VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

CASE NUMBER 12024

DECISION OF HEARING OFFICER

I. INTRODUCTION

The grievant was formerly an employee of an educational institution in the Commonwealth. The school terminated her from employment on September 11,2023 for excessive absenteeism. The case involves the application of, and interplay between, three policies of the Department of Human Resource Management (DHRM). For the reasons herein-after stated, I reverse the termination of employment of the grievant.

II. PROCEDURAL BACKGROUND

The grievant commenced this proceeding by filing her Form A on Oct 5, 2023. I was appointed as hearing officer effective October 23, 2023. I conducted a prehearing conference call on November 2. By agreement of the parties, I scheduled the matter for hearing on November 30. Later in November the school requested that the matter be continued. By agreement, a new date of December 18 was set.

On November 15 the grievance submitted a request for certain documents from the agency. Upon review of the request and the response of the school, I entered an order on November 22 requiring production of only some of the documents. She filed a revised request on November 28. The school responded on November 30, and I entered a subsequent ruling on December 1. On December 2 the grievant requested a rescheduling of the hearing. On December 19 a compliance ruling was issued by the DHRM Office of Employment Dispute Resolution regarding my rulings respecting the production of documents.

I entered a second amended prehearing order on January 13, 2024, setting the matter for hearing for February 5. At the request of the grievant, the hearing was rescheduled for February 12 to give her additional time to review the requested documents. After an exchange of exhibits between the parties, the grievant objected to a proffered exhibits from the school, emails written prior to January 1, 2023. I sustained that objection.

The hearing happened on February 12, the date chosen by the agreement of the parties. The school presented four witnesses. It was represented by a non-lawyer employee, an Associate

Vice-President (AVP). The grievant represented herself, testified, and called the AVP as a witness.

III. ISSUE DECIDED

Whether the school acted properly in issuing the grievant a Group III Written Notice and terminating her from employment on September 11, 2023 for excessive absenteeism?

IV. FINDINGS OF FACTS

The grievant worked at the school in 2023 as an Education Support Specialist (Student Success Coach). She had been employed by the school for approximately ten years. Beginning May 24, 2023, the grievant missed work through her termination on September 11.

When the grievant failed to show up for work on May 24 she notified her supervisor that she needed to be off work for an indefinite amount of time for medical reasons. She filed a claim for disability benefits through the Virginia Sickness and Disability Program (VSDP) third party administrator ("TPA"). The school became aware of this claim no later than May 30. The AVP notified the grievant that she was "to be told of options" by another employee of the school. That employee was copied on the email from the AVP to the grievant. The grievant submitted information to the TPA, including a note from her physician dated May 27, 2023. The note stated that the grievant needed to be excused from work for 90 days.

On June 30, the AVP sent a letter to the grievant informing her of her exhausted paid leave. The letter stated that she was being placed on leave without pay status beginning June 30, 2023. The letter further stated, "to ensure we explored options, we consulted with VCCS Human Resources, who advised to inform you to either: 1) Return to work, or, 2) Resign." The grievant was given a deadline of July 6, 2023 to respond with her decision.

On July 3, the AVP sent an email to the grievant. The email stated that the grievant would be placed on leave without pay status as of July 10 unless she returned to work, or the TPA approved her claim. The email concluded by stating "for your review and consideration, I have attached information on FMLA and ADA. Should any of these options apply, please complete the forms and return by July 19, 2023." The information provided included a completed FMLA leave form dated July 3 and reflecting that the school received notice of the grievance health issues on May 26, 2023. It also indicated that the grievant was eligible for FLMA leave.

The TPA denied the initial request by the grievant for short-term disability benefits on July 13. The reason stated was "plan provision not met." No further explanation was given, and the parties presented no evidence as to what provision was lacking. The grievant requested an appeal of this denial. On or about August 25 the TPA acknowledged that it had requested a 45-day extension for making a final decision on the claim.

On September 11, the TPA sent notice of denial of the claim to the AVP. Approximately four hours later, the AVP notified the grievant that she was being terminated from employment

for absenteeism, her claim through the VDSP having been denied. The school issued a Group III Written Notice on that date, terminating the grievant from employment.

