to a collection site for breath alcohol testing. The agency here had reasonable suspicion based on the reports of the smell of alcohol on the grievant and her gum-chewing as she was reporting to the Human Resource Director. If the test reveals impairment, appropriate disciplinary action is to be taken pursuant to Operating Procedure 135.1. Section IX (c) (2) requires an employee whose alcohol concentration is between .02 and .039 to be relieved of duty for twenty-four hours.

Agency Operating Procedure 135.1 allows management to treat a violation of Policy 1.05 of the Department of Human Resource Management ("DHRM") ("Alcohol and other Drugs") as either a Group I, II, or III offense depending on the nature of the violation. That policy references DHRM Policy 1.60 ("Standards of Conduct"). Policy 1.60 lists as a factor in issuing a Group III Written Notice whether the action endangered others in the workplace.

The grievant, on February 11, 2010, was in a position that caused her to have direct contact with inmates. The inmates with whom she was working included violent offenders and those with mental health issues. As stated above, the applicable law requires that I give a significant amount of deference to the decisions of management in an action such as this. The decision by management to treat the offense by the grievant to be so serious as to warrant termination is one, which I cannot find to be unreasonable.

The grievant has raised two primary defenses to this charge. The first is that she was not voluntarily under the influence of alcohol. She argues, instead, that the alcohol detected in her system stemmed from her ingesting NyQuil approximately seven hours prior to the testing being

done. She claims that she was unaware of the presence of alcohol in the self-administered medication.

Involuntary intoxication can be a defense in certain instances, but not where the substance was knowingly and voluntarily consumed. Riley v. Comm., 277 Va. 467 (2009). Even accepting the truthful testimony of the grievant that after 10 p.m. on February 10 she consumed nothing alcoholic other than the NyQuil, this defense of the grievant is disingenuous. She stated that she took the NyQuil in order to take advantage of its sedative effects to allow her to sleep a few hours prior to beginning work. Did she expect the sedative effects to be concluded by her scheduled work time? Given her intelligence and experience working with substance abuse patients at some point in her work history, I strongly doubt that was the case. At the time she was escorted to the office of the Human Resource Officer, she was chewing gum. Chewing gum is not allowed for employees in her position while on duty. Therefore, a reasonable argument is that she was attempting to mask the smell of alcohol on her breath or to otherwise skew the results of the testing that she expected was forthcoming.

The second defense is that the test results were invalid. No convincing expert evidence was presented to establish the results were not valid due to any burping by the grievant within a few minutes of the test or to the extent to which certain dental work may have affected the test results.

APPEAL RIGHTS

As the Grievant 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 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, 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**. 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 DEDR 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 court shall award reasonable attorneys= fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

DECISION

For the reasons stated above, I reduce the Group III offense for absenteeism to a Group II offense. I uphold the issuance of the Group III offense for being under the influence of alcohol while working and the termination of the grievant from employment. Because I uphold this offense, I cannot order reinstatement of the grievant to her position based on my reducing my other offense to the Group II violation.

SO DECIDED this September 22, 2010.

/s/Thomas P. Walk, Hearing Officer
Thomas P. Walk, Hearing Officer