Issue: Administrative Review of Case #8048/grievant claims hearing officer improperly upheld Group II and Group III Written Notices; Ruling Date: August 3, 2005; Ruling #2005-1005; Agency: Department of Corrections; Outcome: hearing officer not in compliance

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COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2005-1073
August 3, 2005

The grievant has requested that this Department administratively review the hearing officer's decision in Case Number 8048. The grievant claims that the hearing officer improperly upheld Group II and Group III Written Notices against her which resulted in her termination from employment on January 19, 2005.

FACTS

The grievant was employed with the Department of Corrections (DOC or the agency) as a Corrections Captain at Facility X. At the time of her termination, the grievant had been employed by DOC for 19 years.

On November 2, 2004, the facility's warden directed the grievant to inform two lieutenants that they could continue to attend school classes. The hearing officer found that although the grievant failed to perform this task, she advised the assistant warden that she had spoken with both lieutenants. On November 10, 2004, the grievant was advised that the warden was considering possible disciplinary action for the grievant's failure to follow instructions.

The grievant was on annual leave from November 17 to December 15, 2004. Although the grievant argues that she was granted leave for December 16th as well, the hearing officer found that the grievant was scheduled to return to work on the 16th, but that she failed to do so. That same day, the grievant contacted a licensed clinical social worker to enter treatment for work-related stress. The grievant subsequently worked on her next scheduled workday, December 18th, but left work early the following day.

On December 20, 2004, the grievant saw her physician for treatment of "physical manifestations of work related stress"—specifically, heart palpitations, shortness of breath, chest pain and dizziness. The grievant had previously seen her physician regarding these symptoms on October 22, 2004, at which time he diagnosed her as having an anxiety disorder, for which he prescribed medication and referred her for psychotherapy. During the grievant's December 20th appointment, the grievant's physician concluded that she was unable to work because of her mental condition. On

her next workday, December 21, 2004, the grievant called her supervisor at the start of her shift stating that her physician had excused her from work. That same day, the physician faxed the agency a note on a prescription pad that simply stated "long term disability." The facility's Human Resources Officer (HRO) subsequently advised the grievant that the note was insufficient.

The grievant was scheduled to work again on December 22nd. The grievant did not work that day but instead delivered a second note from her physician. That note indicated that the physician had seen the grievant on December 20, 2004, and that she was released to return to work on January 8, 2005. The HRO advised the grievant of the call-in procedure[1] and advised her that this second note from her physician was also insufficient. In addition, the HRO provided the grievant with Family and Medical Leave Act (FMLA) paperwork.

On December 23, 2004, the grievant called the HRO, who told the grievant that if she were not going to report to work on her next scheduled workday, she would have to notify her direct supervisor. The HRO also apparently reiterated the need for additional medical documentation. On December 24, 2004, the grievant applied for short term disability. The agency learned of this request on January 3, 2005.

The grievant was scheduled to work from December 27-30, 2004, but she apparently failed to report to work or call her supervisor on any of those four days. On December 30, 2004, the HRO mailed a certified letter to the grievant informing her that she was being considered absent without authorization from her position, and that if the grievant failed to notify the HRO's office within three days of receipt of the letter, she would be considered to have resigned her employment voluntarily.[2] Although the hearing officer found that the grievant failed to respond to this letter either by contacting the HRO or by providing "acceptable" medical documentation, he noted that during late December and early January, the HRO spoke with the grievant on multiple occasions.

By letter dated January 10, 2005, the warden advised the grievant that a recommendation was "pending" for a Group II Written Notice for failure to follow supervisor's instructions. The conduct identified as the basis for this disciplinary action was the grievant's alleged failure to notify the lieutenants of the warden's instructions regarding school classes, as well as her absences during the period from December 16th to January 10th. In enumerating the conduct for which the grievant was being charged, the January 10th letter specifically noted that the agency had been advised of a short-term

[1] The hearing officer noted that although the grievant's "Conditions of Employment" state that security staff must call their shift commander at least two hours before the beginning of a shift if they will be absent because of illness, the grievant's supervisor testified that he permitted the grievant to call in as late as the start of the shift.

[2] The hearing officer notes that the agency sent all its correspondence to the grievant during December 2004 and January 2005 by certified mail. He further states that although the agency eventually received receipts for all of its letters to the grievant, one letter was initially returned by the post office but successfully resent by the agency. The hearing officer does not identify which letter was initially returned.

disability claim made by the grievant on December 24, 2004. The letter charged that the grievant had "continuously avoided direct contact with [her] managers," "failed to properly follow procedures for notifying [her] supervisor," "failed to follow guidance from [the HRO]," and had "outstanding unauthorized absences that much [sic] be properly addressed." The warden concluded with a demand that the grievant "contact [her] directly to arrange a meeting to discuss these issues within three days of receipt of letter [sic]."

