COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In the matter of: Grievance 11470

Hearing dates: January 31, 2020 and February 7, 2020
Decision Issued: February 27, 2020

PROCEDURAL HISTORY

On November 7, 2019 Grievant was issued a Group II Written Notice for violation of attendance/excessive tardiness and was terminated on account of accumulation of Written Notices.[1] On December 2, 2019 Grievant filed a *Grievance Form A* grieving the issuance of the Group II Written Notice with termination and raising allegations of hostile work environment, impediment of filing FMLA, retaliation, and age discrimination. Undersigned was appointed hearing officer effective December 16, 2019.

The parties waived rights to a hearing being held within 35 days of the appointment of the hearing officer and confirmed such waivers by e-mail. Pre-hearing telephone conferences were held on January 2, 2020 and January 30, 2020 with Attorney for Grievant, Attorney for Agency, and Hearing Officer participating. Attorney for Grievant moved to be able to participate in the grievance hearing via telephone and, there being no objection, the motion was granted.

Grievant's Attorney moved to allow Grievant to use a cell phone to confer with her privately during the hearing, including while Grievant was testifying as a witness. Agency objected only to private conversations and/or text messaging by Grievant to her attorney while Grievant was testifying. Hearing Officer did not permit private conversations and/or text messaging between Grievant and her attorney while she was testifying, however, as to any other time she was permitted to do so. All of Grievant's requests during hearing for a recess to confer with her attorney privately were granted.

All of Grievant requests for issuance of orders for the appearances of witnesses were granted. The grievance hearing commenced on January 31, 2020 with Grievant appearing in person and her attorney appearing by speakerphone. All witness appearing on 1/31/20 testified in person. One of Grievant's witnesses was not available to testify on 1/31/20. The parties agreed such witness could testify at a later date by conference call and agreed oral closings would be made on the date of the conference call, after such witness testified. A conference call was held on February 7, 2020, such date being agreeable to the parties.

On February 2, 2020 Grievant, herself, e-mailed Hearing Officer her desire to recall two witnesses for clarification of matters and asking a legal question. As it appeared the e-mail was not copied to either attorney, Hearing Officer copied the e-mail to both attorneys. Hearing Officer also confirmed by e-mailed he could not respond directly to Grievant, as she was

[1] Tab 1.

represented by counsel, and could not give legal advise to either party. Hearing Officer further indicated, subject to input from both attorneys, his understanding that all matters in this cause were concluded except for receiving testimony of the one remaining Grievant's witness and receiving oral closings after such testimony. Subsequently, Grievant's request to recall witnesses was withdrawn.

On February 7, 2020, a conference call was held to receive testimony of Grievant's Witness and to receive oral closings. Participating in the conference call were Grievant's Attorney, Grievant's Witness, Agency Attorney, Agency Party Representative, and Hearing Officer. Grievant did not participate in the conference call and it was represented by Grievant's attorney that her client chose not to participate in the conference call. At the February 7, 2020 conference call, before closings were presented, counsel for Grievant raised she would like to present a written closings at a later date. Agency noted its objection. Upon consideration of matters, including the prior agreement to present oral closings, the timeline in this cause, and the case having been continued for the presentation of the witness's testimony and oral closings, Hearing Officer directed closings arguments/statements were to be presented orally after the Grievant's witness testified.

On February 7, 2020, upon receipt of the testimony of Witness and oral arguments, by conference call, the grievance hearing concluded.

APPEARANCES AT HEARING HELD ON 1/31/20 AND 2/7/20

A. On January 31, 2020 the following appeared:
Agency Attorney (present in person)
Agency Party Representative (who was also a witness and was present in person)
Grievant's attorney (who appeared via speaker telephone)
Grievant (who was also a witness and was present in person)
Witnesses (all witnesses on this date were present in person)

B. On February 7, 2020 the following appeared via conference call:
Agency Attorney
Agency Party Representative
Grievant's Attorney
Witness of Grievant

ISSUES

Whether the issuance of a Group II Written Notice with termination was warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.[2]

[2] *Grievance Procedure Manual*, Sections 5.8 and 9.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. [3]

FINDINGS OF FACT

After reviewing all the evidence admitted and observing the demeanor of each witness who testified in person, the Hearing Officer makes the following findings of fact:

