DECISION OF HEARING OFFICER

In the matter of
Case Number: 11553
Hearing Date: August 13, 2020
Decision Issued: September 2, 2020
Amended Decision: September 8, 2020

SUMMARY OF DECISION

The Agency had found Grievant violated the rules of conduct in that she failed to (i) report to work without notice and (ii) follow instructions and/or policy. The Agency then issued Grievant a Group III Written Notice with a five-day suspension. The Hearing Officer found The Agency failed to meet its burden. Accordingly, the Hearing Officer rescinded the Group III Written Notice and the accompanying suspension.

HISTORY

On May 15, 2020, the Agency issued Grievant a Group III Written Notice with a five-day suspension. This notice asserted that Grievant violated the code of conduct by (i) failing to report without notice and, (ii) failing to follow instructions and/or policy. On May 15, 2020, Grievant timely filed a grievance. The Office of Employment Dispute Resolution (EDR) assigned this Hearing Officer to the matter on June 24, 2020.

The Hearing Officer held a telephonic prehearing conference on July 13, 2020.[1] Based on discussions during the prehearing conference (PHC), the Hearing Officer determined that the first available date for the hearing was August 13, 2020. Accordingly, she set the hearing for that date. Among other matters discussed during the PHC was the date for the parties to exchange their exhibits and witness lists and also provide them to the Hearing Officer. Accordingly, it was determined during the PHC that the exchange would take place by 11:59 p.m. on August 10, 2020. On July 13, 2020, the Hearing Officer issued a scheduling order addressing those matters discussed and ruled on during the telephone conference, to include the exchange deadline. Then on July 16, 2020, the Hearing Officer issued an amended scheduling order. Both are incorporated here by reference.[2]

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. The Agency's Advocate objected to one of Grievant's exhibits: that is, Grievant Exhibit 24. The advocate argued that the exhibit noted matters occurring after Grievant's discipline and therefore was not relevant. After hearing arguments for and against admission of this exhibit, the Hearing Officer took the matter under advisement. During the hearing, she overruled the objection. There were no objections to any other exhibits. Accordingly, the Hearing Officer admitted Agency's entire exhibit binder including its exhibits 1 through 15. Further, she admitted Grievant's entire exchange of papers,

[1] This was the parties' first date available for the PHC.
[2] *See* Scheduling Order and Amended Scheduling Order.

including her exhibits 1 through 32.

The Hearing Officer held the hearing by video conference by agreement of the parties.

At the hearing both parties were given the opportunity to make opening and closing statements and call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant represented herself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (3 witnesses)
Grievant
Witnesses for Grievant (2 including Grievant)[3]

ISSUE

Was the written notice with a suspension warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness by video, the Hearing Officer makes the following findings of fact:

1. The agency is a facility under the Department of Behavioral Health and Developmental Services. The facility consists of, among other buildings, residential homes for clients of the agency and administration building(s). The Agency has designated Building 1 as the administration building.

Grievant's Work History with the Agency

[3] Grievant's witness list identified three individuals as potential witnesses, excluding Grievant. The 3 identified were noted as employees of the Agency. Grievant did not request witness orders for anyone. Advocate represented that one of the state employees listed as a witness for Grievant was out on leave. Accordingly, she did not appear as a witness. Grievant stated during the hearing that the third state employee listed as a potential witness for the grievant was no longer needed. Grievant stated she would not be calling this witness.

2. The Agency initially hired Grievant as a part-time worker on February 10, 2017, with an hourly pay of $10.00. She was limited to no more than 29 hours of work per week. (G Exh. 2).

On June 25, 2017, the Agency essentially promoted Grievant by hiring her in a new full-time position of Direct Support Professional I in the Agency's residential department. Her annual salary was $24,000.00. In this position, Grievant's evaluation by her supervisor rated Grievant a "contributor." (G Exhs. 4 -6).

The Agency promoted Grievant again on December 10, 2018, to the position of Direct Support Professional II in the Agency's residential department. The Agency identified this position as number 00030. In this position, Grievant's annual salary increased to $29,904.00. Her annual performance evaluation dated November 1, 2019, again rated Grievant a "contributor." (G Exhs. 8).

As an employee in the Agency's residential department, Grievant could routinely be required to work eight (8) to sixteen (16) hours per shift. (A Exh. 3; Testimony/Statement of Grievant).