The next day, January 11th, the grievant called the HRO and informed the HRO that she would be sending additional medical documentation. The HRO acknowledged that she had received another note from the grievant's physician. This note, dated January 8, 2005, indicated that the grievant was unable to return to work until January 13, 2005 "due to current illness." [3] The grievant questioned why the facility was not accepting her doctors' notes and requiring additional documentation: the HRO explained that she was following a September 2000 memorandum setting forth agency policy. This memorandum, entitled "Clarification of DOC Procedure 5-12.13B Sick Leave Verification," states that documentation from health care providers may not simply state "patient was under my care" or "please excuse from work," but rather must describe the physical or mental limitations—although not the diagnosis—which preclude the employee from performing his or her work duties. Examples of permissible statements of limitations include "Patient is recuperating from surgery" and "Patient is receiving daily treatment by the health care provider."

On January 13, 2005, the facility received a letter from the grievant's licensed clinical social worker stating that she was treating the grievant and that due to her current illness, the grievant would not be able to return to work for at least two weeks. [4] That same day, the HRO called the insurer to determine the status of the grievant's short-term disability claim. She was apparently advised that the insurer had recently received information from the grievant's doctor and the grievant's claim was under review.

The grievant called the warden on January 18, 2005. According to the warden, the grievant stated that she could not come into the facility to have the pending disciplinary matters resolved or discuss those matters with the warden on the telephone. On January 20, 2005, the HRO advised the insurer that the grievant had been terminated from employment on January 19, 2005. By letter dated January 21, 2005, the agency forwarded the grievant copies of a Group II and a Group III written notice dated January 19th. The Group II Notice, which stated an offense date of December 21, 2004 through January 19, 2005, charged the grievant with a failure to follow supervisor instructions. The Group III Notice, which also gave offense dates of December 21, 2004 through January 19, 2005, charged the grievant with absence in excess of three days without proper authorization or satisfactory reason. In addition, the agency provided the grievant with a copy of a letter dated January 20, 2005 advising the grievant that she was being

[3] Agency Exhibit No. 2, pg. 7 of 10.
[4] Agency Exhibit No. 2, pg. 8 or 10.

terminated for her absence without properly notifying supervision and obtaining permission for her absence.

The grievant timely grieved her termination. In her grievance, she raises the following issues: (1) that her absences were the result of "medical necessity" for which she should have received leave; (2) that her "inability" to address the November 10 allegations was the result of psychological disorder and that disciplinary action for the alleged conduct was inappropriate given all surrounding circumstances; and (3) that termination was not appropriate under the circumstances, including her past performance record, and "would be a form of discrimination against her for having the misfortune of being sick." The grievant also specifically noted that she suffers from a "psychological disorder," that the disorder has manifested itself as depression and anxiety, as well as a number of physical symptoms, and that, as a result of her condition, she had been approved for short-term disability benefits. In addition, the grievant provided documentation from her health care providers regarding her psychological condition.

After the parties failed to resolve the grievance during the management resolution steps, the grievance was assigned to a hearing officer. On May 18, 2005, the hearing officer issued a decision upholding the disciplinary actions against the grievant. The grievant subsequently requested an administrative review of the hearing officer's decision.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions…on all matters related to procedural compliance with the grievance procedure."[5] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[6]

Hearing officers are authorized to make "findings of fact as to the material issues in the case"[7] and to determine the grievance based "on the material issues and the grounds in the record for those findings."[8] Further, "[i]n cases involving discipline, the hearing officer reviews the facts *de novo*" to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action.[9] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate

[5] Va. Code § 2.2-1001(2), (3), and (5).
[6] *See Grievance Procedure Manual* § 6.4(3).
[7] Va. Code § 2.2-3005.1(c).
[8] *Grievance Procedure Manual* § 5.9.
[9] *See Rules for Conducting Grievance Hearings*, § VI (B).

under all the facts and circumstances.[10] Further, the grievance procedure requires that the hearing officer's determination be supported and documented through a hearing decision that "contain[s] findings of fact on the material issues and the grounds in the record for those findings."[11]

Accordingly, hearing officers have the duty to receive probative evidence and to exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs.[12] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, this Department cannot substitute its judgment for that of the hearing officer with respect to those findings.