01. Grievant was employed by Agency as a Custodial Operations Specialist and was assigned to work 3:00 pm to 11:30 pm Monday through Friday. Grievant was employed by Agency for nearly five years.[4]

02. On March 12, 2019 management provided to Grievant, in writing, her leave balances and notification that disciplinary action may be taken against an employee that goes into leave without pay ("LWOP") Status if they are not currently covered by a program such as FMLA or VSDP.[5]

03. On October 9, 2019 Grievant was provided notice, in writing, by her Supervisor that HR considers four tardy occurrences at work in a 30 day period to be grounds for disciplinary action and she had three tardy occurrences in the three week period prior to the notice. She was requested to, "Please make sure to be on time." The 10/9/19 notice indicated the dates Grievant was tardy and the amount of time she was tardy each date as follows:

10/08/19 - 2 hours tardy
10/01/19 - 15 minutes tardy
09/23/19 - 4 hours tardy [6]

04. Between 9/23/19 and 11/1/19 Grievant called in on six workdays indicated she would be late or would miss work the day. She was tardy on three scheduled workdays and did not appear for work at all on 3 scheduled workdays. Grievant, when she called in, provided the following reasons for being late or absent on such days:

Date	***Arrival at work***	***Reason given by Grievant***
11/01/2019	did not appear	going to have to call in today, no heat & water at house, no place to take a shower
10/09/2019	did not appear	going to have to miss work today- have to take cat to emergency vet
10/08/2019	late 2 hours	running about 2 hrs late, no reason provided
10/01/2019	late 15 minutes	car getting worked on
09/24/2019	did not appear	have to call in for the day, not feeling well
09/23/2019	late 4 hours	running probably an hour late - head cold [7]

05. On November 1, 2019 Grievant called in but did not appear for work that date, as scheduled. As a result, Grievant entered on Leave Without Pay (LWOP) status. Disciplinary action was taken and, on November 7, 2019 she was issued a Group II Written Notice with termination on account of an accumulation of two active Group II Written Notices. The 11/7/19

[3] *Grievance Procedure Manual*, Sections 5.8 and 9.
[4] Tab 4.
[5] Tab 4.
[6] Tab 9.
[7] Tab 8, Tab 9 and testimony.

Group II Written Notice was issued for violation of the Standards of Conduct Policy 1.60-Attendance/excessive tardiness.[8]

06. At the time the 11/7/19 Group II Written Notice was issued Grievant had one active Group I Written Notice and one active Group II Written Notice.[9]

The prior active Group I Written Notice was issued Grievant on November 8, 2018 (Offense Date 10/11/18) for attendance/excessive tardiness and having entered a Leave Without Pay ("LWOP") status on 10/11/18. Prior to receiving the Group I Written Notice, Grievant had been given a written memo on 2/19/18 and on 3/23/18 informing her of her leave balances and informing her management may take disciplinary action against an employee that goes into LWOP status if the employee is not currently covered by a program such as *Fair Labor Standards Act* (FLSA), or Virginia Sickness And Disability Program (VSDP).[10]

The prior active Group II Written Notice was issued May 24, 2019 for attendance/excessive tardiness and entering into LWOP status on 5/9/19. On 3/12/19 Grievant was given a written memo informing her of her leave balances and informing her management may take disciplinary action against an employee who goes into LWOP status if they are not currently covered by a program such as FLSA or VSD.[11]

07. Agency employees, including Grievant, receive a discretionary leave - Personal Sick and Family Personal Leave. Discretionary leave does not require prior approval from the employee's Supervisor to use while other types of leave received by Agency employees require approval from the employee's Supervisor to use.[12]

08. Discretionary leave, Personal Sick Leave or Family Personal Leave, is available for unscheduled absences and, while no prior approval is required by the employee's Supervisor, the employee must follow call in procedures.[13]

09. Grievant receives 96 total hours of discretionary leave on January 10th of each year (32 hours family and personal leave and 64 hours sick leave). The 96 hours of discretionary leave granted for one year does not carry over and cannot be added to the following year's 96 hours of discretionary leave granted on January 10th. [14]

10. Each Agency employee, including Grievant, is responsible for monitoring his/her discretionary leave throughout the year and is responsible to manage time so as not to enter LWOP status.[15]

