Issue: Group III Written Notice with Termination (absence in excess of 3 days without notice); Hearing Date: 07/13/12; Decision Issued: 07/20/12; Agency: DCJS; Cecil H. Creasey, Jr., Esq.; Case No. 9843; 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. 9843

Hearing Date: July 13, 2012
Decision Issued: July 20, 2012

PROCEDURAL HISTORY

Grievant was a program specialist for the Department of Criminal Justice Services ("the Agency"), and he challenges the Group III Written Notice and termination. On February 28, 2012, the Agency issued the Grievant a Group III Written Notice for absence in excess of three days without authorization (February 6-9, 2012), with termination of employment. The Grievant had a prior active Group II Written Notice, for leaving work without permission.

Grievant timely filed a grievance to challenge the Agency's disciplinary actions. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On May 30, 2012, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer to hear the grievance. A pre-hearing conference was held by telephone on May 31, 2012. The hearing ultimately was scheduled for the first date available between the parties, their counsel, and the hearing officer, July 13, 2012, on which date the grievance hearing was held, at the Agency's facility. Because of good cause shown, the time for concluding the grievance has been extended, accordingly.

Both sides submitted documents for exhibits that were, with some objections ultimately overruled, accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Counsel for Grievant
Counsel for Agency
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the termination memorandum?
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 under applicable policy)?
4. 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 termination and job reinstatement.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. 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.

DHRM Policy 4.30, Leave Policies – General Provisions, at III, states:

A. Agency approval necessary for all leaves of absence
   Before taking a leave of absence from work, whether with or without pay, employees should request and receive their agencies' approval of the desired leave.
B. Employee requests for leave
   1. Procedure for requests
      a. Employees should request leaves of absence as far in advance of the desired leave as practicable.
      b. Employees also should submit requests for leaves of absence in accordance with the specific requirements set forth in the respective leave policies, and which may be set forth in their agencies' procedures for requesting leaves.
   2. Special circumstances
      If an employee could not have anticipated the need for a leave of absence, the employee should request approval for the leave as soon as possible after leave begins. In reviewing the request for approval, the agency should consider, among other things, the circumstances necessitating leave and whether the employee could have anticipated the need.

Agency Exh. 35.

DHRM Policy 4.57, Virginia Sickness and Disability Program, assigns responsibilities to the affected employee, including the following excerpts:

- Understand the program features of VSDP and his or her role and responsibilities of participating in the program.
- Complete leave slips using leave until time off is authorized by VSDP . . .
- Understand the requirement for notifying your supervisor and the TPA of absence and ensuring that medical information is provided to the TPA in a timely manner.
- Ensure that a family member or other person knows to contact the TPA in the event the employee is unable to do to disability/illness.
- Ensure that supervisor is kept informed regarding disability claim and any changes that occur to return to work date; and restrictions.
- Report any outside wages or income earned to Human Resource Department (STD), Workers' Compensation Claims Adjuster if work-related, and the TPA (LTD and LTD-W) so that disability payment can be adjusted.
- Report any change in disability to the TPA.

The State Standards of Conduct, DHRM Policy 1.60, provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. The policy specifically identifies a Group III offense to include absence in excess of three days without proper authorization or a satisfactory reason. Agency Exhs. 2 and 3.

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."

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 Grievant has worked for the Agency for 14 years, and with state service for 34 years. The operable facts of the discipline are not materially in dispute and are summarized effectively in the Agency's Written Notice. Agency Exh. 4. The notice, issued by the Grievant's immediate supervisor, stated:

> On January 31, 2012, you sent an email to me stating that your physician had indicated that it was not advisable for you to return to work on February 1, 2012. Since your claim for short term disability with Unum would expire on January 31, 2012, you indicated that you would need to use leave to cover the remainder of the week ending on Friday, February 3, 2012. Following that date you failed to contact me to coordinate your absence and more than three work days passed. It was only after I sent you a letter providing advance notice of disciplinary action by courier on February 9, 2012 did you send an email to me regarding your absence in which you indicated that you needed to use your personal leave to cover your absence.

