Issue: Group II Written Notice (failure to follow policy); Hearing Date: 06/13/18; Decision Issued: 06/14/18; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11198; Outcome: Full Relief.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11198

Hearing Date: June 13, 2018
Decision Issued: June 14, 2018

PROCEDURAL HISTORY

On October 12, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy.

On November 11, 2017, 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 he requested a hearing. On April 30, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On June 13, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Corrections employs Grievant as a Counselor at one of its facilities. He began working for the Agency in 2009. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked in an office inside the Facility. In order to get to his office, he had to enter the Facility's lobby and pass through a security check. Many employees worked at the Facility and often long lines developed as employees waited to pass through the security check point. After passing through the security check point, Grievant would walk approximately five minutes to the Housing Unit where he worked. After entering the Housing Unit, he would approach a key box containing the key to his office. After entering the key code into the box, the box would open and he could obtain his key. He would then take his key and open the door to his office to begin working. At the end of Grievant's shift, he would replace the key in the key box and leave the Facility. Each time Grievant entered his code into the key box an electronic record was created and kept by the Agency.

Grievant was scheduled to work 8.5 hours including a 30 minute lunch break each day. At the end of each week, Grievant was to submit a time sheet to the Agency showing the time he started working his shift and the time he ended his shift. Grievant was expected to work 40 hours per week or account for his absences with leave.

Prior to March 2017, employees were at work when they were in the lobby attempting to pass through security. For example, if an employee was scheduled to begin working at 8 a.m. and he or she was in the Facility lobby at 8 a.m., the employee would not be considered late by the Agency.

Prior to March 2017, many employees had the same start times and, thus, a crowd often arose in the Facility lobby at the start time. Employees had to wait in line for lengthy periods of time sometimes up to 45 minutes to pass through the security check point and begin walking to their posts.

To alleviate the long waiting times, the Lead Warden issued a memorandum on March 10, 2017 regarding staggered work schedules. The Lead Warden added for non-security staff:

> 1. For purposes of determining work hours, work begins when the employee arrives at the actual work station (place of performance of essential job functions).
> 2. Unless pick up of key or equipment is an integral part of the [principle] duties, that time is not compensable (picking up keys to enter a locked office is not integral).[1]

Following the issuance of the Lead Warden's memorandum, a meeting was held including the Housing Unit managers, counselors, and the HR Officer. Employees were told that if an employee was responsible for picking up the mail, then that counselor's start time would be the time the counselor picked up the mail and not the time the counselor arrived as his or her desk.

Grievant was responsible for picking up the mail when he entered the Facility. The mail was located in the Facility's lobby.

Someone contacted the State Fraud, Waste, and Abuse Hotline and alleged Grievant "is scheduled to arrive at work at 8 a.m. but 2-4 times a week arrives 35-45 minutes late."[2] The Office of the State Inspector General assigned investigation of the complaint to the DOC Internal Audit. The Investigator, Mr. K, was assigned responsibility to investigate the complaint. He conducted an investigation by reviewing Grievant's weekly timesheets and the key log records and speaking with Grievant and the Senior Warden. The Investigator concluded that the "employee had 26 hours and 34 minutes of time, not to include 1 day of incomplete key log information, that could not be accounted for during the 25 day period."[3]

CONCLUSIONS OF POLICY

The Agency alleged Grievant should receive a Group II Written Notice for violating Operating Procedure 110.1 by claiming to have worked hours for which he did not work. The Agency has not met its burden of proof[4] to support the disciplinary action

[1] Agency Exhibit 4.

[2] Agency Exhibit 6.

[3] Agency Exhibit 5.

[4] The Investigator concluded that Grievant had 26 hours and 34 minutes of time and 1 day of incomplete key logs for which Grievant could not account. It is not Grievant's burden of proof to account for his time.

for several reasons. First, the investigation was conducted by Mr. K who was a DOC employee. The Agency refused to allow Mr. K to testify on behalf of the Agency even though the Agency's Representative attempted to have him testify.[5] Second, during the course of the investigation, Mr. K obtained the code entry records for the key box showing the dates and times Grievant obtained and returned his office key to the key box. Mr. K compared these records to Grievant's weekly timesheets. The Agency failed to produce copies of Grievant's timesheets and the key box records. There is no way for the Hearing Officer to verify Mr. K's conclusion that Grievant's timesheets showed he was at work when the key box records showed he was not at work. Third, the Agency alleged Grievant under-reported his time for at least 25 days. The Agency failed to identify those dates. Without knowing which dates Grievant was supposedly tardy, there is no basis for Grievant to explain his absences. The time period examined could have been a random sample of dates or a series of dates or dates before and after the March 10, 2017 memorandum. Without knowing the dates considered, there is no basis to determine which standard (at Facility Lobby or at employee's office) for start time applied. Fourth, Grievant established that the start time for his shift was when he picked up the mail at the Facility's lobby. The Agency did not present evidence showing what time Grievant picked up the mail in the lobby compared to the time he recorded on his timesheet.[6]

The Agency presented evidence that during a fact finding meeting with the Assistant Warden, Grievant admitted to reporting to work at 8:40 a.m. or 8:45 a.m. while recording his start time as 8:30 a.m. This evidence alone is not sufficient to support the issuance of a Group II Written Notice.[7] It is unclear whether the dates Grievant was referring to were any of the 25 days reviewed by the Investigator.

DECISION

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

It is the Agency's burden to show that Grievant was not working when he claimed to be at work. Thus, whether Grievant could account for his time to the Investigator is insignificant.

[5] It does not matter why the Agency did not allow Mr. K to testify. Without his testimony or some other written explanation of how he reached his conclusions, the evidence is not sufficient to support the disciplinary action.

[6] The unknown complainant reported that Grievant was scheduled to report to work at 8 a.m. The evidence showed that Grievant most likely was scheduled to report to work at 8:30 a.m. While the complainant might have thought Grievant was 35 to 45 minutes late, he would only have been 5 to 15 minutes late. Picking up the mail or delaying in passing through security may have accounted for a 5 to 15 minute delay.

[7] Even if this evidence was sufficient to support the issuance of disciplinary action, it would show Grievant was tardy and not that he violated the Lead Warden's memorandum. Tardiness is a Group I offense, not a Group II offense. A single incidence of tardiness is not sufficient to support the issuance of a Group I Written Notice.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal 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.[1]

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.