Issues: Group II Written Notice (entered LWOP for 7th time) and Termination (due to accumulation); Hearing Date: 05/17/12; Decision Issued: 05/18/12; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 9808; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9808

Hearing Date: May 17, 2012
Decision Issued: May 18, 2012

PROCEDURAL HISTORY

On January 26, 2012, Grievant was issued a Group II Written Notice of disciplinary action with removal for entering Leave Without Pay Status on January 9, 2012.

On February 9, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 16, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 17, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

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

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Correctional Education employed Grievant as a Guidance Secretary at one of its Facilities. She had been employed by the Agency for approximately 4 years prior to her removal effective January 26, 2012. The purpose of her position was to, "provide operational support of a specialized nature to the school's Guidance Counselor in addition to general office administration."[1]

Grievant had prior active disciplinary action. On May 26, 2011, Grievant received a Group I Written Notice for entering Leave Without Pay Status. On August 25, 2011, Grievant received a Group II Written Notice for entering Leave Without Pay Status for a sixth time. Grievant was advised that "Another Group II notice may result in termination."

On April 4, 2011, Grievant sent Ms. J, an employee in the Human Resource Office, an email stating:

> I need to know how to go about getting fmla for my [medical condition] so that even if I lose time off, I won't get written up for it. This is an issue I've had since 10th grade. [Ms. W] suggested that I contact you for this information.

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1 Agency Exhibit 3.

Ms. J replied:

> You may submit a request for FMLA to HR. We will check to make sure you are eligible for it. If you are, we will send you a FMLA letter and a medical certification form that must be completed by your doctor. Please let me know if you have any other questions.

On April 6, 2011, Grievant sent Ms. J an email stating, "I would like to submit a request for FMLA regarding my ongoing [medical condition]. What is my next step?" Ms. J replied, "I will forward your request to [Ms. R]. She will send you a letter and a copy of the medical certification form that must be completed by your doctor."

On April 7, 2011, Ms. R sent Grievant a letter stating:

> Per your request, I am sending information on the Family and Medical Leave Act. This act may assist in the need to provide or assist with care giving of yourself or an immediate family member. Under the state's FMLA policy (DHRM Policies and Procedures 4.20), you may take up to 12 weeks of unpaid leave for your illness. The time may be taken intermittently as 60 days or 480 hours of FMLA leave – whatever your treatment dictates. During the FMLA leave, your position will be held available for your return. We are requesting medical certification of your medical condition from your physician. The Certification of Health Care Provider form is attached and must be returned to me as soon as possible.

Neither Grievant nor her medical provider submitted information to the Agency regarding a request for Family Medical Leave.

Grievant was scheduled to work on January 9 and January 10, 2012. She developed strep throat and was unable to report to work as scheduled. She was examined by her doctor and authorized to return to work on January 11, 2012. Grievant had exhausted all of her leave balances as of January 9, 2012. She entered Leave Without Pay Status on January 9, 2012.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[2] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

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[2] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Poor attendance a Group I offense.[3] The Agency expected Grievant to report to work as scheduled and to avoid being placed on Leave Without Pay Status. Grievant exhausted all of her leave balances. She was sick on January 9, 2012 and could not report to work. She was placed on Leave Without Pay Status for a seventh time. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant had an active Written Notice for entering Leave Without Pay Status issued on August 25, 2011. The Written Notice issued January 26, 2012 represented the same offense and, thus, it was appropriate for the Agency to elevate the disciplinary action in this case from a Group I to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices the agency may remove an employee. Grievant has accumulated two Group II Written Notices. The Agency's decision to remove Grievant must be upheld.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[4] Under the *Rules for Conducting Grievance Hearings,* "[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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because she was not permitted to work an alternate schedule to account for her lengthy commute to work. Grievant argued that if she had been permitted to arrive to work at a later time she could have avoided being tardy in the past and avoided entering Leave Without Pay Status. This argument fails. Grievant did not enter Leave Without Pay Status on January 9, 2012 because she was tardy for work. She was absent from work due to illness that

[3] See, Attachment A, DHRM Policy 1.60.

[4] Va. Code § 2.2-3005.

extended through January 10, 2012. The evidence showed that the Superintendent instructed that all staff at the Facility should begin their work shifts at 7:45 a.m. Although evidence was presented that Ms. B may have been permitted to arrive at a time other than 7:45 a.m. because of the need for medical treatments, there is no reason for the Hearing Officer to believe the Grievant was singled out for an improper purpose and required to report to work at 7:45 a.m.[5]

Grievant argued that had she been able to claim Family Medical Leave, some of her absences in the past that caused her to enter Leave Without Pay Status could have been avoided. The evidence showed that Grievant knew of the Family Medical Leave Policy and was provided by the Agency with the necessary forms to request Family Medical Leave but Grievant chose not to apply. Grievant did not apply for Family Medical Leave with respect her absence on January 9, 2012 even though she was aware of the Family Medical Leave Policy.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

[5] State agencies may establish different work schedules for their employees based on business needs.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   600 East Main St. STE 301
   Richmond, VA 23219

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

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.[6]

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

[6] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.