3. On February 10, 2020, the Agency essentially promoted Grievant again as she was hired as a Direct Support Professional II in the Agency's day department. The Agency has identified this position as number 00022. Grievant's annual salary increased to $31, 983.00 once the Agency hired her as day support paraprofessional. (G Exh. 10). Further, in this assignment, Grievant primarily worked a day shift.

4. The Hearing Officer finds that working in the assignment of Day Support Professional in Home #2 exposes an employee to working longer than an 8 hour shift or day shift.

5. The evidence, to include Grievant's work history, shows she is a good worker and has no disciplinary history with the Agency. (G Exhs. 2-9 and 29).

Grievant's Need for Family Medical Leave Act (FMLA) Leave

6. On June 14, 2019, Hospital admitted Grievant's minor child, a teenage son, for multiple reasons. A medical report from Hospital indicates those reasons included his

- making suicidal threats;
- running away behavior; and
- physically attacking family members.

The son's medical record noting his date of birth indicates he was a minor on April 22, 2020, and remains one.

(G Exh. 11).

7. On June 21, 2019, Grievant informed the Agency that she needed leave to care for her son. The Agency then determined and notified Grievant that she was eligible for Family Medical Leave Act (FMLA) leave; that is, the Agency approved Grievant's FMLA leave request. (A Exh. 8).

8. In addition, the Agency informed Grievant that she was required to use her available leave (sick, vacation, or other leave) during her FMLA absence. (A Exh. 8 at 4).

9. To support her FMLA status Grievant provided the Agency with a completed certification form. Grievant completed one section of the certification. The medical provider completed the other section. (A Exh. 8).

10. Particularly, Grievant certified that the care she would be providing for her son included "counseling, physiological therapy, sessions, mental health outings and events. Emotional support." The certification indicates Grievant signed and dated her certification on June 22, 2019. (A Exh. 8 at 5).

11. In the physician's section of the certification, the health care provider notes in pertinent part that the child was hospitalized on June 14, 2019. As previously referenced a June 14, 2019 medical note regarding the child substantiates the doctor's reporting. (A Exh. 8; G Exh. 11).

In addition, on this certification, the health care provider noted that the child would need treatment visits at least twice a year for his condition. Furthermore, she commented that the child was referred for individual and family therapy. Moreover, the health care provider described other relevant medical facts related to the child's condition by noting the child "will need therapy sessions once or twice a week **but also the patient (child) needs increased supervision and support."** (A Exh. 8 at 6 (emphasis and parenthetical added).

The health care provider also remarked that the child would require follow up treatments. Consistent with earlier statements, she estimated that upon release from the hospital the child would require therapy sessions twice a week. Additionally, the health care provider stated that the parent will need to be home to supervise and support the patient. (A Exh. 8 at 7).

12. The Hearing Officer finds that the health care provider's recommendation of therapy as frequent as twice a week indicates the child had/has a serious health condition.

13. In her certification, the health care provider estimated the child would need intermittent care from July 1, 2019, to July 1, 2020. (A Exh. 8 at 7).

14. The certification indicates the health care provider signed and dated her certification on June 24, 2019. (A Exh. 8 at 8).

15. FMLA regulations 29 C.F.R. §§825.305 and 306 require only estimates of the duration of intermittent leave and not absolutes.

16. Grievant remained eligible for FMLA-qualifying leave on April 22, 2020. (A Exh. 8; G Exh. 15).

The April 22, 2020 Incident

17. On April 22, 2020, the Agency was operating under an emergency due to COVID-19. Specifically, in home #2 of the Agency, some residents and staff had tested positive for the coronavirus. Consequently, this home did not have enough staff to operate because some staff had called in sick. In addition, some residents of the home had been quarantined due to their having contracted the virus. To address the emergency situation, the Agency determined that to meet its staffing needs in home #2, it required additional staff to work in home #2. Management determined this would necessitate moving staff from other departments or locations of the Agency to home #2.

An assignment of direct support professional (DSP) in home #2 constituted an assignment in the residential department of the Agency. As such, a DSP assigned to home #2 could be required to work up to 16 hours. In effect, this was more than an 8 hour day shift.

