Issue: Group III Written Notice with Termination (unsatisfactory performance); Hearing Date: 01/14/15; Decision Issued: 02/13/15; Agency: VCCS; AHO: Jane E. Schroeder, Esq.; Case No. 10517; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Case Number Case # 10517

Case Heard: January 14, 2015
Decision Issued: February 13, 2015

PROCEDURAL HISTORY

The Grievant was employed as a Campus Buyer at the agency. On November 5, 2014, the agency issued to the Grievant a Group III Written Notice for Offense Code 11: Unsatisfactory Performance. The Grievant was terminated. The Grievant initiated the Employee Grievance Procedure on November 20, 2014 by completing Grievance Form A – Dismissal Grievance. The grievance was subsequently qualified for hearing. On December 10, 2014, the hearing officer was assigned to hear the case.

Attempts by the hearing officer to schedule a joint pre-hearing conference were unsuccessful. The hearing officer spoke separately to the Agency Advocate and to the Grievant and secured a mutually agreeable hearing date. The hearing was set for January 14, 2015. A Pre-Hearing Report dated December 13, 2014, was sent to both parties. The Pre-Hearing Report gave the date of the hearing, as well as the date that the list of witnesses and copy of the exhibits were due. Both the Agency Advocate and the Grievant sent acknowledgements of the receipt of the Pre-Hearing Report. The Grievant did not send any exhibits or a list of witnesses.

The hearing took place on January 14, 2015. The Grievant did not attend the hearing and did not contact the Hearing Officer prior to the hearing to say he would not attend. Three witnesses testified for the Agency. The agency=s exhibits 2-10 were entered into evidence. The three-hour hearing was recorded on a digital recorder and stored on a CD. Five days after the hearing the Grievant sent an email to the Agency Advocate and the Hearing Officer stating that he was unable to attend the hearing because he couldn't get to the hearing, that he was now homeless and living out of his car, that there was no way to contact him, and that he would send a PO Box address. No further communication was received from the Grievant.

APPEARANCES

Two Agency Advocates

Witnesses for Agency:	#1	Associate Director of HR
	#2	Director of Material Management

#3 Buyer Specialist

Witness for Grievant: None

ISSUE

Whether the Group III Written Notice issued on November 5, 2014, for Offense Code 11: unsatisfactory performance should be upheld, modified or rescinded, and whether the termination upheld.

On the Written Notice, Section II – Offense, the Agency alleges, "[Grievant] has failed to come to work after repeated attempts to contact him to do so. This has created a hardship for the department as his pattern of inattendance directly impacts his ability to successfully perform his job duties. Additionally, [Grievant] has provided insufficient documentation on multiple occasions to support his inattendance. As an amendment to the letter of intent, [Grievant] failed to report without notice on October 23 and 24, to further illustrate his unwillingness to abide by [Agency]'s policies with regards to attendance."

On the Written Notice, Section IV – Circumstances considered, the Agency wrote, "The [Agency] reviewed your response and postponed disciplinary action until UNUM reviewed and denied the appeal more than once. As [Grievant] is not covered under approved FMLA or Short Term Disability and due to his continued pattern of inattendance and lack of communication, his response does not mitigate the proposed action. [Greivant] had ample opportunity to contact HR and received multiple communications from HR regarding his return to work status."

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. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual)

FINDINGS OF FACT

1. The Grievant was hired in January, 2013, as a buyer for the agency. The agency has six campuses with a buyer at each campus. The Grievant was assigned as the buyer at the Loudoun campus. At the time he was hired, the Grievant was living in Richmond, which is at least a two-hour commute from the Loudoun campus. The Grievant initially told the Materials Management Director ("Director") that he would move to the Northern Virginia area. The Grievant never moved.[1]
2. The normal working hours for the agency are 8:30 a.m. – 5:00 p.m. The Grievant did not consistently get to work on time. His hours were changed to 10:00 a.m. – 6:30 p.m. He still did not arrive to work on time consistently.[2]

