Issue: Separation from State (unable to meet work conditions); Hearing Date: 01/13/16; Decision Issued: 01/27/16; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10732; Outcome: No Relief - Agency Upheld.

DECISION OF HEARING OFFICER

HEARING DATE: JANUARY 13, 2016

DECISION DATE: JANUARY 27, 2016

I. PROCEDURAL MATTERS

The grievant filed his Form A on August 28, 2015. The Director of the Office of Employment Dispute Resolution qualified the matter for hearing on November 3. He issued a ruling upon reconsideration on November 12, 2015, again finding that the issues raised are grievable. I was appointed as hearing officer on December 9. I conducted a prehearing conference by telephone on December 14 and issued a Prehearing Order. The hearing was held on January 13, 2016, lasting approximately 4.25 hours.

II. APPEARANCES

The grievant represented himself. He testified and called agency employees as his witnesses.

The agency was represented by legal counsel. The Warden of the subject facility was present throughout the hearing as the representative of the agency and testified. A total of seven agency employees testified during the hearing, including two by telephone.

III. ISSUES PRESENTED

A. Whether the agency acted in accordance with law and policy with respect to any duty to accommodate the grievant under the Americans With Disabilities Act?

B. Whether the agency gave sufficient notice to the grievant of its August 1, 2015 deadline to act prior to separating him from employment?

C. Whether the agency acted appropriately in separating the grievant from employment notwithstanding his lack of actual notice of the August 1, 2015 deadline, rather than granting him a short extension to comply?

D. Whether the agencies actions were disciplinary in nature, based on the grievant's failure to comply with the agency's instructions regarding the August 1, 2015 deadline?

IV. FINDINGS OF FACT

The grievant was employed by the Department of Corrections as a Corrections Officer and similar capacities since 1991. On April 10, 2014 he submitted a false inventory sheet. On May 1, 2014 the agency issued him a Group II Written Notice for that action. The agency supervisor considered issuing a Group III disciplinary action but decided to mitigate it to a Group II based on the long satisfactory work record of the grievant. The grievant unsuccessfully pursued a grievance of that matter and it is now final.

On or about April 15, 2014 the grievant began an extended period of time when he was absent from work, taking either annual or sick leave. Through the remainder of his employment he worked on only four days of his scheduled time. Those dates were July 21, 2014, October 19, 2014, and January 12 and January 13 in 2015. He worked only partial shifts on the 2014 dates. During the pendency of his prior grievance the grievant had requested a transfer to a different facility. The agency agreed to the transfer. Due to the lack of any openings at the new facility, the grievant was not scheduled to work there until January 12, 2015. He worked eight hour

shifts at the facility on January 12 and 13. He then resumed the pattern of being off work on leave.

After he began his extended time of taking leave the grievant submitted numerous written, terse excuses from his treating physician. Those excuses were dated and had the following notations:

- May 6, 2014: "Work Excuse, This individual should be excused from work for medical reasons from Wed. May 7 to July 19, 2014;" on July 18 the doctor certified the grievant as able to return to work, without restrictions, on a trial basis;
- July 22, 2014: "Unable to work for 30 days;"
- August 22, 2014: "Work Excuse: 8/22 through 9/26/2014;"
- September 26, 2014: "FMLA 9/26/2014 - 10/18/2014;"
- January 13, 2015: "Work Excuse: Wed., 1/14/15 through Mon., 3/2/15;"
- February 25, 2015: "Work Excuse: 3/1/2015 - 4/1/2015;"
- March 30, 2015: "Medical Release from Work Duties for 4/1/2015 to 5/1/2015;"
- June 29, 2015: "Work Excuse from June 30 through August 1."

On March 12, 2015 the agency sent the grievant, by certified mail, a letter requesting verification of the need for sick leave. The agency included with the letter a separate letter to the treating physician and an authorization form for the release of information. The agency provided to the physician the employee work profile for the grievant and a list of the physical requirements for his position. The agency requested the physician provide a statement that the grievant was unable to perform any assigned work and the anticipated end date of

incapacity/partial incapacity, if the physician made such a determination. The grievant received this letter from the agency on April 3.