Unum is the third party administrator for the Commonwealth's short term disability plan. The Grievant had been out on short term disability that was approved by Unum through January 31, 2012. As of Wednesday, February 1, 2012, the Grievant's short term disability had not been extended by Unum, and the Grievant contacted his supervisor via email to notify and request use of annual leave for the remainder of the work week, February 1 through February 3, 2012.

With his short term disability still not having been extended by Unum, the Grievant did not follow up with his supervisor on Monday, February 6, 2012, or February 7 and 8, to provide

a status of his return to work, short term disability extension, or request for annual leave. The Grievant asserts that his illness and subsequent extension of his short-term disability provide satisfactory reason for not contacting his supervisor to inform him of the need or request for approved leave starting February 6, 2012.

The Agency's human resource generalist wrote to the Grievant several times during his period of short term disability and reminded the Grievant of his responsibility to contact his immediate supervisor. For instance, on December 12, 2011, she wrote to the claimant, including the following:

> Please be reminded that you need to closely coordinate your absence with and submit leave requests to your supervisor, [ ]. You must call her/him to let her/him know the expected duration of your absence as soon as possible, and regularly keep her/him informed of your status. If you find that your circumstances change, you must call and speak directly to [your supervisor]. Please submit your leave requests using the "short term disability(SD)" leave code and Disability Credit Election form(s), if applicable, to [your supervisor].

Agency Exh. 7. On December 28, 2011, the human resource generalist again wrote to the Grievant, including the following:

> Please be reminded that you need to closely coordinate your absence with your supervisor, [ ]. You must call her/him to let her/him know the expected duration of your absence as soon as possible, and regularly keep her/him informed of your status. If you find that your circumstances change, you must call and speak directly to [your supervisor].

Agency Exh. 9. The State Employee Handbook provides that employees

> are expected to report to work in accordance with the work schedule assigned by your supervisor, and you are responsible for letting your supervisor know as soon as possible if you expect to be late or absent. Ask your supervisor about your agency's procedure for reporting absences. Failure to notify your supervisor appropriately may result in disciplinary action including termination.

Agency Exh. 30.

The Grievant did, in fact, honor the requirement to keep his supervisor apprised of his various short term disability approvals and status changes and need for leave up through February 3, 2012. Agency Exhs. 10, 12, 14.

The supervisor's advance notice of disciplinary action stated:

> On January 31, 2012 you sent me an email informing me that your physician indicated that it was not advisable to return to work on February 1, 2012 and since your claim for short term disability with Unum expired January 31, 2012 and had

> not been extended, you indicated you would need to use leave to cover the remainder of last week.
>
> Since that time, you have not called or communicated with me, have not taken action to coordinate and approve your absence with me as you have been instructed, and you have been absent in excess of three workdays without proper authorization.
>
> In the past I have counseled you about the importance of communicating any absence with me.
>
> I am considering issuing you a Group III written notice and terminating you from employment for this offense unless you provide a satisfactory reason or explanation for your conduct sufficient to mitigate the contemplated disciplinary action. . .

Agency Exh. 16.

Testifying for the Agency were the human resource generalist, the Grievant's immediate supervisor, Agency section manager, and human resources director. All Agency witnesses testified that during short term disability employees continue to have the employment obligations to notify the Agency and arrange for the required leave. This obligation is not delegated to the third party administrator for short term disability. Testifying for the Grievant were a former co-worker at the Agency, a friend and roommate, another friend who worked on a television commercial with the Grievant in January 2012,[1] and the Grievant. The Grievant's witnesses attested to the Grievant's work abilities or the fact that the Grievant was ill throughout his short-term disability.

The Grievant admitted the truth of his supervisor's advance notice of disciplinary action. He also testified that he questioned the constant need to keep his supervisor informed, and during the grievance steps the Grievant asserted that he simply did not think about his obligation starting February 6, 2012, until he received his supervisor's courier-delivered letter on February 9, 2012, notifying him of pending disciplinary action.