As previously referenced, Grievant had been hired as a day support worker as of February 2020. She was working in that assignment on April 22, 2020. Then shortly before noon on April 22, 2020, Supervisor reassigned Grievant to work in home #2. Supervisor selected Grievant, along with another employee, because Grievant had recent experience working in the home. This modification in Grievant's assignment would likely require her to work 8 to 16-hour shift(s), rather than her normal day shift.

18. The Hearing Officer finds that such a change would adversely affect Grievant's ability to care for her child as her time at work would not be limited to the day shift. And Grievant would be unavailable to care for her son after normal day business hours as she was accustomed to doing while assigned to the day department.

19. Shortly before lunch time, Supervisor approached Grievant and informed her of the reassignment. The parties dispute whether Supervisor specifically instructed Grievant to report to a scheduler to determine her hours in home #2 or to report directly to home #2. However, the evidence establishes that Grievant's assignment to work in home #2 was effective immediately on April 22, 2020. Further, her supervisor gave Grievant virtually little notice of this reassignment.

Grievant objected to the assignment.

(Testimonies of Director of Person and Central Support, Grievant, Supervisor, HR Generalist; A Exh. 2 at 3 and A Exh. 3 at 7-9).

Supervisor's Version of Events on April 22 and 23, 2020

20. Supervisor's version of what occurred on April 22, 2020, and April 23, 2020, after he notified Grievant of the reassignment is noted here. By his testimony, after the notification to Grievant, she objected and informed Supervisor that she had a son with a compromised immune system. Supervisor informed Grievant that personal protective equipment (PPE) would be made

available for the employees. Further, he informed Grievant that after an employee works his or her shift, the Agency would pay for the employee to stay in a hotel room in an effort to avoid contaminating the employee's other household members. Then Grievant informed Supervisor that she did not have to work in home #2 because of FMLA status. The Supervisor then responded that she had to have a legitimate reason to employ FMLA leave. Grievant responded saying she did not have to let Supervisor know the reason for the FMLA leave. Next, Supervisor again instructed Grievant to report so she could be scheduled for the reassignment.

Supervisor stated that Grievant then went to HR and met with staff there. Supervisor stated that once the meetings concluded, he observed Grievant in the administration building and asked her if she had reported to the scheduler for her assignment in home #2. Grievant informed him that HR informed her she did not have to report. Supervisor then stated he directed Grievant to report for scheduling as he had not been advised that she had been exempt from working in the home.

According to his testimony, Grievant then walked off the job without notifying him. Supervisor contends that Grievant also failed to report to work as scheduled on April 23, 2020, and did not contact him until about 3:01 p.m. on April 23, 2020, to inform him she would not be in on that day and the next.

(Testimony of Supervisor).

[redacted] Version (note she was only a witness to the HR meetings)

21. HR Generalist' version of what occurred on April 22, 2020, is noted here. HR Generalist testified she was present for a meeting with Grievant and HR Director. It was during the meeting with HR staff and Grievant on April 22, 2020, that Grievant requested FMLA leave starting April 23, 2020 for a two-week continuous period to care for her son. (Testimony of HR Generalist).

By HR Generalist testimony, the HR Director informed Grievant during the meeting that she did not believe a two-week continuous period of leave was approved FMLA as Grievant's FMLA leave for her son was intermittent. Then according to HR Generalist, the director stated she would review the FMLA certification form previously submitted by Grievant. Even though the Agency had in its possession this form, the director did not retrieve it for review during the meeting.

Also, at one point during HR Generalist testimony, she testified that Grievant did not request FMLA leave for April 22, 2020, then at another time during her testimony, HR Generalist stated that she did not recall Grievant asking for FMLA leave for April 22, 2020.

Moreover, by her testimony HR Generalist could not recall if HR Director stated during the meeting that Grievant had the right to use FMLA leave.

(Testimony of HR Generalist).

Grievant's Version of What Occurred on April 22, 2020

22. By her testimony and written statement Grievant notes that upon being told of the reassignment, she objected to her supervisor and requested an alternative assignment. Supervisor informed Grievant there was none and her day support assignments were suspended.

Grievant acknowledged Supervisor informed her that PPE was available and that the Agency would pay for an employee to stay in a hotel room after working an 8-16 hour shift in the home where residents/staff had tested positive for COVID-19. Grievant informed Supervisor again that accepting the assignment would prevent her from being available to safely provide the medical care for her son. She states that after that conversation she and Supervisor agreed she needed to talk to HR regarding her concerns.