The grievant raises three challenges in her request for administrative review: that the hearing officer wrongly upheld the Group II Notice regarding her failure to notify the lieutenants about school leave; that he wrongly upheld the Group III Notice for her alleged absence without authorization; and that he improperly failed to mitigate the disciplinary actions taken by the agency. Each of these arguments is addressed below.

Group II Notice

Although the grievant admits that she failed to follow the warden's instructions to speak to one of the two lieutenants about school leave, she argues that her conduct did not warrant a Written Notice. Specifically, she argues that the disciplinary action was taken as part of a campaign against her by the warden; that although she spoke to one of the two lieutenants, the warden pressured him into acting against the grievant; and that the issue of school leave was a problem on all shifts, not just her shift.

In making this argument, the grievant appears to rely on evidence that was not presented at hearing. The grievant was previously advised by this Department that any claims of new evidence must be brought to the hearing officer. She subsequently made an untimely request to the hearing officer for reconsideration, and her request was denied. To the extent that the grievant does not rely on new evidence but instead takes issue with the hearing officer's findings of disputed fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision, such determinations are entirely within the hearing officer's authority.

[10] *Grievance Procedure Manual* § 5.8(2).
[11] *Grievance Procedure Manual* § 5.9; *see also Rules for Conducting Grievance Hearings* § V(C).
[12] Va. Code § 2.2-3005(C)(5).

Group III Notice

In challenging the hearing officer's decision, the grievant argues that the Group III Notice was also part of the warden's targeting of her, and she attempts to offer new and/or additional evidence to support her claims. As noted previously, however, the grievant failed to timely raise her claims of new evidence to the hearing officer.

The grievant also challenges the hearing officer's ruling on the ground that the agency acted improperly in requiring her to provide additional medical information and refusing to accept the doctors' notes she provided. The grievant asserts that the agency was not permitted "to delve into the details of why a person is out sick."

In hearings contesting formal discipline, the agency bears the burden of showing that the disciplinary action taken was warranted and appropriate under the circumstances.[13] In determining if an agency has met this burden, the hearing officer must consider whether the grievant engaged in the behavior described in the Written Notice, whether the behavior constituted misconduct, and whether the disciplinary action was consistent with law and policy.[14] Here, the Group III Written Notice charged the grievant with "[a]bsence in excess of 3 days without proper authorization or satisfactory reason." The hearing officer concluded that the grievant engaged in the alleged misconduct by failing to provide the medical documentation required by agency policy, as expressed in the September 2000 memorandum, and by failing to "fully explain" to the warden her situation.[15]

In finding that the grievant failed to provide the specific medical documentation required by agency policy, however, the hearing officer failed to discuss or acknowledge the documentation provided to the agency by the grievant on or about January 8th and 13, 2005. In contrast to the physician's notes discussed by the hearing officer in his decision, the January 8th and 13th documentation, from the grievant's physician and licensed clinical social worker respectively, specifically identified the grievant's "current illness" as the reason for the grievant's continuing absence.[16]

As the hearing officer acknowledged in his decision, the September 2000 memorandum on which the agency relied in finding the grievant's medical documentation to be insufficient states that sick leave verification is not required to include a diagnosis; rather, all that is required is a brief statement of the physical or mental limitations which render the employee unable to perform her job duties. The September 2000 memorandum includes as examples of sufficient statements of a physical

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[13] *Grievance Procedure Manual* § 5.8.
[14] *Grievance Procedure Manual* § 5.9; *Rules for Conducting Grievance Hearings* §§ V(C), VI(B).
[15] In upholding the Group III Written Notice, the hearing officer wrote, "[b]asically, grievant could have satisfied the agency's need for information with two telephone calls—one to her physician asking him to provide the specific information required by agency policy, and one to the warden to fully explain what the grievant's situation was."
[16] *See* Agency Exhibit 2, at pp. 2, 7-8.

or mental limitation the following: "Patient is recuperating from surgery"; "Patient is receiving daily treatment by the health care provider"; "Patient is contagious." In none of these examples is the underlying medical condition identified to the agency.

Because one basis for the discipline against the grievant was her failure to provide documentation in accordance with the September 2000 policy, the January 8th and January 13th notes are material to any determination of whether the Group III notice was warranted and appropriate. The hearing officer is therefore ordered to reconsider his decision to address this evidence. In particular, the hearing officer should address in his reconsideration, whether the January 8th and January 13th notes provided sufficient information under the September 2000 memorandum.

