Issues: Group II Written Notice (excessive unplanned absences) and Termination (due to accumulation); Hearing Date: 08/13/12; Decision Issued: 08/21/12; Agency: DGS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9861; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9861

Hearing Date: August 13, 2012
Decision Issued: August 21, 2012

PROCEDURAL HISTORY

On May 30, 2012, Grievant was issued a Group II Written Notice of disciplinary action for excessive unplanned absences. Grievant was removed from employment based on the accumulation of disciplinary action.

On June 7, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 11, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 13, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

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 as a Group I, II, or III offense)?

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?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of General Services employed Grievant as a Trade Tech. The purpose of his position was:

> To perform journey level Carpentry repair and maintenance work and or other general repair and maintenance tasks as required to meet the needs of the General Service Team's customers.[1]

Grievant had prior active disciplinary action. On September 1, 2010, Grievant was issued a Group I Written Notice for continued unplanned and excessive absences. On February 3, 2012, Grievant was issued a Group II Written Notice with a three workday suspension from February 6, 2012 through February 8, 2012 for excessive unplanned absences and failure to follow supervisor's instructions.

Grievant was scheduled to work weekly, Monday through Friday. On February 14, 2012, Grievant notified the Agency that he would not report to work because his son was sick. He used 8 hours of annual leave that day. On February 16, 2012, Grievant notified the Agency that he would not be reporting to work because his son was sick. He used 4 hours of annual leave and 4 hours of compensatory leave. On February 24, 2012, Grievant left work early due to his son's illness.

[1] Agency Exhibit 4.

Grievant had exhausted all of his available Family Personal[2] and Annual leave balances as of February 27, 2012. On February 27, 2012, Grievant informed the Agency that he would not be reporting to work because his son was ill. Grievant entered "XX" or "Docking Status" and was not paid for 3.5 hours due to his absence that day.[3] On February 28, 2012, Grievant informed the Agency that he would not be reporting to work because his son was ill with a viral infection. Grievant was placed on Docking Status for 8 hours on February 28, 2012.

On February 29, 2012, Grievant notified the Agency that he would not report to work because he had pneumonia. He took 8 hours of personal sick leave. On March 1, 2012, Grievant reported to work but left after one hour due to side effects of his medication. He took 7 hours of personal sick leave.

On March 5, 2012, Grievant informed the Agency that he would not be reporting to work because his son's school was closed. Grievant was placed on Docking Status for six hours on March 5, 2012.

On March 13, 2012, Grievant notified the Agency that he would not be reporting to work because he had strep throat and had to have a bone density test for his hip. He took 8 hours of personal sick leave.

On March 26, 2012, Grievant informed the Agency that he would not be reporting to work as scheduled because his son was sick. Grievant was placed on Docking Status for two hours on March 26, 2012. On March 27, 2012, Grievant informed the Agency that he would not be reporting to work because his son had a doctor's appointment at 3:15 p.m. Grievant was placed on Docking Status for eight hours on March 27, 2012.

On March 28, 2012, Grievant informed the Agency that he would not be reporting to work because he was sick. Grievant took 8 hours of sick leave. On March 29, 2012, Grievant informed the Agency that he would not be reporting to work because he was sick. He took 8 hours of sick leave. On April 11, 2012, Grievant informed the Agency that he would not be reporting to work due to a doctor's appointment for an eye procedure. Grievant took 8 hours of sick leave. On April 30, 2012, Grievant notified the Agency he would be absent from work due to a plumbing problem and flooded kitchen in his home. Grievant took 6 hours of annual leave and 2 hours of compensatory leave. On May 8, 2012, Grievant notified the Agency he would not be reporting to work due to

[2] State employees under the Virginia Sickness and Disability program receive Family Personal leave on January 10 of each year.

[3] The Agency's leave accounting system under the Virginia Department of Accounts referred to Grievant's absences as "Leave Without Pay". This description should not be confused with the human resource concept of "Leave Without Pay Conditional/Unconditional" or "LWOP" under DHRM Policy 4.45. Leave without pay under the Agency's leave accounting system means that the employee was not paid for a particular day typically because the employee lacked leave balances to support payment.

an ankle problem. He took 8 hours of sick leave. On May 9, 2012, Grievant notified the Agency that he would not be reporting to work in order to rest his sprained ankle. He took 8 hours of sick leave. On May 21, 2012, Grievant notified the Agency that he would not be reporting to work because his legs hurt. He took 8 hours of sick leave.

On May 23, 2012, Grievant notified the Agency that he would not be reporting to work because of an upper respiratory condition. He took 6 hours of annual leave and 2 hours of overtime leave. On May 24, 2012, Grievant informed the Agency that he would not be reporting to work because he was sick with an upper respiratory condition. Grievant was placed on Docking Status for six hours on May 24, 2012. On May 25, 2012, Grievant had received prior approval to be absent from work due to his son's school holiday. Grievant was on Docking Status for eight hours on May 25, 2012.