Grievant then states she met with HR Director and HR Generalist around 12:15 p.m. and shared with them her concerns regarding her son's medical needs and using her FMLA leave. She also testified or indicated concerns with the amount of notice given regarding the reassignment. Grievant stated she was told that if she went out on FMLA leave it was her right. Further, she testified and stated that HR Director also told her that all she needed if she worked in home #2 was her PPE and she could go home. To this response, Grievant expressed confusion and concern regarding how she could provide for her son's care at home and also avoid contaminating him with the virus.

By her testimony and statement, Grievant noted that around 12:30 p.m. she also spoke to the Agency's Director about her concerns. She informed Agency Director that Grievant was the mother of three children and one needed her support because of his mental health needs. She testified that Agency Director responded also that Grievant had a right to use FMLA leave.

Grievant also testified/stated that after meeting with HR, about 12:50 p.m. she spoke to Supervisor again as she was leaving the administration building. During that conversation she again requested an alternative assignment and for Supervisor to allow her to continue to work in day support. Supervisor responded "no" to her request. Grievant then stated that she informed Supervisor she needed to use FMLA leave to provide medical care for her child. She then asked for her leave balance to which Supervisor stated he would get. Grievant then stated she asked him to text it to her. Grievant testified that she and Supervisor walked back into the building where she clocked out at about 1:05 p.m.

(Testimony/Statement of Grievant; A Exh 3 at 7 -9).

Further Grievant testified that on April 23, 2020, she sent her supervisor a text inquiring about her leave that she had asked about the day before. This text indicates Grievant informed Supervisor/HR she would be taking FMLA leave to care for her son. (Testimony/Statement of Grievant; G Exh. 1; A Exh. 3).

Group Notice

23. On May 15, 2020, the Agency issued Grievant a Group III Notice with a five day suspension for failing to follow her supervisor's instructions/policy and for not reporting to work as scheduled on April 23, 2020.

Other

24. Grievant returned to work on April 27, 2020, and informed her supervisor she had made arrangements for child care. (A Exh. 3 at 9; Grievant's Testimony).

25. She also submitted a leave slip requesting FMLA leave for April 22, 23, and 24, 2020. Supervisor approved FMLA leave retroactively for those days and hours. (A Exh. 1 at 7).

26. Agency's leave policy provides in pertinent part that before an employee takes leave, it should be requested and approved by the agency. (A Exh. 5 at 1).

27. On or about August 11, 2020, the Agency instructed staff that had worked in home #2 to not enter the administration building as a precaution to avoid cross contamination.

28. According to the agency director, when Grievant met with her on April 22, 2020, Grievant mentioned FMLA and the need to care for her son. (Testimony of Agency Director).

29. On or about March 19, 2020, the Agency communicated with its employees and informed them of the availability of Public Health Emergency Leave (PHEL) due to the COVID-19 crisis. Further, the Agency indicated it would be flexible with employees who were custodial parents and needed to make alternative child care arrangement. Specifically, in pertinent part the communication stated the following:

> ...There are also options available for an employee who needs time to secure alternative child care. Approvals will be made on a case by case basis. Please speak with your Supervisor if these situations apply to you. They will work with HR to determine what options may be available to you. 3/20/20 PHEL for child care is for anyone that is the custodial parent and/or guardian.

(G Exh. 21 at 15).

DETERMINATIONS 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/her 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).

Va. Code § 2.2-3000 (A) 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[4]

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal 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.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline: Group II offenses are more than minor in nature or repeat offenses. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

On May 15, 2020, management issued Grievant a Group III Written Notice with suspension. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue(s) before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the Grievant engage in the conduct? If so, was the behavior misconduct?

First, the Agency contends that on April 22, 2020, Grievant failed to follow her supervisor's instructions and report to the scheduler so that she could be scheduled to work in Home #2, starting on April 22, 2020. Residents and staff had tested positive for COVID-19 causing staffing shortage in the home. Grievant objected to the assignment. According to the Agency, she stated she would go out on FMLA leave if she had to. After being told of her

[4] Grievance Procedural Manual §5.8

reassignment, a little over an hour later, she clocked out and left the work place without her supervisor's authorization.