The physician responded to the agency with a letter dated April 10, 2015, which was received on April 14. (The boldface emphasis is added.) The doctor stated **"it is my considered medical opinion that [the grievant] is unable to perform any of the assigned work and this medical letter is offered to support that belief. It is my belief that the anticipated end date of incapacitation/partial incapacity could not** be **expected before July 2015**." The doctor recited eight conditions affecting his ability to perform his job. He found that **"the issues are not physical but are mental."** The physician went on to state that of the symptoms for which he had treated the grievant most, if not all, were **"related to an impaired work environment."** He cited six specific events or conditions alleged to affect the grievant mentally. The physician gratuitously referred to these working conditions as being **"unfair labor practices."** The bottom-line conclusion of the doctor was that the grievant was **"working in a hostile environment and therefore is not suitable for work due to the stressful and unchanging work environment."**

This letter from the physician was the last detailed information provided to the agency regarding the condition of the grievant prior to July 17. On that date the agency drafted a letter to the grievant. It pointed out that he had been absent form work for 133 consecutive regularly scheduled work days creating a hardship for the agency. Pursuant to Department of Human Resource Management Policy No. 4.55 the agency gave the grievant the following options:

- Apply for disability retirement;
- Request a reasonable accommodation to be allowed to return to work;

- Apply for a position within the agency that he was minimally qualified that can accommodate his restrictions;
- Apply for a position external to the agency; or
- Request a Review for Placement into another agency position.

The letter then stated that if he did "not apply for disability retirement through VRS and are unable to return to work by August 1, 2015, your employment with the agency will not continue beyond that date." If he failed to apply for disability retirement or make arrangements to return to work on or before August 1, his health care plan coverage would terminate on July 31. The agency further noted that the last documentation received from the health care provider was the letter of April 10, 2015. The grievant was advised that he was required to provide further documentation from the physician of his ability to return to work, whether full time or with modifications. The requested modifications were to be specifically stated by the provider.

The July 17 letter was mailed by the agency on July 20 by certified mail. The United States Postal Service first attempted delivery of the letter on July 22. The grievant testified that his pattern was to check his mail only on the 1st and 15th days of each month. The letter was sent to the correct address for the grievant, to a mailbox at his home. He stated that he was not around his home on July 22 due to working out of the area. He stated that Human Resource Officials with the agency knew of his pattern of only checking his mail twice a month.

The grievant received the letter on Saturday, August 1. Because it was a Saturday, he did not believe that it would be of any use for him to attempt to contact any of the Human Resource Officials listed in the letter at the telephone numbers or e-mail addresses given. The letter was signed by the Employee Benefits manager of the agency and gave her phone number and e-mail

address. The Employee Relations Manager was also named, with her contact information being provided. The Employee Relations Manager testified that she regularly checks her work e-mail and voice messages on weekends and other days when she is away from the office.

On the first non-weekend day after receiving the letter, August 3, the grievant went to the facility at which he had been employed and spoke with the Human Resource Officer. He pointed out that he had remaining leave time that could be used to cover additional absences. He requested the Grievance Form A and stated that he would not file a grievance if he was allowed to remain employed until either August 9 or August 24 so that he could obtain another month of service on his work record. The agency denied his request; this grievance followed.

V. ANALYSIS

Chapter 30 of Title 2.2 of the Code of Virginia sets forth a comprehensive procedure for state employees to challenge certain adverse employment actions. A separate document adopted by the Virginia Department of Human Resource Management Office of Employment Dispute Resolution, the *Grievance Procedure Manual*, ("GPM"), establishes the procedures governing such grievances. Here, the grievant challenges his separation from employment based on claims of lack of due process, misapplication of policy, harassment, and retaliation. Those claims do not automatically qualify for a grievance hearing under *GPM* Section 4.1(a), but fall under Section 4.1(b), "Actions Which May Qualify." The Director of the Office of Employment Dispute Resolution found that the grievant raised sufficient factual issues to require a hearing under the *GPM*. See Ruling 2016-4243. He delineated four issues to be decided. On each of

those issues the grievant had the burden of proving his claim by a preponderance of the evidence. *GPM* Section 5.8(3). I address each issue separately.

A. Consistency With Law and Policy

The Americans With Disabilities Act, 42 USC 12101, *et seq*, prohibits discrimination in employment against otherwise qualified individuals with a disability. A disability is an impairment that substantially limits a major life activity. Individuals who have a record of such an impairment or are regarded as having the impairment are also covered by the Act. Working is considered to be a major life activity. A person is "qualified" if he can perform the essential functions of the job, with or without reasonable accommodations. 42 USC 12111(8). For purposes of this decision I have assumed that the job-related anxiety of the grievant is a covered impairment. He did not prove that he was otherwise qualified as of August 1, 2015.