The decision to issue this Group III Written Notice was based, in part, upon the grievant having an active Group I Written Notice from March 2, 2023, and an active Group II Written Notice from May 24, 2023. She had received a rating of "Contributor" in her most recent evaluation prior to her termination. The subject disciplinary action was issued by her direct supervisor; it is unclear who made the final decision to issue it and terminate the grievant from employment.

V. ANALYSIS

The Commonwealth of Virginia provides protections to its employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Human Resource Management (DHRM) Office of Employment Dispute Resolution has developed a Grievance Procedure Manual (GPM) and Rules for Conducting Grievance Hearings (the Rules). The GPM sets the applicable standards for this type of proceeding. Section 5.8 provides that in disciplinary grievance matters (such as this case) the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of evidence, that its actions were warranted and appropriate. The Rules state that in a disciplinary grievance a hearing officer shall review the facts de novo and determine:

I. Whether the employee engaged in the behavior described in the Written Notice.

II. Whether the behavior constituted misconduct.

III. Whether the discipline was consistent with policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The grievant does not dispute that she did not work for the seventy-eight workdays between May 23, 2023 and September.11 She also does not contest, and I find, that failing to work when scheduled is actionable misconduct, being a violation of DHRM Policy 1.60, the Standards of Conduct. Under that policy, excessive absenteeism can be the basis for the issuance of a Group III Written Notice and termination from employment. The Notice issued to the grievant cites her for being absent for three days without proper authorization.

As noted, these findings do not end the inquiry. A disciplinary action must be consistent with all relevant laws and policies. I do not find that to be true in this case.

To resolve this case I reviewed three separate, but related, DHRM policies. The Standards of Conduct, Policy 1.60, is only one of them. Policy 4.57 sets out the Virginia Sickness and Disability Program (VSDP). The primary purpose of that program is "to provide supplemental replacement income for employees suffering periods of at least partial disability. The goal is to encourage rehabilitation, with an ultimate goal to return employees to back to gainful employment when medically able." Policy 4.57 requires that an employee's position be held

open during times of short-term disability (STD). The policy further provides, however, that "if the situation warrants, Policy 1.60, Standards of Conduct may be used while employees are on STD." That provision of the policy is ambiguous, it being unclear when a situation would warrant the application of Policy 1.60. I am not required to decide that, the grievant never having been approved for short-term disability benefits. The language of the policy, as a whole, leads to the conclusion that an employee, such as the grievant, whose claim is denied can properly be disciplined for excessive absenteeism in appropriate circumstances.

This is not an appropriate case. The Group III Written Notice issued on September 11, 2023, is improper because of the third relevant policy, DHRM Policy 4.20, Family and Medical Leave. Leave under that policy runs concurrently with leave under the VSDB for eligible employees. Policy 4.20 requires a state agency to notify an employee that it is designating the leave as FMLA "at the time employers are informed of the VSDB claim." Here, the school did not notify the grievant of her rights under Policy 4.20 until July 3, approximately 6 weeks after it learned of the pending claim. That notification came concurrently, or almost concurrently, with the June 30 letter to the grievant apprising that her options were returning to work or resigning.

That letter could reasonably cause confusion to the grievant, when coupled with the July 3 provision of the completed FMLA form. By the time the school notified the grievant of her rights under Policy 4.20, she had already effectively used about 6 weeks of paid leave, instead of the 12 weeks of unpaid leave available to her. Using the July 10, 2023, date as the beginning of the leave without pay status (as stated in the July 3 e-mail) the 12 weeks of unpaid medical leave available to the grievant under Policy 4.20 and federal law would have ended on October 2, 2023. The school chose to terminate her on September 11, only 9 weeks into the unpaid leave period. I find this violation of Policy 4.20, the late notification of rights, to be crucial in resolving this case. It was a material violation of the policy. The disciplinary action was taken prematurely. Had the appropriate information been provided to the grievant in compliance with policy, the disciplinary action would have been justified, assuming the grievant had not been allowed to return to work and done so.