11. If an Agency employee exhausts available leave balances and does not report for work, the time missed is charged as Leave Without Pay ("LWOP") and entering LWOP status without prior authorization can be considered abuse of leave and may result in disciplinary action up to and including termination. Furthermore, each instance of LWOP is treated as a separate

[8] Tab 1 and testimony.
[9] Tab 10 and Tab. 12.
[10] Tab 12.
[11] Tab 10 and Tab 11.
[12] Tab 14.
[13] Tab 14 and testimony.
[14] Testimony.
[15] Tab 14 and testimony.

instance requiring advance authorization and can result in separate disciplinary action.[16]

12. Supervisors are not permitted by Agency policy to approve non-discretionary leave for unscheduled absences.[17]

13. Agency employees are not permitted to use any leave time before it has actually accrued.[18]

LAW AND CONCLUSIONS:

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60*, *effective April 16, 2008.* The *Standards of Conduct* provide a set of rules governing the professional and personal conduct of employees and establishing acceptable standards for work performance of employees. The *Standards of Conduct* 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.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. Group II Offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action and Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally would warrant termination. Tardiness and poor attendance are listed as examples of a Group I Offense but, if the employee has an active Group I Written Notice for the same offense, Agency may issue a Group II Written Notice.

The normal discipline for a Group II Offense includes issuance of a Group II Written Notice and up to ten workday suspension without pay for a first offense and termination upon accumulation of a second active Group II Offense.[19] The active life, from date of issuance, of a Group I Written Notice is 2 years and the active life of a Group II Written Notice is 3 years.

§ B. 2. of Policy 1.60 provides the examples of offenses presented in Attachment A. are

[16] Tab 14, S*tudent Engagement and Campus Life - Administrative Policies - Policy No. 0023* .
[17] Testimony and Tab 14.
[18] Testimony.
[19] DHRM Policy 1.60 § B. 2. b. and Attachment A.

not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

Grievant:

Grievant worked for Agency nearly 5 years as a Custodial Operations Specialist and performed custodial and custodial related services at Agency. Grievant's quality of work is not at issue in this proceeding and it is not contested she got along well with both staff and consumers. Agency concerns in this case center around tardiness and absence from work resulting in her entering into LWOP status. Agency took disciplinary action for this and issued a Group II Written Notice. Additionally, as Grievant had one active Group I and one active Group II at the time she was issued the present Group II Written Notice, Grievant was terminated due to her having accumulated two active Group II Written Notices.

Grievant does not contest her being absent on the scheduled workdays as was alleged by Agency but raises allegations of hostile work environment, impediment of filing FMLA, retaliation, and age discrimination. Grievant further contends if she had been granted FMLA leave, one or both of her Group II Written Notices would not have been issued and she would not have been terminated.

Tardy and/or absence:

After Grievant received her first Group II Written Notice, Grievant was tardy to work and management notified her of their concerns as to her tardiness. On 10/9/19 management provided a notice, in writing, to Grievant confirming her having 3 tardy occurrences (on 9/23/19, 10/1/19, and 10/8/19) in the last three weeks and that HR considers four tardy occurrences in a 30 day period to be grounds for disciplinary action.

After Grievant receiving her 5/24/19 Group II Written Notice, which addressed attendance/excessive tardiness and LWOP status, the evidence indicates Grievant called in on six work days leaving voice mails she would be late or not appearing. On these six workdays Grievant was either late for work or did not show for work. Grievant provided the following reasons for being tardy for her shift or not appearing at all on those workdays:

Date	***Tardy/Missed work***	***Reason for* tardy/not appear *given by Grievant***
09/23/2019	late 4 hours	head cold
09/24/2019	did not appear	not feeling well
10/01/2019	late 15 minutes	car getting worked on
10/08/2019	late 2 hours	no reason provided
10/09/2019	did not appear	take cat to emergency vet
11/01/2019	did not appear	no heat/water, no place to take a shower[21]

Grievant was scheduled to work on November 1, 2019. She called in as policy required but did not appear for work. As a result of not appearing for work on November 1, 2019, Grievant entered into a LWOP status without having received prior authorization. Grievant had exhausted her available leave balances on 11/1/19 and had time she missed from work for which she did not have available leave time. As a result, the time missed from work without

[20] Tab 8 and Tab 9.