The agency had before it the April 14, 2015 certification by the physician of the grievant being totally unable to perform his job. The physician relied on the work environment in general, rather than pointing to any specific accommodations that could be made. The grievant similarly made no request for specific accommodations, other than the approved transfer that took effect in January 2015. Somewhat curiously, the physician wrote about the "deteriorating work environment at the facility to which the grievant had been transferred." That assessment ignores the fact that the grievant had only worked two shifts at the facility, approximately 3 months prior. The new facility was the one to which the grievant requested a transfer the previous year. The burden of requesting an accommodation is on the employee. Assuming that the conditions at the new facility were troubling to the grievant, he had over six months to request an additional transfer or further accommodations.

The grievant was subject to the provisions of DHRM Policy No. 4.55, "Traditional Sick Leave." Under that policy, the burden is on the employee to provide verification of the need to be absent from work for medical reasons. Prior to the July 17, 2015 letter, the only documentation possessed by the agency was that the grievant had an anticipated return to work date no earlier than July, 2015. The excuse provided by the physician on June 29 extended that date without further explanation, until August 1. The failure of an employee to provide requested information can support a termination from employment. *Snyder v. Virginia Employment Commission,* 23 Va. App. 484 (1996). The demand by the agency for additional documentation or the submission of a disability retirement package by the grievant by no later than August 1, 2015 was entirely consistent with applicable law and policy.

B. Sufficiency of Notice:

The July 17, 2015 letter from the agency was based on Policy No. 1.70, "TERMINATION/SEPARATION FROM STATE SERVICE." That policy allows an agency to require an employee to apply for disability if an employee covered by the traditional sick leave program "becomes mentally or physically incapable of performing his or her job, and there is no reasonable accommodation, including through transfer, or demotion to another position, that will enable an employee to perform the job." If the employee declines disability, the agency is given the option to apply DHRM Policy No. 1.60, Standards of Conduct, addressing unsatisfactory work performance.

The grievant has not contested that the application of Policy 1.70 is appropriate. He argues, instead, that his removal from employment was handled improperly under Section H of that policy. That section requires the agency to notify the employee prior to removal from

employment and to "notify the employee, verbally or in writing, of the reasons for such a removal giving the employee a reasonable opportunity to respond to the charges." His challenge to the application to this section is two-fold.

First, he raises the issue of whether he was given a reasonable opportunity to respond to the charges. He relies on his not having received the July 17 letter until August 1 after having told an agency Human Resource Officer of his pattern of checking his mail on a regular, but very infrequent basis. I have been referred to no controlling authority as to what constitutes a reasonable opportunity to respond under this section. I believe that a reasonable analogy is to the service and trial of a Warrant in Debt in a General District Court in Virginia. Such a pleading is for a civil claim that could result in a judgment against the defendant (party to be served) in an amount up to $25,000.00. Section 16.1- 83 of the Code of Virginia provides that the trial of such a warrant may be held if the defendant receives proper service at least five days prior to the trial. If the grievant had received the letter on the date on which delivery was first attempted, July 22, he clearly would have been given a reasonable opportunity to respond to the charges.

I view the mailing of the letter to the grievant as the functional equivalent of having a Warrant in Debt served by posting a copy of it at the front door of the residence of the defendant. Under Section 8.01-296 of the Code of Virginia, a default judgment can be granted against a defendant after posted service only if a copy of the warrant has been mailed to the defendant at least 10 days prior to the hearing date. Carrying the analogy forward, the grievant received sufficient notice when the postal service attempted delivery on July 22 and left notice of the attempt and the existence of the letter. The opportunity for the grievant to contact the agency Employee Benefits Manager by voice mail or e-mail message on August 1 eliminates any

concern that the letter was retrieved by him on a Saturday when the agency offices were not open for normal business.

Section 1-210 of the Code of Virginia provides additional time to perform certain acts when a deadline falls on a weekend or legal holiday. It says that the action may "be performed" on the next business day when the appropriate office is open. The most relevant subsection is 1-210(E). That subsection uses the terminology of administrative order. I can't equate that phrase with the letter of July 17. The statute is designed to cover items having the force of law such as regulations, statutes, and orders authorized by law. As discussed below, the agency had the discretion to extend the August 1 deadline if it desired.