Upon receiving the courier-delivered advance notice of disciplinary action on February 9, 2012, the Grievant sent his supervisor a detailed email response. Agency Exh. 19. Throughout the grievance steps, the Grievant asserted that is simply forgot to contact his supervisor starting February 6, 2012. At the grievance hearing, (but not during the grievance steps) the Grievant

[1] While the extent of the Grievant's disability was questioned, the fact of the Grievant's short term disability was not wholly challenged by the Agency. However, going to the extent of disability, the Agency presented a video of a television commercial in which the Grievant participated as an actor, along with his friend who testified to the circumstances of the events that took place the day of filming on January 26, 2012. Agency Exhs. 32 and 33.

asserted that he was simply too ill to contact his supervisor from February 6 through February 9, 2012.[2]

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

I find that the Agency has met its burden of showing the claimant was absent from work for more than three days, February 6 through 9, 2012, without obtaining authorization or providing notice. It was only in response to the Agency's notification to the Grievant of impending discipline that the Grievant contacted his supervisor on the afternoon of February 9, 2012. An employee is not excused from notifying his employer of his status while on short term disability administered by a third party. While the Grievant asserts his failure was not intentional, the Agency is not required to prove intent to establish the offense of not reporting for work or arranging leave. There is insufficient evidence from the Grievant to show he was

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[2] The Grievant may be arguing that he has been subjected to a form of discrimination through the alleged failure of the Agency to provide a reasonable accommodation for his disability. The Grievant, however, has not presented any medical evidence of a condition that would prevent him from phoning, emailing, or otherwise contacting his supervisor during the days starting February 6, 2012.

The Grievant seemed to assert that the Agency knew or should have known of his alleged medical inability to communicate, however, he ultimately conceded that he never put the Agency on notice of a specific medical impediment excusing his obligation to keep his employer apprised of his need for continuing leave.

While not directly on point, the discipline concept in ADA circumstances is instructive. Generally, it is the obligation of an individual with a disability to request a reasonable accommodation. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance. *See Hill v. Kansas City Area Transp. Auth.,* 181 F.3d 891, 894 (8th Cir. 1999) (request for reasonable accommodation is too late when it is made after an employee has committed a violation warranting termination).

In an ADA situation, the employer may refuse the request for reasonable accommodation and proceed with the termination because an employer is not required to excuse performance problems that occurred prior to the accommodation request. When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:

> tolerate or excuse the poor performance;
>
> withhold disciplinary action (including termination) warranted by the poor performance;
>
> raise a performance rating; or
>
> give an evaluation that does not reflect the employee's actual performance.

See EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, at II (2.3) and IV (4.4), (1992), *available at www.adainformation.org/Employment.aspx.*

Thus, without any specific medical evidence justifying or excusing the Grievant's failure to keep his supervisor apprised of his need for continuing leave as of February 6, 2012, the failure of the Grievant to bring this to the employer's attention prior to discipline and prior to termination renders the medical excuse issue out of reach. The Agency has met its burden of proof, and, under the applicable law, there is no excuse available to reverse discipline.

incapacitated at a level that prevented him from contacting his employer the week starting February 6, 2012.

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.* As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." 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.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the

> facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important expectation of employee attendance and notification. I find that the Agency has acted reasonably in its discipline of the Grievant. The prior, active Written Notice for leaving work without permission weighs against mitigation. While the Grievant was otherwise considered a good employee, the Agency demonstrated a legitimate business reason to enforce its attendance and notification policy and procedure. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action outside the bounds of reasonableness.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. For a claim of retaliation to succeed, the Grievant must show (1) he engaged in a protected activity; (2) he suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by asserting a prior complaint to the EEOC, alleging the Agency created a hostile, *i.e.*, bullying, work environment. The Grievant asserts that the retaliation he has experienced stems from this complaint. Further, he could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and termination. However, as explained below, the Grievant does not satisfy the burden of proof of showing that the materially adverse action was taken because of his protected activity.

There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct of unapproved absences without notice, all of which was solely within the control of the Grievant.

Job termination is inherently a harsh result. It is unfortunate that the Agency is losing an otherwise valuable employee, but there are no factors that would make it unreasonable to impose the Agency's choice to remove Grievant. Accordingly, Grievant's request for relief must be denied.

DECISION

For the reasons stated herein, the Agency's issuance of the Group III Written Notice and termination 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 Office of Employment Dispute Resolution, Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Department of Human Resource Management, 101 N. 14th Street, 12th Floor, Virginia 23219 or faxed to 786-1606.

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 shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer