Issue: Administrative Review of Hearing Officer's Decision in Case No. 8667; Ruling Date: December 14, 2007; Ruling #2008-1832; Agency: Virginia Department of Transportation: Outcome: Remanded to Hearing Officer.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2008-1832
December 14, 2007

The agency has requested that this Department administratively review the hearing officer's decision in Case Number 8667. The grievance is remanded to the hearing officer for the reasons described below.

FACTS

The hearing officer found the facts as follows:

The Virginia Department of Transportation employed Grievant as an Engineering Technician II. The purpose of his position was:

> To serve as the Department's on-site project manager to ensure Contractor's compliance with all contract documents, also to serve as Department's customer service representative ensuring that the stakeholders' needs are met.

On December 15, 2005, a Manager sent Grievant and several other employees an email stating, in part:

> Starting immediately all inspectors will need prior approval, from their Construction Manager (C.M.), for all vacation and personal leave. This will involve submitting a leave slip in advance to the C.M. for consideration and their response.
>
> Furthermore when sick, all inspectors must notify the C.M., either personally or through the Project Inspector, at the earliest possible time on the date of the event.

On January 22, 2007, Grievant stopped working and began receiving benefits under short term disability on the following day. His case was managed by the Third Party Administrator who was responsible for reviewing Grievant's

medical documentation and determining whether to continue Grievant's benefits. Short term disability benefits were scheduled to end March 15, 2007.

On March 14, 2007, the Construction Manager sent Grievant a memorandum stating:

> As of [3/12/07] there is no record of continued coverage due to health issues. As of this date your absence from work is unauthorized. [Third Party Administrator] has informed the Department that their expectation is you would return to work on Full Duty on that date. Payroll has you listed as leave without pay.
>
> I last spoke with you on 3/1/07 on the phone and urged you to facilitate the communication between your doctor(s) and the Department. Since you provided no medical documentation, I can only acknowledge your request to be off, but I have no documentation to prove your absence. It is a requirement of employment with VDOT that any documentation justifying leave be handed in to your supervisor for processing in a timely fashion. It is your sole responsibility that this occurs. Every effort should be made by you to be accurate and timely in providing appropriate medical documentation. While I understand and am sensitive to your medical conditions, the Department does not have the ability or responsibility to contact your doctor or coordinates [sic] your disability coverage. In reviewing your file I am aware of [sic] this responsibility has been expressed to you several times.
>
> If you do not contact me and provide the appropriate documentation to justify your absence and provide [Third Party Administrator] documentation sufficient to justify your disability status, you may be terminated for failure to report and perform assigned work. Three days without proper notification is grounds for termination.
>
> Please resolve this immediately.

Grievant obtained a note from his physician, Dr. S, dated March 22, 2007 stating:

> Since 3/12 -- still ill and unable to work while going through the evaluations.

On Monday, April 16, 2007, at 7:23 a.m., Grievant called the Construction Manager's direct telephone number and left a message on his voicemail. Grievant said, "my doctor has asked that I still stay out through the

16th and please call me back at your earliest convenience. I will not be returning to work today." The Construction Manager did not return Grievant's telephone call because, for some unknown reason, he did not receive the message.

Grievant was removed from employment effective April 19, 2007.

Grievant presented the Agency with a note about Grievant from Dr. S dated May 17, 2007. The note stated, "Under our care for GI problems 4/13 -- 27/07."

On June 25, 2007, Dr. S responded to a letter dated April 18, 2007 sent to him by the Third Party Administrator. The Third Party Administrator asked several questions regarding Grievant's current condition. Dr. S's response is in italics below:

> 1. What is it about job [Grievant] is unable to do?
> Any part of the job due to the abdominal discomfort
>
> 2. Do you still currently have him out of work?
> Yes
>
> 3. What are the patient's current restrictions and limitations? Please be specific.
> Unable to work due to undiagnosed abdominal pain
>
> 4. What is your prognosis for return to employment on a part-time or full-time basis?
> Unclear pending GI evaluations, treatment + possible response to treatment

In response to the Third Party Administrator's request that the doctor answer the questions by April 30, 2007, Dr. S wrote:

> I could not respond at this date since reports from consulting physicians had not yet been received.[1]

The hearing officer found that the agency had met its *prima facie* case to show a violation of the Standards of Conduct because the grievant had been absent from work for more than three days without providing a satisfactory reason.[2] However, the hearing officer determined that mitigating factors warranted that the disciplinary action be rescinded.[3] The hearing officer relied on two grounds for the mitigation of the Group III Written Notice. First, as the hearing officer determined the facts, the grievant had left a message for the Construction Manager on the

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[1] Decision of Hearing Officer, Case No. 8667, Sept. 21, 2007 ("Hearing Decision"), at 2-4 (footnotes omitted).
[2] *Id.* at 5.
[3] *Id.* at 5-7.

morning of April 16, 2007, stating that he would not be at work that day.[4] Second, the grievant was in consultation with his doctors and attempting to obtain necessary documentation of his absence.[5] However, because of the difficulties in treating the grievant, the grievant's doctor was unable to respond to requests for medical information because he had not received reports from consulting physicians.[6] The hearing officer determined that the grievant's delays in providing medical documentation were "not surprising."[7] Therefore, he rescinded the disciplinary action and awarded back pay.[8] The hearing officer stated further that the agency "need not provide Grievant with back pay, etc. for the days Grievant was on short-term disability."[9]

The agency now requests administrative review of the hearing officer's decision, challenging the consideration of mitigating factors on various grounds. First, the agency claims that the hearing officer erred by concluding that the grievant rightly assumed his absence was approved by leaving a voice mail message with his supervisor without receiving a response. Second, the agency argues the hearing decision "sets an untenable precedent in that it suggests that agencies do not have the authority to deny employees leave when the employee is under a physician's care."[10] Third, the agency asserts that the hearing officer substituted his judgment over the agency's regarding how long the agency must wait to receive medical documentation from an employee during an ongoing absence. Lastly, the agency argues that the hearing officer improperly considered the grievant's physician's report dated June 25, 2007. In addition to these arguments, the agency questions the relief awarded by the hearing officer and the presumption that allegedly led to the award.

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."[11] 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.[12]

Evidentiary Issues

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[4] *Id.* at 5-6.
[5] *Id.* at 6.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 7.
[9] *Id.*
[10] There is no indication in the hearing decision that the hearing officer has established such a precedent as described by the agency. Rather, the hearing officer rescinded the Written Notice based on the particular facts of the case. To the extent the agency is asserting that the hearing officer may have misapplied an applicable leave policy, such a challenge would appear to be a question of policy more properly within the consideration of the Department of Human Resource Management on administrative review. *See, e.g.,* Va. Code § 2.2-3006(A); *Grievance Procedure Manual* § 7.2(a). In addition, certain laws, such as the Family and Medical Leave Act, might require that an employee is entitled to leave irrespective of whether the agency might approve that leave.
[11] Va. Code § 2.2-1001(2), (3), and (5).
[12] *See Grievance Procedure Manual* § 6.4(3).

The agency argues that the hearing officer improperly considered the June 25, 2007 physician report. As stated in the *Rules for Conducting Grievance Hearings*, "the technical rules of evidence do not apply and most probative evidence (any evidence that tends to prove that a material fact is true or not true) is admitted."[13] While the agency correctly points out that management decided to terminate the grievant without reference to this physician report, it cannot be said that the report is irrelevant to the grievance. It appears that the hearing officer considered this piece of evidence primarily because it stated the reasons why the grievant's physician was unable to provide documentation earlier.[14] In sum, the hearing officer did not violate the grievance procedure or hearing rules by considering the June 25, 2007 physician report because it was clearly relevant to the issues of the grievance, regardless of whether the agency considered it.[15]

However, a further point regarding the evidence relied upon by the hearing officer must be made here. The agency states in its request for review that the grievant did not submit, in a timely manner, documentation that justified the grievant's absence from work beyond April 13, 2007. In the hearing decision, there is no discussion of the exhibit establishing the fact that the grievant's medical documentation may have only approved him to be out of work through April 13, 2007. A doctor's note concerning the grievant, dated April 4, 2007, states: "Patient has an appointment … on April 13, '07 for an evaluation & can return to work after this. If any [r]estrictions to work, the determination will be made on or after 4-13-07."[16] While the meaning of this note is subject to interpretation, it is without a doubt necessary to include in the decision and potentially impacts the outcome of this case.[17] Because the hearing officer did not include a discussion of this exhibit, the hearing decision must be remanded for further consideration of this evidence.

Family and Medical Leave Act (FMLA)

An eligible employee can take up to 12 workweeks (60 workdays or 480 work hours) of unpaid FMLA leave per calendar year.[18] One of the permissible reasons for taking such leave is "because of a serious health condition that renders the employee unable to perform the functions of his or her position."[19] A serious health condition is defined as an "illness, injury, impairment or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or