Moreover, in concluding that the grievant engaged in misconduct when she failed to provide appropriate medical documentation and to "fully explain" her situation to the warden, the hearing officer did not address whether the requirements for information imposed by the agency were consistent with law and policy—specifically, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, and the policies reflecting these laws.[17] Both the ADA and the FMLA require employers to grant medical leave under certain circumstances, and both impose restrictions on an employer's ability to obtain medical-related information from employees.[18]

In particular, the decision failed to address the following issues under the ADA: (1) whether the grievant was a "qualified individual with a disability"; (2) if so, whether the grievant's request for leave constitutes a "reasonable accommodation" under the ADA, and whether the agency properly denied the leave; (3) whether the agency's

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[17] *See, e.g.*, Department of Human Resource Management (DHRM) Policies 2.05 and 4.20. We note that the facility's policy on "Employee Work Schedules," Local Operating Procedure 208, does not specifically identify an employee's own serious health condition as a basis for family and medical leave. As such an interpretation would be inconsistent with DHRM policy and federal law, we assume that the omission by the facility was unintentional.

Although the grievant did not specifically identify these statutes or the related policies in her grievance, it is clear from the grievance record, including the hearing tapes, that the grievant alleges her absences were the result of a medical condition, that the agency improperly failed to grant her leave for these medical absences, that the alleged medical condition was directly related to her work, that her condition affected her ability to meet with the warden regarding her illness, and that the agency's actions constituted discrimination on the basis of her disability. These allegations are sufficient to raise claims under the ADA and the FMLA, as well as under any related policies. *See generally* Reed v. Sword, 2005 U.S. Dist. LEXIS 9833 (W.D.Va. May 24, 2005), at *5 (court is "obligated to construe the complaint as asserting 'any and all legal claims that its factual allegations can fairly be thought to support.'")

[18] For a discussion of an employer's rights and duties under the ADA, see, *e.g.*, Appendix to 29 CFR Part 1630 (Interpretive Guidance on Title I of the Americans with Disabilities Act); EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examination of Employees Under the Americans with Disabilities Act; EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act; EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities. For a similar discussion regarding the FMLA, see 29 CFR Part 825. For a discussion of the interplay between the ADA and the FMLA, see EEOC Fact Sheet: The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964.

requests for information and demand that the grievant explain her condition directly to the warden were permissible under the ADA; and (4) whether the agency had any duty under the ADA to consider the medical information obtained through the grievance process in determining whether to uphold the discipline. Further, the hearing officer's decision did not consider if the grievant was covered by the FMLA, if her illness constituted a "serious health condition" under the FMLA, and if so, if the agency's demands for medical documentation were in accordance with the limitations imposed under that statute.[19]

The hearing officer is therefore ordered to reconsider his decision to address these questions. If additional information is required for the hearing officer to address these issues, he is directed to reopen the hearing as necessary to take appropriate evidence from the parties.[20]

Failure to Consider Mitigation

The grievant also alleges that the disciplinary actions taken by the agency were too harsh in light of her past record. Although mitigation is appropriate only where a disciplinary action exceeds the limits of reasonableness, a hearing officer is required to consider mitigating circumstances in determining whether discipline is warranted and appropriate.[21] In his written decision, the hearing officer notes that the agency had employed the grievant for 19 years and that during this period she was a satisfactory performer with no previous disciplinary actions. However, he does not specifically address whether any circumstances exist which would mandate mitigation. The hearing officer is therefore directed to reconsider his decision to address specifically the existence, or absence, of any mitigating (and, if appropriate, aggravating) circumstances.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this Department orders the hearing officer to reconsider his decision in accordance with this ruling. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[22] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[23] Any such

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[19] *See* 29 CFR §§ 825.305, 825.306. For example, while an employer may request that an employee provide medical certification, the request must generally be in writing and only certain limited information may be sought; if an employee is also using paid leave during the period of FMLA leave, only the certification requirements for the taking of paid leave may be imposed; and the employee must be advised of the time frame (if any) in which to return the medical certification to the employer, and this time frame must be not less than 15 days. *See* 29 CFR §§ 825.305, 825.306.

[20] We note, for example, that although the hearing exhibits indicate that the agency provided the employee with FMLA "paperwork," those FMLA documents do not appear to be in the hearing record.

[21] *Rules for Conducting Grievance Hearings* §§ V(C), VI(B).

[22] *Grievance Procedure Manual,* § 7.2(d).

[23] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual,* § 7.3(a).

appeal must be based on the assertion that the final hearing decision is contradictory to law.[24] This Department's rulings on matters of procedural compliance are final and nonappealable.[25]

Claudia T. Farr
Director

[24] *Id. See also* Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).
[25] Va. Code § 2.2-1001 (5).