Agency managers concluded it would be necessary to take disciplinary action against Grievant for his excessive unplanned absences. They decided to inform Grievant on May 29, 2012 of the Agency's intent to take disciplinary action against him. Because the Supervisor was absent on May 29, 2012, the Agency planned to meet with Grievant on May 30, 2012 to inform him of its intention to take disciplinary action. Grievant experienced a significant mental health problem in the morning of May 30, 2012 and he called the Agency in the morning and stated he would not be reporting to work because "something very bad had happened". Two hours later, the Manager and Supervisor called Grievant and asked him why he believed he should keep his job. Grievant responded that he would either quit or his doctor would take him out on disability for at least 30 days. The Supervisor and Manager did not tell Grievant that he was being removed from employment at that time. Grievant called the Third Party Administrator and filed for short term disability. Grievant received a Group III Written Notice with removal on May 31, 2012. The Written Notice indicated his date of removal was May 30, 2012. Grievant was subsequently denied short term disability because the Third Party Administrator believed that Grievant had been removed from employment on May 29, 2012.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[4] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

[4] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

"Poor attendance" is a Group I offense.[5] An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his/her personnel file. Having excessive unplanned absences is a form of poor attendance.

Employees are expected to adhere to their assigned work schedules.[6] Grievant developed a pattern of unplanned absences for which he used leave. The Commonwealth provides employees with family personal[7], sick leave, and annual leave in amounts sufficient to enable employees to account for unexpected and necessary absences from work. When an employee uses leave to such a degree that the employee repeatedly must be placed on Docking Status such that a pattern of behavior is evident, that employee's attendance is poor.[8]

Grievant received adequate notice of his obligation to report to work as scheduled. In the approximately three month period after returning from disciplinary suspension, Grievant continued a pattern of unplanned absences. In addition, he entered Docking Status approximately 5 times. The Agency has established that Grievant's attendance was poor during that timeframe. Because Grievant has been disciplined previously for the same offense, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for poor attendance.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

Grievant argued that for each day he was absent from work, he presented doctor's or other notes to explain the reason why he was absent from work. When an employee presents a doctor's note or other written explanation of an absence, that note does not render the employee's absence immune from being considered poor attendance. A doctor's note may enable an agency to pay an employee with available leave balances for being absent, but the note does not necessarily mean the employee's attendance is adequate.

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[5] See, Attachment A, DHRM Policy 1.60.

[6] See, DHRM Policy 1.25.

[7] Employees receive between 16-40 hours of family personal leave per year which may be used for any purpose with supervisor approval.

[8] It is possible to establish poor attendance even if an employee does not enterDocking Status. In this case, the number of times Grievant entered Docking Status is sufficient to show that his attendance was poor.

DHRM Policy 4.20 governs Family Medical Leave. Under this policy the Commonwealth provides "eligible employees with up to 12 weeks of unpaid family and medical leave per leave year because of their own serious health condition or the serious health condition of an eligible family member, or up to 26 weeks of unpaid leave to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent or next of kin of the servicemember."

A serious health condition is defined as:

> An illness, injury, impairment or physical or mental condition that involves inpatient care or either:
>
> 1. A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:
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> Treatment two or more times within 30 days by or under the supervision of a health care provider the first of which must occur within seven days of the first day of incapacity; or One treatment by a health care provider, within the first seven days of incapacity, with a continuing regimen of treatment; or
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> 2. Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or
>
> 3. Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visit to a health care provider at least twice a year, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; or
>
> 4. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; or
>
> 5. Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

Grievant argued that the Agency failed to provide him with the required notice of his rights under the Family Medical Leave Act. He argued that had he been able to claim family medical leave, his absences would have been protected from being considered as part of the disciplinary action against him. 29 CFR 825.300(b) provides:

> (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-

> qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances.

Grievant had actual knowledge of FMLA because he received letters dated June 28, 2005 and September 14, 2006 from the Agency's human resource staff notifying him of his rights under FMLA. Grievant did not apply for Family Medical Leave in 2012.

The Agency did not acquire knowledge that Grievant's leave may have been for an FMLA qualifying reason. Many of Grievant's absences were in order to care for his son who was ill. Grievant's absences were due to a variety of illnesses lasting a day or two. Grievant did not establish that he informed the Agency of sufficient information for the Agency to have concluded that his absences were for FMLA qualifying reasons regarding his or his son's illnesses before May 30, 2012.

Grievant argued that he informed the Agency of his post traumatic stress disorder on May 30, 2012 and that should have caused the Agency to begin a conversation with Grievant regarding family medical leave. Even if Grievant provided the Agency with sufficient notice of an FMLA qualifying reason on May 30, 2012, there remains a sufficient basis to support the disciplinary action. Grievant was absent for many reasons other than post traumatic stress disorder. He was absent due to his son's illnesses, a viral infection, pneumonia, strep throat, plumbing problems, ankle problems, and upper respiratory problems.

Short Term Disability "commences upon the expiration of a 7 calendar day waiting period, and provides replacement income for a maximum of 125 work days at either 100%, 80% or 60% for defined periods of time based on an employee's total months of state service. If the disability/illness is deemed catastrophic, the employee would receive 100% or 80% income replacement and the waiting period would be waived."[9]

Grievant applied for short term disability on May 30, 2012. His removal from employment was effective May 31, 2012 when he received the Written Notice. Although the Third Party Administrator's was in error when it denied Grievant's claim because he had been remove from employment on May 29, 2012, the outcome of this case does not change. Grievant was removed from employment May 31, 2012. Removal from employment ends any claim for short term disability. Grievant was removed from employment prior to the end of his seven day waiting period.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[10] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing

[9] DHRM Policy 4.57.

[10] Va. Code § 2.2-3005.

officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

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

3. 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 the Office of Employment Dispute Resolution to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

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

Or, send by email 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 give a copy of all of your appeals to the other party and to EDR. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.[11]

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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