1 Testimony of Director, Exhibit 5, p. 16.

2 Testimony of Director

3. By March, 2014, the Director was hearing complaints from the campus personnel that the Grievant frequently was not there. The Director also noted that the Grievant was making some poor decisions regarding the procurements, that the Grievant did not seem to be proficient in using the eVA electronic procurement system, and that the Grievant had not been able to solve a vendor dispute.
4. The Director took the following steps:
   a. He talked to the Grievant about the performance concerns, specifically that the Grievant was exceeding authority regarding purchases, and not getting purchases pre-approved,
   b. He changed the Grievant's supervisor to the Buyer Specialist who would oversee the Grievant's work at the Loudoun campus; and
   c. He arranged for the Grievant to have more training from other personnel in the department regarding the eVA system and correct way to secure purchases.
5. There was not significant improvement in performance or attendance.[3]
6. In May, 2014, the Grievant applied for and was granted Family and Medical Leave Act ("FMLA") intermittent leave due to a medical problem.[4] According to the testimony of the Associate Director of Human Resources ("HR"), under the intermittent leave, the Grievant could take the day off work when he notified his supervisor by 7:30 a.m. that he would be taking FMLA leave.[5] The Agency's policies and procedures regarding FMLA leave, including the use of intermittent FMLA leave were not provided by the agency for this hearing.
7. The Grievant's performance and attendance continued to be poor. The Grievant did not consistently notify the supervisor when he was not coming to work because he was taking FMLA leave. Many times he was hours late to work or did not come to work because of other reasons such as traffic or mechanical issues with his car. The Grievant's work at the Loudoun campus was not getting done. The Director and the Buyer met with the Grievant on several occasions to address performance and attendance issues.[6]
8. According to the testimony of the Associate Director of HR, the FMLA leave has no end date, unless the Agency requests recertification. On July 17, 2014, the Agency requested recertification. On July 28, HR personnel met with the Grievant to explain that he had to reapply for FMLA leave, and to show him the procedure to do so. He was sent a reminder by email, and by registered mail. The Grievant did not reapply for FMLA leave. The FMLA leave was concluded on August 25, 2014.[7]
9. The Grievant's job performance during this time did not improve. His work at the Loudoun campus was not being done. The Director assigned another employee to do the Grievant's job. The Director then removed the Grievant from the Loudoun campus and

3 Testimony of Director
4 Exhibit 8, p. 1
5 Testimony of Associate Director of HR
6 Testimony of Director, Buyer Specialist, Exhibit 7
7 Testimony of Associate Director of HR

placed him in the department central office in Fairfax under the direct supervision of the Director. The Grievant's job responsibility was to fix the vendor issue that he had not fixed since March. The Grievant never completed that task. On August 27, 2014, the Grievant was given a Group II Written Notice for unsatisfactory performance and failure to follow instructions and/or policy. [8]

10. In September, the Grievant reapplied for FMLA leave. He was granted full-time FMLA leave for September 17, 2014 through October 17, 2014, with a return-to-work date of October 20, 2014.[9]
11. The Grievant did not return to work on October 20. He sent an email stating that he would not return to work that day because of medical issues. He attached a letter from his doctor, dated October 17, 2014. The doctor's note stated, "My patient, [Grievant] is experiencing severe anxiety symptoms and he needs time off to get his medications adjusted. So he should be able to get short term disability." The Associate Director of HR responded with an email that his FMLA leave was over, that he had been denied short term disability twice by the Agency's insurance company, and that he needed to report to work.[10]
12. The Grievant did not go to work on October 21 or 22, but he did call his supervisor both days to say he would not be in. On October 23 and 24, the Grievant did not go to work and did not notify his supervisor.[11] On October 24, the Director sent the Grievant a letter of intent to issue a Group III Written Notice with Termination. The Grievant responded with an email on October 27 in which he stated he was still appealing the denial of short-term disability, and he thought the doctor's note (See paragraph 11 above) would be enough to extend his FMLA leave.[12]
13. The Agency waited a week to allow the Grievant's third appeal of denial of short-term disability to be decided. On November 4, short-term disability was again denied. On November 5, the Agency issued the Group III Written Notice with termination.[13]

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653,656 (1989).