[21] Tab 8 and testimony.

available leave was charged as LWOP and, ultimately, she was issued a Group II Written Notice with termination on account of accumulation.[22]

Leave:

Grievant, as well as other Agency employees, receive and can accrue various amounts and types of leave, including, among others, Annual, Comp, Comp OT, Personal Sick, and Family Personal. Agency Policy requires a supervisor's approval prior to use of certain types of leave, including annual leave. Policy also provides for discretionary leave, such as personal sick leave or family personal leave, which may be used without supervisor's approval.[23]

Discretionary leave is available for unscheduled absences and can be used by an employee for unforeseen reasons when the employee cannot report to work as scheduled. Discretionary leave does not require prior approval by a supervisor in order to be used but the employee is still required to follow call in procedures.

Supervisors are not permitted to approve non-discretionary leave for unscheduled absences and employees are not permitted to use any leave time before the leave time has actually accrued. [24]

By policy, it is the responsibility of the employee to monitor and manage their discretionary leave throughout the year. Also, each employee, including Grievant, is responsible for submitting his/her own leave time and reporting what leave time is taken on a monthly basis.[25]

Before Operations Coordinator assumed his position, Agency was between coordinators. Operations Coordinator observed matters for a period of time before making certain changes to practices as to leave and attendance. He had observed major attendance issues. He found serious problems with leave, including finding annual leave had been allowed to be used by employees as discretionary leave, which was not consistent with policy.[26] After consultations with his supervisors and HR, Agency determined that leave matters needed to be addressed and leave should only be used in a manner that is consistent with Agency policy.

In efforts address and clarify and implement leave matters and to stress leave was to only be used in a manner consistent with policy, management provided a HR training/presentation to employees, including Grievant, on or about December of 2017. This training address leave management, leave policy, and the need for Agency's leave policy to be followed. The training session also addressed the proper use of discretionary leave, that annual leave could not be used as discretionary leave, the requirements for approval of non-discretionary leave, LWOP status, that LWOP status could result in disciplinary action, FMLA, and other matters.[27] Agency stressed to employees that all leave was to be handled only in a manner consistent with policy.

Operations Supervisor implemented leave and attendance policies consistently and equally as to all employees.

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[22] Tab 6 and testimony.
[23] Tabs 14, 15, and testimony.
[24] Tab 14 and testimony.
[25] Tabs 6, 14, and testimony.
[26] Tab 14 and testimony.
[27] Tab 14 and testimony.

Leave Without Pay (LWOP) Status:

As set forth in S*tudent Engagement and Campus Life - Administrative Policies - Policy No. 0023*, it is the responsibility of each employee to managing his/her leave time so as not to enter Leave Without Pay ("LWOP") status. If an employee enters into a LWOP status the employee can be subject to disciplinary action, including termination.[28]

Policy No. 0023 provides if an employee exhausts available leave balances and does not report for work, the time missed will be charged as Leave Without Pay and entering LWOP status without prior authorization can be considered abuse of leave and may result in disciplinary action up to and including termination. Furthermore, each instance of LWOP is treated as a separate instance and can result in separate disciplinary action.[29]

Grievant was aware or should have been aware of Agency policy as to entering into LWOP status. Leave policy was explained to Grievant during her new employee orientation. On or about December of 2017, Grievant attended a presentation by HR addressing *Leave Management* which addressed LWOP status, discipline for entering into LWOP status, and discretionary leave use.[30] Additionally, prior to the 11/7/19 Group II Written Notice, Grievant had received one Group I and one Group II Written Notice for absence/tardy issues and entering into LWOP status. With each Written Notice she had received a prior written notification stating that management may take disciplinary action against an employee who goes into LWOP status if they not covered by a program as FLSA or VSDP.[31] Also, on November 1, 2019 Grievant acknowledged in a writing she knew she would probably get written up for LWOP.[32]

Staff Handbook and Policy:

Agency has promulgated and published its *Staff Handbook* which addresses a number of Agency policies, including Agency prohibitions against discrimination and harassment, Leave policy, FMLA, the requirements for regular and timely attendance, and discipline actions. [33]

DHRM Policy 2.35, *Civility in the Workplace* (Effective 1/1/19) supersedes Policy 1.80, Workplace Violence, and Policy 2.30 Workplace Harassment. DHRM Policy 2.35 strictly prohibits harassment, bulling, workplace violence, and retaliation. The prohibition against harassment includes both discriminatory and non-disciriminatory workplace harassment.