The Family and Medical Leave Act 1993, as amended (Act) is a United States labor law requiring covered employers to provide employees with job-protected and unpaid leave for qualified medical and family reasons. The main purpose of the Act is to help employees balance work and personal family needs to promote national interest in preserving family integrity. 29 U.S.C. 2601.

It is undisputed that the Agency or its department is a covered employer.

This Act provides certain protections to employees who request leave or otherwise assert FMLA rights. For instance, the law prohibits an employer from interfering with an employee's use or attempt to use FMLA. In pertinent part, the applicable law provides the following:

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> The Act's [FMLA] prohibition against interference prohibits an employer from discriminating or retaliating against an employee ... for having exercised or attempted to exercise FMLA rights. .... [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions....

29 C.F.R. § 825.220(c).

Under the Act, FMLA leave may be continuous, reduced, or intermittent. Regarding intermittent leave, the Act defines it as follows:

> Leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods **from an hour or more to several weeks**.

29 C.F.R. § 825.102. (emphasis added).

Furthermore, under the Act both the employer and employee have certain responsibilities when FMLA leave is requested. One responsibility of the employee desiring to take FMLA leave is to give notice to the employer. Applicable to this case is the responsibility of the employee when leave is not expected. This is so because the Hearing Officer finds that the facts in this case clearly show that the leave was not expected. In such a case, applicable law provides that "[w]hen the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a). Further, the employee must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. 29 C.F.R. § 825.303(b).

Now, the Hearing Officer considers the facts in this case.

The evidence shows that when Grievant reported to work on April 22, 2020, she expected to perform day support work. Customarily she worked the day shift. However, around lunch time, Supervisor approached Grievant and informed her that she had been selected to do residential work in home #2. This home had been recognized as having some staff and residents recently test positive for COVID-19. Supervisor instructed Grievant to report to be scheduled to work in this home. The evidence shows the reassignment was to take effect that day and immediately. Accordingly, Grievant had virtually no notice of her reassignment. Grievant objected and "pleaded" with her supervisor for an alternative assignment. Supervisor informed her she was not needed to do day support and she was to report for scheduling to work in the COVID-19 positive home.

The evidence shows that this shift change carried with it the realistic potential of significant consequences for Grievant. For one, Grievant customary job, day support, was an 8-hour day shift. The abrupt change in assignment ordered by Supervisor changed her assignment from day support professional to residential support professional. This modification in her schedule could realistically lead to Grievant working from 8 to 16 hours. Consequentially, Grievant's availability to care for her son as she normally did after a day of work could be severely impacted. This is so because she would not be home to support her son which the evidence shows a medical provider had deemed him seriously mentally ill. Specifically, a medical record showed the child had a history of suicidal threats and running away. The FMLA certification completed by his health provider indicated that not only did he need therapy, but support and care as well. Further, the child's physician noted that the child required this care at least until July 1, 2020.

As previously mentioned, Grievant's reassignment likely would prolong her shift and consequently adversely affect her ability to care for her son's mental needs. In addition, the reassignment carried the real possibility of unfavorably affecting Grievant's son's physical health. Such is the case because the evidence indicated that Grievant's son had a compromised immune system and was more susceptible to contracting COVID-19. By working in home #2 where positive COVID-19 cases existed, Grievant would put herself at extra risk of contracting COVID 19 and infecting her son. The evidence clearly demonstrates this extra-risk as staff in the administration building (where the agency housed the human resource employees to include the HR Director and Generalist and the Agency Director) instructed those like Grievant who had worked in homes designated as "COVID-19 positive" to refrain from entering the administration building to avoid cross contamination.

After pleading with her supervisor for accommodations, he offered none to address her child care concerns. This was the case even though management had communicated to employees that the administration would be flexible in assisting employees in obtaining child care. Particularly, in communications to employees from Human Resource on or about March 19, 2020, Human Resource stated the following in pertinent part:

Public Health Emergency Leave (PHEL):

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There are also options available for an employee who needs time to secure alternative child care. Approvals will be made on a case by case basis. Please speak with your Supervisor if these situations apply to you. They will work with HR to determine what options may be available to you. 3/20/20 PHEL for child care is for anyone that is the custodial parent and/or guardian.

The evidence shows that after conferring with Supervisor about her child care concerns and receiving his response, Grievant went to Human Resource in an effort to work out the dilemma. There two meetings were held. Grievant spoke to HR Director, HR Generalist and communicated that she needed to take FMLA leave to care for her son. In addition, she communicated the same to the Agency's Director.