Reading Policy 4.20 in conjunction with Policy 4.57 creates an implied authorization for an absence that would ordinarily be sanctionable under Policy 1.60. This authorization is conditional upon the VSDP claim being approved. It is only because the grievant was not shown to have been given the timely chance to seek FMLA leave that I reverse her Group III discipline and termination.

A significant amount of evidence and argument was presented by the grievant regarding allegations that her termination was discriminatory and a further form of harassment. I find it unnecessary to decide those issues.

VI. DECISION

For the reasons stated above, I rescind the Group III Written Notice issued on September 11, 2023, for excessive absenteeism. The grievant shall be restored to employment with the

school. She shall have her back pay restored to her from October 2, 2023, subject to offset for any interim earnings. She shall have restored to her all other benefits. This shall include reimbursement of health insurance premiums paid, if any, as allowed by Policy 1.60. The parties are reminded that this ruling has no effect on the other prior, active Written Notices.

VII. APPEAL RIGHTS

The parties may file an administrative review request within fifteen calendar days from the date this decision is issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resources Management to review the decision. You must state the specific policy and explain why you believe the decision is not consistent with that policy.

Please address the request to:

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

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

2. If you believe the decision does not comply with the grievance procedure, or you have new evidence that could not have been discovered before the hearing you may request that EDR review the decision. You must state these specific portions of the grievance procedure with which you believe the decision does not comply. Please address your requests to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th street, 12th floor
Richmond, VA 23219

or send by email to EDR@dhrm.virginia.gov, or by facsimile to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be received by the reviewer within fifteen calendar days of the date of the issuance of this decision. You must provide a copy of all your appeals to the other party, EDR, and the hearing officer. The decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contrary to law. You must file a notice of appeal with the clerk of 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 you may call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights help from an EDR Consultant.

ORDERED this February 25 ,2024

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer

IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE CASE NUMBEER 12024

DECISION OF HEARING OFFICER UPON RECONSIDERATION

By decision dated February 25, 2024, I vacated the Group III Written Notice issued by the school to the grievant by the school at which she was employed. I directed she be restored to employment. I awarded partial back-pay. The school appealed my decision to the Department of human Resource Management (DHRM), which issued Administrative Review Ruling 2024-5681 on April 5, 2024. That ruling remanded the case to me for reconsideration of a single primary issue. Reference is hereby made to that Ruling for a statement of the facts of the grievance and applicable law and policy. For the reasons below, I now uphold the issuance of the formal discipline and the termination of the grievant from employment for excessive absences.

My initial decision was based on the failure of the school to follow DHRM Policy 4.20 in notifying the grievant of possible protected job-protected unpaid leave under the Family Medical Leave Act (FMLA). That policy sets forth protection for an employee with a "serious health condition." The definition of that phrase is broad and multi-pronged, covering multiple scenarios.

The sole evidence in the record regarding the applicability of FMLA to the grievant's situation was a physician's note authorizing her to be off work for ninety days. There were no supporting medical records or corroborating testimony, aside from that of the grievant's own, which was not detailed as to her underlying condition. The inference from the evidence that was presented that the grievant suffered from a serious health condition is not sufficient to show entitlement to FMLA protection. She may have been eligible under at least one of the prongs of the definition of serious health condition. The evidence does not show which, if any, portion of the definition applied to the grievant. The burden of proof to show eligiblility for FMLA coverage was on the grievant. She failed to meet that burden.

Additionally, the grievant failed to show that she complied with Policy 4.20 in requesting FMLA protection. The college adequately described to her the process of asking for FMLA. It provided a partially pre-completed Form WH-380-E for her to have a physician to provide additional details regarding her condition. The grievant had the

burden of providing the fully completed form to the college or third-party administrator. The record does not show that the grievant took the necessary steps to follow through with any desire she had for FMLA coverage. In this instance, the failure of the college to follow DHRM Policy 4.20 is insufficient to excuse the grievant's own failures of action or proof.

For these reasons, I uphold the termination of the grievant from employment and the Group III Written Notice. The parties have the appeal rights described in Administrative Review Ruling 2024-5681.

ENTERED this April 9, 2024.

THOMAS P. WALK, HEARING OFFICER