Discriminatory Harassment is defined in Policy 2.35 as:

> "Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, political affiliation, veteran status, or disabilities, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Non-Discriminatory Workplace Harassment is defined In Policy 2.35 as:

> Any targeted or directed unwelcome verbal, written, social, or physical conduct that either denigrates or shows hostility or aversion towards a person not predicated on the person's protected class.

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[28] Tab 14 and testimony.
[29] Tab 14, Policy No. 0023, and testimony.
[30] Tab 14 and testimony.
[31] Tabs, 10, 11, 12, and 13.
[32] Tab 5.
[33] Tab 15.

Allegations:

Grievant alleged hostile work environment. Grievant testified to one incident where she and a member of management cursed at each other, however, the indicated member of management also testified and denied he was cursing but testified he was cursed at.

Grievant also presented a witness, a former housekeeper, who quit her job with Agency in July of 2018 citing fears any future tardy/absence would unfairly lead to write-ups/disciplinary action. The former employee also expressed concerns management micro managed. She citing being required to type in time each night and unrealistic expectations as to her being on time to work every night.

The former employee admitted she was tardy about five times when she got her first write-up, a Group I, in May of 2018. She did not contest being tardy for work on April, 1(3 hrs. late), April 4 (2 hrs. late), April 8 (30 min. late), April 22 (30 min. late), April 25 (2 1/2 hrs. late), April 27 (45 min. late), and May 1 (3 1/2 hrs. late) in 2018. She further expressed concern with being written up the first time she was late after having received the Group I. She testified she was late due to traffic conditions and noted she did not have a cell phone to call in on. While not contesting being tardy, she opined, to her knowledge, no one else was written up for tardiness. She knew there was an Agency policy for its employees to be to work on time and not tardy.

Operations Coordinator implemented changes within housekeeping. When Operations Coordinator assumed his position he observed and identified issues of tardiness, absence, and leave use being inconsistent with policy. He addressed those issues with his Supervisors and others. As a result, changes were implemented within housekeeping to insure policy was complied with. Employees were notified on multiple occasions of Agency's leave policies and HR conducted a presentation on Leave Management which included addressing leave types, leave policies, and possible disciplinary actions concerning tardiness, absence from work, or LWOP status.

Management is charged with managing the affairs and business of the Agency. Housekeeping/Custodial duties are a necessary part of Agency's operations which can be affected by absenteeism and tardiness. Operations Coordinator did require strict adherence to attendance and leave policy. He was consistent in his application policy and was consistent in how employees were treated.

The decision to issue Grievant discipline was not made by any one person. Operations Coordinator signed as issuing the Written Notice. However, Operations Coordinator, consulted with his supervisor, additional management, and HR before a decision to issue discipline was made. The decision to issue discipline was a collective decision made after confirming Grievant entered into LWOP status on November 1, 2019 without prior authorization and after confirming Grievant did not have sufficient discretionary leave to cover the time she missed from work.

The evidence indicates the decision to issue the 11/7/19 Group II Written Notice with termination was based solely upon Grievant's tardiness/absences, her resultant LWOP status without prior authorization on 11/1/19, and her having active Group I and a Group II Written Notices.

There is insufficient evidence that Grievant's age, protected status, harassment, retaliation, or matters related to FMLA (further discussed below) were a consideration or basis

for Grievant being issued discipline.

Family and Medical Leave Act ("FMLA"):

Grievant raised allegations she was impeded in her efforts to seek leave under the FMLA. The FMLA provides eligible employees up to 12 weeks of job protected unpaid leave in a 12 month period for certain family and medical reasons. FMLA leave may be taken due to the employee's own serious health condition or a serious health condition of certain family members.[34]

Section 105 of the Family and Medical Leave Act of 1993 prohibits an employer from interfering with, restraining, or denying the exercising or attempt to exercise an FMLA right. Furthermore, 29 CFR § 825.220 prohibits an employer from discriminating or retaliating against an employee for having exercised or attempted to exercise FMLA rights.

Absent unusual circumstances, employees are required to comply with Agency's usual and customary notice and procedural requirements for requesting leave. In requesting leave the first time, employees are not required to reference the FMLA but must provide sufficient information for her employer to reasonably determine whether the FMLA may apply to the leave request.