The Hearing Officer had an opportunity to observe Agency witnesses and Grievant via video during the hearing. She also considered other evidence of record and after carefully considering all the evidence, the Hearing Officer finds Grievant's testimony and statements more credible than Agency's witness(es). Grievant informed HR that she needed FMLA for April 22, 2020, the remainder of the day; April 23 and 24, 2020. In making this finding the Hearing Officer is cognizant of HR Generalist testimony that Grievant only requested FMLA for her son for April 23, 2020, and continuing for two weeks. Hearing Officer finds this testimony is not persuasive. It is not sensible. Hearing Officer finds that it is advantageous for Agency's witnesses to put a spin on the testimony and say Grievant did not include April 22, 2020 in her FMLA notice. Further HR generalist waivered in her testimony. At one point she testified that Grievant only asked for FMLA leave for April 23, and 24, and continuing for two weeks. Then at another point she stated that she did not recall Grievant asking for FMLA leave for April 22, 2020. Grievant contends she did ask for such leave. The Hearing Officer finds her credible as it would be illogical for Grievant to asks for FMLA leave for April 23 and 24, 2020 to care for her son's needs and not the 22nd when the need for child care existed for April 22 as well.

Further, the Hearing Officer finds Grievant believable because she was a good worker. And the evidence does not show she has a disciplinary history. In fact, the evidence shows she was promoted several times.

Accordingly considering all the evidence of record the Hearing Officer finds that the weight of the evidence shows Grievant gave sufficient notice that she was taking FMLA leave for the remainder of her work day on April 22, 2020, and for April 23 and 24, 2020. Regarding claim by Supervisor that he was not notified, the Hearing Officer believes the Grievant and finds he was clearly notified twice that she planned to take FMLA leave to care for her son if there was not a more accommodating assignment. In addition, Grievant gave plenty of notice to others in management; that is, HR Director, HR Generalist; agency Director.

In addition, the Hearing Officer finds that Grievant's leave was unforeseeable considering Supervisor gave Grievant virtually no notice of the reassignment. Agency's argument that

Grievant should have expected she could be reassigned in the manner she was because she is an essential employee is not persuasive. Again, she had virtually no notice. Further, the agency had communicated that it would be flexible with custodial parents in arranging alternative child care.

Moreover, the Hearing Officer is not persuaded by the Agency's argument that Grievant's FMLA leave was to be used intermittently and her requesting two continuous weeks was not intermittent. The FMLA regulations clearly notes that intermittent leave may vary from a few hours to a few weeks. Certainly, two continuously weeks can constitute intermittent leave. In addition, the Hearing Officer finds the Agency had sufficient information to know that the leave requested on April 22, 2020, was qualified. Grievant stated repeatedly she needed to care for her son and mentioned FMLA. Her required care and support for her son are clearly mentioned in the certification. While the agency had possession of this certification, it failed to retrieve it for review on April 22, 2020.

In making the finding above, the Hearing Officer is cognizant of the fact that Supervisor retroactively approved Grievant's leave. Of significance also, the Agency has not rescinded that approval. The Agency's own actions demonstrate that Grievant's requested leave to care for family under the FMLA act was appropriate.

Moreover, the agency's claim that Grievant failed to obtained prior approval for her leave is refuted. Grievant was eligible for intermittent leave for her son. She requested such. Further, she provided notice to multiple persons in management as soon as practicable that she was taking such leave.

B. Did the Agency's Discipline violate law or policy?

Agency's actions of disciplining Grievant for using her qualified FMLA leave constitutes interference with her FMLA leave.

Accordingly, for the reasons noted above, the Hearing Officer finds that the Grievant did not engage in misconduct and that the Agency's discipline was not consistent with policy or law.

DECISION

Hence, for the reasons stated here, the Hearing Officer rescinds the discipline. The Agency is ordered to rescind the Group III notice and suspension, to reinstate all appropriate benefits, and to back pay Grievant for any wages lost as a result of the suspension.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

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

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

[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].

ENTER *NUNC PRO TUNC*: September 2, 2020.

September 8, 2020 Enter:

Date: September 8, 2020 Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate/Agency Representative
Grievant
EDR's Director of Hearings

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