8 Testimony of Director, Exhibit 6
9 Exhibit 8, p.2
10 Exhibit 4, pp. 7-8, Exhibit 5, p. 3
11 Testimony of Associate Director of HR
12 Testimony of Associate Director of HR, Exhibit 4, p. 4, Exhibit 5, pp. 1-2
13 Testimony of Associate Director of HR, Exhibit 4, p. 2

VA Code ' 2.2-3000(A) provides:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under ' 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Policy 1.60 provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Commonwealth=s disciplinary system typically involves the use of increasingly significant measures to provide feedback to employees so that they may correct conduct or performance problems. Counseling is typically the first level of corrective action but is not a required precursor to the issuance of Written Notices. When counseling has failed to correct misconduct or performance problems, or when an employee commits a more serious offense, management should address the matter by issuing a Written Notice.

Offenses are grouped by levels, from Group I to Group II. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention. Group II Offenses include acts of misconduct of a more serious nature that significantly impact agency operations. Group III Offenses generally include acts of misconduct of a most serious nature that severely impact agency operations.

In this case, The Director issued a Group III Written Notice to the Grievant for Unsatisfactory Performance. The Written Notice alleges that the Grievant "has failed to come to work after repeated attempts to contact him to do so. This has created a hardship for the department as his pattern of inattendance directly impacts his ability to successfully perform his job duties. Additionally, [Grievant] has provided insufficient documentation on multiple occasions to support his inattendance. As an amendment to the letter of intent, [Grievant] failed to report without notice on October 23 and 24, to further illustrate his unwillingness to abide by [Agency]'s policies with regards to attendance."

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section AFramework for Determining Whether Discipline was Warranted and Appropriate@ states as follows:

> The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).[14]
>
> Using this framework, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

In this case, the evidence showed that the Grievant had long-standing attendance problems. He was unable to complete tasks assigned to him. The Director had to get another employee to do his job. He did not follow procedures to report to work as scheduled. He did not follow procedures regarding absences. Even when the Grievant had FMLA intermittent leave, he missed many days due to reasons unrelated to FMLA leave. He commuted a long distance in heavy traffic. His frequent absences impacted his performance. The Agency has proven, by a preponderance of the evidence that the Grievant engaged in the behaviors alleged in the Written Notice.

(ii) Whether the behavior constituted misconduct

Under the Standards of Conduct, employees are expected to "report to work as scheduled and seek approval from their supervisors in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures." (Standards of Conduct, p.2). Grievant is subject to the Standards of Conduct. He needed to report to work as scheduled. He frequently did not. There were many, many absences unrelated to the FMLA leave over a period of many months. On the final return-to-work day on October 20, 2014, the Grievant did not return to work as he was instructed to do. He did not report to work again. He did not follow the procedures regarding absences. Under the Standards of Conduct, this behavior constitutes misconduct.

(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy

The disciplinary action taken by the agency was to issue a Group III Written Notice. The Grievant was terminated. The Grievant had a previous Group II Written Notice from August, 2014 regarding the same problems. Under the Standards of Conduct, a Group III Written Notice is appropriate for absence in excess of three work days without authorization. The Agency has proven that the Grievant was absent the whole week of October 20-24 without authorization. I find that the disciplinary action taken by the agency was consistent with law and policy.

Mitigating Circumstances

[14]Rules for Conducting Grievance Hearings, VI.B1., Effective Date 7/1/2012.

According to the Rules for Conducting Grievance Hearings, AA hearing officer must give deference to the agency=s consideration and assessment of any mitigating and aggravating circumstances. A hearing officer may mitigate the agency=s discipline only if, under the record evidence, the agency=s discipline exceeds the limits of reasonableness.@[15]

In this case, the Agency tried over the course of many months to counsel and assist the Grievant to change his pattern of poor performance, poor attendance, and improper notification regarding absences. This Hearing Officer finds that the agency's discipline of imposing a Group III Written Notice with termination does not exceed the limits of reasonableness. Therefore, the hearing officer may not mitigate the agency's discipline in this case.

DECISION

The Grievant's Group III Written Notice and Termination of November 5, 2014 is upheld.

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

[15] Rules for Conducting Grievance Hearings, p. 17

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.[16]

[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].

February 13, 2015

Jane E. Schroeder
Jane E. Schroeder, Hearing Officer

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