In general, an employer may require its employees comply with the employer's usual and customary policies for requesting leave, unless unusual circumstances prevent the employee from doing so. Generally, an employer may take action under its internal rules and procedures if the employee fails to follow its usual and customary rules for requesting leave. However, an employer may not discriminate against any employee taking FMLA leave.

Also, in general, an employee must give at least 30 days advance notice of the need to take leave when he/she knows about the need for the leave in advance and it is possible and practical to do so. If 30 days advance notice is not possible because the foreseeable situation has changed or the employee does not know exactly when leave will be required, the employee must provide notice of the need for leave as soon as possible and practical. However, when the need for leave is unexpected, the employee must provide notice as soon as possible and practical.

An employer may request a certification be provided, generally due within 15 calender days, to be used in determining if the employee's absence qualifies as FMLA leave. The evidence indicates Agency requires a certification be provided before it will grant leave to eligible employees but no certification was returned to Agency. Once the certification is received, the employer has to make a determination within 5 business days whether the leave will be designated as FMLA leave.

On or about the Spring or Summer of 2018, Grievant, at some point, went to Operations Coordinator and told him she was concerned she might be needing to take some leave. There were health matters with Grievant's stepfather, who subsequently passed, her mother, and Grievant herself (who indicates she had shingles). Grievant did not mention FMLA but Operations Coordinator suggested to her this might be the kind of circumstance FMLA might be appropriate and told her she should talk to HR Representative about it. The evidence also indicates Grievant was told if she did decide to go through with it she just needed to let us know.[35]

[34] Tab 14 and Tab 15.
[35] Testimony.

Grievant and her Supervisor met with HR Representative who was told Grievant may be interested in FMLA and was asked if she can get the paperwork. HR Representation was told they wanted to know what the next steps were if Grievant decided to go that route. After a brief discussion, Grievant was given Agency's FMLA packet of documents. Grievant was told that if there were any questions come back and ask. Grievant never confirmed to management whether she wanted leave/FMLA leave or not and never return any paperwork requesting or in support of her making a request for leave/FMLA leave.

Agency's *Staff Handbook* indicates employees seeking FMLA leave are required to provide a 30-day advance notice of the need to take FMLA leave when the need is foreseeable. The *Staff Handbook* also provides employees who they can contact concerning FMLA information and documents, and who they can contact to get the appropriate forms needed. Agency's *Staff Handbook* also notes a medical certification is required to be provided before Agency will grant the leave to eligible employees and provides leave may be granted for one or more of the following reasons:

- a serious health condition that makes the employee unable to perform his/her job;
- the care of an employee's child (birth, adoption or foster care); or
- the care of the employee's spouse, parent, stepparent, child, or stepchild who has a serious health condition.[36]

There is insufficient evidence to find that Grievant informed Agency she actually wanted FMLA leave, that she actually requested FMLA leave, or that she took any action on the FMLA documents and paperwork Agency provided her.

Grievant presented a witness who asked for FMLA as to a parent's serious medical condition and her Supervisor took her to HR representative. She had also received the Agency's FMLA packet from HR and but proceeded through with the paperwork. She submitted the paperwork/certification to the physician for her father who indicated she was a bit leery of filling it as she was not providing care while her father in the hospital/rehabilitation center. The witness noted there were problems with the certification/statement from a physician not providing a return to work date. Witness testified she was later informed her FMLA leave was not approved due to the problem with the certification in that her physician did not put in a return to work date. Witness also testified she was aware of two other employees receiving FMLA leave.

Grievant asserts if she had been granted FMLA leave she would not have received one or both of the two Group II Written Notices issued her and there would be no accumulation for a termination to occur. Grievant has the burden as to this assertion and has not met her burden.

The evidence as to the actual dates and reasons Grievant missed work or was tardy does not indicate matters were necessarily related to reasons FMLA leave may be used or granted. Grievant's reasons for being tardy or absences presented in this cause included no heat & water at house, taking cat to emergency vet, car getting worked on, not feeling well, head cold.

As to previously issued discipline, Grievant did not file a grievance challenging issuance of either Written Notices. Additionally, there is insufficient evidence to determine the cause for any underlying tardiness, missed work, or LWOP status.

[36] Tab 15.

Upon review of the evidence in this cause, there is insufficient evidence to determine if Grievant's tardiness/missed work/LWOP status was due to a reason for which FMLA leave may be used. Additionally, upon review of the evidence presented in this cause, there is insufficient evidence presented to find Grievant was impeded in seeking FMLA leave.