The second argument raised by the grievant is that the July 17 letter constituted notice of his separation from employment without the opportunity to respond as required by Policy No. 1.60. This argument is based on an unreasonable interpretation of the letter. The letter provided the grievant options of either applying for disability retirement or returning to work. If the physician had certified the ability of the grievant to return to employment, then he would not have been terminated. If the physician had certified an inability to return to work, then the agency would have been within its prerogative to separate the grievant from employment. The burden of proof on this issue, as with the other issues herein, was on the grievant. He failed to prove the failure by the agency to provide a "final notification of removal" other than the July 17 letter was not harmless.

C. Lack of Actual Notice:

This issue can be restated as whether the agency abused its broad discretion in not allowing the grievant additional time to submit relevant medical information. As stated above,

the grievant had the burden of showing that the additional information or argument to be presented by him would have made any difference. This he failed to do.

Without controlling authority being presented by the parties, I am again relying on analogous situations. I have reviewed the case of, *Blakes v. Gruenberg, Chair*, No. 1:14 CV 1652 (EDVA, 12/18/15), 2015 US Dist. LEXIS 169702. That case involved the failure by a plaintiff to timely file a civil action alleging sexual discrimination. The plaintiff alleged that the late filing of the claim should be excused due to her attorney being responsible for providing personal care to his sister. The Judge was asked to apply the legal doctrine of equitable tolling to save the case from dismissal.

The Federal Judge cited other cases that allow a court to base its determination on the constructive notice of an event provided to a plaintiff, rather than the actual knowledge of the plaintiff. Ms. Blakes received a determination letter from the Equal Employment Opportunity Commission, starting the clock running on the time available to her to file a civil suit. The letter was not actually received for several days after it was placed in her box. These facts are very similar to what happened with the grievant. The judge found that the appropriate date to use was the one at which the letter arrived at the intended address. I find his reasoning sound. I find that the grievant received notice on July 22, 2015 of the options being provided to him.

The Doctrine of Equitable Tolling is not to be applied unless the party seeking to take advantage of it was induced or tricked into inaction by misconduct of the other party or if extraordinary circumstances exist. Neither factor exists in this case. For a party to be found to have been the victim of misconduct by another party, the "victim" must be unaware that he is in jeopardy of adverse consequences. The grievant here was fully aware of his obligation to

provide the relevant medical evidence to the agency. He had consistently provided medical excuses over fourteen months. The March 12, 2015 letter to him from the agency warned him that failure to provide requested information would result in his being placed on unauthorized leave. The last excuse provided by him is dated June 29, 2015 and provided a work excuse through August 1. Nevertheless, he was not scheduled to see his physician again until August 3. He clearly was not tricked by the agency.

I do not find extraordinary circumstances are present here that would make it in equitable for the agency not to have extended the deadline for a response. To take advantage of the Equitable Tolling Doctrine, the party must show circumstances beyond his control. The grievant has provided no reasonable explanation for why he did not provide the medical excuse prior to August 1. Similarly, he has provided no reasonable excuse for not retrieving his mail, either personally or through and agent, prior to August 1. Although he testified that the agency was aware that he would not be checking his mail until that date, due to his pattern of checking the mail on the 1st and 15th days of each month, his testimony is contradicted by his receiving the March 12 letter on April 3. April 1, 2015 fell on a Wednesday and was not a holiday. The failure by the grievant to receive the July 17 letter was his inexcusable fault.

Aside from the finding above, the plaintiff did present himself to the Human Resource Officer at the facility early on August 3. Rather than providing any meaningful response as allowed under Policy No. 1.60, he attempted to negotiate a delayed separation from employment. The agency denied that request. I cannot find that such was an abuse of discretion by the agency or an inadequate opportunity for the grievant to respond.

D. Was the Separation Disciplinary:

As stated above, the agency acted within its discretion in providing the grievant the options set forth in the July 17 letter. Those options were clearly set forth. The grievant presented no evidence to show that the agency preferred that he choose one option over the other. When he failed to choose an option, the agency followed its prerogative as set forth in Policies 1.60 and 1.70 and separated him from employment. That was a consequence delineated in the July 17 letter. Although that was not the only option available to the agency, its declining to grant the grievant additional time to respond or use additional available leave was not a punishment of him for failing to either provide the medical proof or apply for disability retirement, or for any other reason.

VI. DECISION

For the reasons stated above, I hereby affirm the separation of the grievant from employment with the agency on August 1, 2015.

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 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

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management 101
North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15- calendar day period has expired, or when requests for administrative 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.

ORDERED this January 27, 2016.

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