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[13] *Rules for Conducting Grievance Hearings* § IV(D).
[14] *See* Hearing Decision at 6.
[15] *See Rules for Conducting Grievance Hearings* § VI(B) ("[T]he hearing officer reviews the facts de novo.").
[16] Agency Ex. 6 (page 2); *see also, e.g.,* Hearing Recording at 00:59:00 – 01:06:11.
[17] The final doctor's note before the grievant's termination, dated March 22, 2007, which the hearing officer included in the statement of facts, stated that the grievant was unable to work for an indefinite period "while going through the evaluations." Hearing Decision at 3. If the hearing officer assumed that the grievant was put out of work by his doctor for an indefinite period, that could lead to a different result than if the April 4, 2007 note, which arguably sets the grievant's return to work at April 13, 2007, is considered. The interpretation of the meaning of this note is the purview of the hearing officer based on the evidence in the record.
[18] DHRM Policy No. 4.20, Family and Medical Leave ("FMLA Policy"), at 2; *see also* 29 U.S.C. § 2612(a)(1).
[19] FMLA Policy at 3; *see also* 29 U.S.C. § 2612(a)(1)(D).

residential medical care facility; or (2) continuing treatment by a health care provider."[20] The grievant's medical condition, based upon the grievant's continued treatment with doctors, could arguably qualify as a serious health condition under this policy and the Act.

The agency contended at hearing that there was no need to provide FMLA protections to the grievant because there was no medical documentation warranting such leave and the grievant never requested FMLA leave.[21] However, the agency also was not clear whether FMLA paperwork was sent to the grievant.[22] The grievant stated that he never received anything from the agency regarding FMLA leave.[23]

We are compelled to note here that an employee need not specifically assert rights under the FMLA or even mention the statute by name to invoke its protection.[24] The employee must provide notice that leave is needed for a potentially qualifying reason.[25] It is then up to the employer to inquire further to determine if the leave is for an FMLA qualifying reason.[26] In this case, it is unclear whether the grievant provided sufficient notice, whether the agency was sufficiently aware of the grievant's past medical problems to put them on notice of the need for FMLA leave, or whether the agency properly inquired as to whether the reason for the grievant's absence qualified under the FMLA. Indeed, there are also questions about how much FMLA leave the grievant might have had available in April 2007.

Under policy, FMLA leave runs concurrently with time on short-term disability ("STD") if the disability is determined by the Third Party Administrator to be FMLA qualified and the agency determines that the employee is FMLA eligible.[27] "Agencies must provide eligible employees with FMLA notification and they must track FMLA hours."[28] The grievant's STD ended on March 15, 2007.[29] The evidence is not clear whether the agency designated the grievant's absence as FMLA eligible, either while the grievant was on STD or after it had ceased. This scenario then raises the further questions of whether the agency should have designated the grievant's periods of absence as FMLA leave or whether the grievant was prejudiced by any such non-designation or possible lack of notification, and whether he should be granted further FMLA leave.[30] In summary, the facts of this case fairly raise FMLA issues, which should have been addressed by the hearing officer. Therefore, the grievance will be remanded for full consideration and discussion of the FMLA and to what extent it might have protected the grievant's job while he was absent in April 2007. This ruling in no way determines

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[20] FMLA Policy at 2; *see also* 29 U.S.C. § 2611(11).
[21] *See* Hearing Recording at 01:22:54 – 01:23:04, 01:24:07 – 01:24:30, 02:09:11 - 02:10:15.
[22] *See* Hearing Recording at 02:09:11 – 02:10:15, 02:13:10 – 02:14:14.
[23] Hearing Recording at 02:15:01 – 02:15:10.
[24] 29 C.F.R. §§ 825.302(c), 825.303(b).
[25] *See id*; *see also, e.g.,* Phillips v. Quebecor World Rai Inc., 450 F.3d 308, 310-311 (7th Cir. 2006); Cruz v. Publix Super Markets, Inc., 428 F.3d 1379, 1383 (11th Cir. 2005); Peeples v. Coastal Office Prods. Inc., 64 Fed. Appx. 860, 863 (4th Cir. 2003).
[26] *Id.*
[27] DHRM Policy 4.57, *Virginia Sickness and Disability Program*, "General Provisions."
[28] *Id.*
[29] Hearing Decision at 3.
[30] *See generally, e.g.,* Moticka v. Weck Closure Sys., 183 Fed. Appx. 343 (4th Cir. 2006).

that the grievant ought to be afforded protection under the FMLA, only that the subject must be analyzed and addressed by the hearing officer. In addition, to the extent that it might apply, if at all, the hearing officer must consider whether the Americans with Disabilities Act (ADA) affects the grievant's case. The hearing officer may reopen the hearing, if deemed prudent, to take additional evidence from both parties regarding the FMLA and ADA. If the hearing is reopened, it must be limited to these issues only.

Mitigation[31]

The majority of the agency's claims in its request for review challenge the findings of the hearing officer on mitigation. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."[32] EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or … an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.[33]

Therefore, for a hearing officer to mitigate a disciplinary action, the rules require a finding that the agency's discipline exceeded the limits of reasonableness upon consideration of the record evidence. This Department will review a hearing officer's mitigation determinations only for abuse of discretion.[34] Therefore, EDR will reverse only upon clear evidence that the hearing officer failed to follow the "exceeds the limits of reasonableness" standard or that the determination was otherwise unreasonable.