Retaliation and age discrimination:

Retaliation is defined as action(s) taken by management or condoned by management because an employee exercised a right protected by law/regulation or reported a violation of law/regulation to a proper authority. To prove a claim of retaliation Grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action.

Grievant contends age discrimination and she was impeded in receiving FMLA rights. FLMA prohibits discriminating or retaliating against an employee for having exercised or attempting to exercise FMLA rights.

Grievant suffered an adverse employment action as she was issued a Written Notice and terminated. Even if it were to be assumed Grievant engaged in a protected activity there remains the matter of establishing a nexus or causal link between the protected activity and the adverse employment action.

Agency presented credible evidence of a non-retaliatory business reason for the adverse action. Agency has shown, by a preponderance of the evidence, that Grievant has a history of tardiness and absences from work and she had received prior Group I and Group II Written Notices, both active, which addressed tardiness, absences, and LWOP. The evidence further indicated, since receiving her prior Group II, Grievant continued to be tardy or absent on numerous occasions. Her last absence from work, on 11/1/18, resulted in her going into a LWOP status without prior approval and provided the basis for issuing a second Group II Written Notice. Additionally, there is not sufficient evidence to find that Agency's stated reason was a mere pretext or excuse for retaliation. Upon consideration of the evidence presented in this cause, there is insufficient evidence to find retaliation.

Grievant also alleges age discrimination indicating a supervisor stated to her that if she were Grievant's age she would retire and she discussed that the Virginia Retirement System was going to be changing. Grievant contends this supports discrimination on account of her age.

To sustain a claim of age discrimination, Grievant must show that: (i) she is a member of a protected age group (ii) she suffered an adverse job action; (iii) she was performing at a level that met her employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's age. *Cramer v. Intelidate Technologies*, 1998 U.S. App Lexis 32676 (4th Cir. 1998) (unpub).

Although Grievant has suffered an adverse job action (i.e. a Group II with Written Notice termination) there is insufficient evidence to find she was performing at a level that met Agency's legitimate expectations. Agency had established legitimate expectations as to attendance for its employees and that they not entering into a LWOP status without authorization. Furthermore, there is insufficient evidence to find or to create an inference Grievant's termination was due to or based on the her age, her exercising or seeking to exercise any FMLA rights, or her opposing or complaining of unlawful practices. There also is insufficient evidence evidence that the Agency acted against her based on her age or a protected status.

Agency has provided a legitimate, non-discriminatory business reason for its actions and there is insufficient evidence to find reasons for the adverse employment action offered by Agency were a pretext for discrimination or were retaliatory for her exercising or seeking to exercise a protected right.

For the reasons stated above, there is insufficient evidence to find retaliation or age discrimination.

Mitigation:

Va. Code § 2.2–3005.1 authorizes a hearing officer to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resources Management ...".[37] The hearing officer must receive and consider evidence in mitigation or aggravation of any offense charged by an agency.[38]

The *Rules for Conducting Grievance Hearings* provide that a hearing officer is not a "super-personnel officer" and, therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness and, if the hearing officer mitigates the Agency's discipline, the hearing officer is charged with stating in the hearing decision the basis for mitigation.

Grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The Agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.[39]

Consideration has been given to the totality of the evidence in this cause including Grievant's length of service and her prior Group I and Group II Written Notices. Based upon review of all the evidence in this cause, the Hearing Officer finds the issuance of the Group II Written Notice with termination on account of accumulation does not exceed the limits of reasonableness.

CONCLUSION

For the reasons stated above, based upon the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

Furthermore, Agency has proven by a preponderance of the evidence that the

[37] Va. Code § 2.2-3005.

[38] Va. Code § 2.2-3005 (C)(6).

[39] Rules for Conducting Grievance Hearings, § VI. (B.)(2.).

disciplinary action of issuing a Group II Written Notice with termination was warranted and appropriate under the circumstances and Agency's discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency's issuance to Grievant of a Group II Written Notice with termination is ***UPHELD.***

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@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.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

2/27/2020 S/LORIN A. COSTANZO

Date Lorin A. Costanzo, Hearing Officer

copies e-mailed to: Grievant's Attorney
Agency's Attorney
EDR