

Issues: Group II Written Notice (unsatisfactory attendance/excessive tardiness);
Hearing Date: 09/27/17; Decision Issued: 10/17/17; Agency: DMV; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11077; Outcome: Partial Relief; **Administrative
Review: Ruling request received 10/18/17; EEDR Ruling No. 2018-4633 issued
10/28/17; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11077

Hearing Date: September 27, 2017
Decision Issued: October 17, 2017

PROCEDURAL HISTORY

On July 26, 2017, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory attendance/tardiness. He was removed from employment based on the accumulation of disciplinary action.

On July 31, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 10, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On September 27, 2017, 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 Motor Vehicles employed Grievant as a Customer Service representative at one of its facilities. He began working for the Agency on March 10, 2013. Grievant had prior active disciplinary action. He received a Group II Written Notice with a three day work suspension on February 24, 2016 for leaving work without permission. Grievant received a Group II Written Notice with suspension on July 12, 2016 for leaving work without permission.

On March 27, 2017, Grievant was given an "Attendance Memo" regarding his tardiness. He was advised:

You are receiving this memo to be aware of the seriousness of this matter. Immediate improvement and compliance with your assigned work schedule is expected. Any future tardiness and absenteeism will result in further disciplinary actions.¹

On June 12, 2017, Grievant received an Interim Evaluation advising him, "[Grievant] needs to focus on his excessive tardiness to work and returning from lunch periods."²

¹ Agency Exhibit 3.

² Agency Exhibit 4.

On June 2, 2017, Grievant was one hour and fifteen minutes late because he overslept. On June 8, 2017, Grievant was seven minutes late to work. On June 9, 2017, Grievant was one hour and forty-five minutes late. On June 16, 2017, Grievant was twelve minutes late to address an issue with his son's medication. On June 26, 2017, Grievant was eight minutes late. On June 17, 2017, Grievant was thirty minutes late preparing for his son's graduation and addressing his son's cough and fever. On July 5, 2017, Grievant was eighteen minutes late because he lost his phone and had no alarm.

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."³ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Tardiness is a Group I offense.⁴ Grievant was advised of the importance of being on time to work and being at work during his work hours. The Agency has presented sufficient evidence to show that Grievant continued to have unsatisfactory attendance and tardiness. The Agency issued a Group II Written Notice, but only has presented sufficient evidence to support the issuance of a Group I Written Notice.

An employee who receives disciplinary action while having two prior Group II Written Notices may be removed from employment. Grievant has received a Group I Written Notice. He has two prior Group II Written Notices and, thus, the Agency's decision to remove him from employment must be upheld.

Grievant argued that the Agency discriminated against him because of his race and disability. The evidence showed that Grievant was tardy to work on several occasions for reasons unrelated to his or his son's health. No credible evidence was presented to show that the Agency discriminated against Grievant because of his race.

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 Human Resource Management"⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ Attachment A, DHRM Policy 1.60.

⁵ *Va. Code § 2.2-3005.*

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further 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 is **reduced** to a Group I Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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.