The agency challenges the hearing officer's mitigation determinations regarding the message the grievant left for his supervisor on the morning of April 16, 2007, the agency's

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[31] Depending on the outcome of the hearing officer's analysis of the FMLA, it may not be necessary to reach the issue of mitigation. However, to the extent the hearing officer's reconsidered decision continues to address mitigation, the following concerns must be addressed.

[32] Va. Code § 2.2-3005(C)(6).

[33] *Rules for Conducting Grievance Hearings* § VI(B) (alteration in original). Any deference the hearing officer might have given to the agency's consideration of mitigating or aggravating circumstances is not relevant to this case because there is no evidence in the record about the agency's consideration of the particular circumstances relied upon by the hearing officer in mitigating the disciplinary action. As such, there was no consideration of mitigating factors by the agency to which the hearing officer was required to give deference.

[34] "'Abuse of discretion'" is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith … but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts … or against the reasonable and probable deductions to be drawn from the facts." *Id.*

authority to deny leave, and the amount of time the agency needed to wait to receive medical documentation. The agency's arguments raise important points in assessing whether the hearing officer properly determined that the disciplinary action exceeded the limits of reasonableness. Indeed, this Department has questions as to whether the hearing officer's mitigation determination was sound. The hearing decision lacks clear and thorough discussion about how the two mitigating factors identified by the hearing officer render the agency's action beyond the limits of reasonableness. For instance, it is not clear to what extent the hearing officer considered the fact that the grievant called in on April 16, 2007 to explain to his supervisor that he would not be at work that day only. There is no discussion of the fact that the grievant did not attempt to call his supervisor to inform him that he would not be in any other day that week.[35] Because the hearing decision lacks discussion of how this fact, and others identified in this ruling and by the agency, were effectively rendered irrelevant by the cited mitigating factors, the hearing officer must revisit his mitigation determination. The hearing officer is ordered to reconsider whether the cited mitigating factors appropriately show that the disciplinary action exceeded the limits of reasonableness. The hearing officer must also consider the arguments raised by the agency in its request for administrative review. Moreover, the hearing officer must explain specifically why the disciplinary action exceeded the limits of reasonableness. The hearing officer did not do so here and, thus, mitigation must be reconsidered.

The hearing officer should also consider how the factors he relied upon for his mitigation conclusions might affect the preliminary question of whether the grievant had committed misconduct in this case. An initial question the hearing officer must answer in determining whether the disciplinary action was appropriate is whether the behavior at issue constituted misconduct.[36] The charge in this case was "absence in excess of three days without proper authorization or satisfactory reason."[37] In mitigating the disciplinary action, the hearing officer cited the fact that the grievant called in on April 16, 2007, and was unable to provide medical documentation in support of his absence because of ongoing problems with his doctors in trying to diagnose his condition.[38] An analysis of such facts might be relevant in determining whether the agency had succeeded in proving that the grievant engaged in misconduct. The hearing officer found that the grievant had called in and, apparently, had a valid excuse for not providing timely documentation in support of his absence. These grounds appear to address the elements of the charge, i.e., the reasons for the grievant's absence and that the grievant was not absent without attempting to contact his employer. The hearing officer must consider these matters on remand.

Relief Awarded

In rescinding the Written Notice and reinstating the grievant, the hearing officer stated that "the Agency need not provide Grievant with back pay, etc. for the days Grievant was on

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[35] Indeed, even if the grievant had difficulty obtaining necessary documentation from his physician, he would still have been able to call his employer to explain the situation and the reasons for his continued absence.
[36] *Rules for Conducting Grievance Hearings* § VI(B).
[37] Hearing Decision at 1.
[38] *Id.* at 5-6.

short-term disability."[39] The agency contends that this statement was based on a faulty assumption by the hearing officer that the grievant's STD claim was approved. According to the agency, the third party administrator did not approve the grievant for further STD benefits, even following the June 25, 2007 physician report.[40] Therefore, because the effect and intent of the order is not clear, the hearing officer must clarify the award of relief with regard to "back pay, etc." in relation to the grievant's assumed time on STD and what effect this may have on the decision, assuming this relief is awarded in the reconsidered decision.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, this grievance is remanded to the hearing officer for further consideration. The hearing decision must be amended to include discussion of the issues discussed above and any other issues that might be fairly raised in connection with these topics.

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.[41] 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.[42] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[43]

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Claudia T. Farr
Director

[39] *Id.* at 7.
[40] *See* Agency Ex. 8.
[41] *Grievance Procedure Manual* § 7.2(d).
[42] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a). To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal, in other words, the basis for its position that the hearing decision is "contradictory to law." *Grievance Procedure Manual* § 7.3(a).
[43] *Id.*; *see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319 (2002).