

Issue: Group I Written Notice (excessive tardiness); Hearing Date: 09/27/10;
Decision Issued: 09/28/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9405; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9405

Hearing Date: September 27, 2010
Decision Issued: September 28, 2010

PROCEDURAL HISTORY

On June 10, 2010, Grievant was issued a Group I Written Notice of disciplinary action for tardiness.

On June 15, 2010, 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 September 8, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 27, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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. 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 Behavioral Health and Developmental Services employs Grievant as a Security Officer III at one of its Facilities. The purpose of this position is to:

maintain security, custody and control of residents population while committed to [the Facility]. Responsible to maintain controlled access both inside and outside the facility.¹

Grievant's Employee Work Profile requires that he "[a]ttends and actively participates in daily muster briefings."² Grievant had prior active disciplinary action consisting of a Group II Written Notice issued on November 10, 2009.

The Agency has a time clock which displays and records the time an employee activates the clock with his or her identification badge. At the start of each shift, Agency supervisors held muster to inform employees of events that had occurred on prior shifts or to discuss policies or present other information. The Agency expected Grievant to attend muster which was scheduled to begin at 3 p.m. This meant he would have to sign in at the time clock approximately two to three and a half minutes before 3 p.m. in

¹ Agency Exhibit D.

² Agency Exhibit E.

order to go through security screening and arrive by 3 p.m. at the location where muster was held.

Grievant activated the time clock as follows:

February 4, 2010 at 3:23 p.m.
February 5, 2010 at 3:57 p.m.
February 23, 2010 at 3:05 p.m.
February 26, 2010 at 3:01 p.m.
March 16, 2010 at 3:09 p.m.
March 18, 2010 at 4 p.m.
April 17, 2010 at 4:36 p.m.
May 16, 2010 at 3:02 p.m.
May 26, 2010 at 3 p.m.

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 Campus Instruction number 4, Attendance Policy authorizes "Disciplinary Action(s)" when an employee has two "occurrences" in the most recent three consecutive month period. The policy defines an "occurrence" to include "[r]eporting to work late beyond the limits of department flextime policy." The department's flextime policy requires employees who report to work more than six minutes late to use leave or go on leave without pay status to address their tardiness. Grievant was tardy to work by more than six minutes on February 4, 2010, February 5, 2010, March 16, 2010, March 18, 2010, and, April 17, 2010. Grievant acted contrary to Campus Policy number 4 thereby justifying the issuance of disciplinary action. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for tardiness.

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....”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 See, 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.

Grievant contends the disciplinary action should be mitigated. He questioned how he could be expected to follow the Agency's policy when the Agency did not know its own policy. There was significant evidence to support the assertion that the Agency was unsure of its own policy. The Agency initially presented its case relying upon Operating Procedures 9.13(12)(A) which addresses unscheduled absences within a calendar year. The Agency argued that Grievant should be disciplined for unscheduled absences which it defined as his absence from muster even though Grievant may have worked the remainder of the day. The policy does not define "absences" as absence from an event. The most logical interpretation of the wording would reflect an absence from work for an entire shift as opposed to arriving late for a shift.⁶ When this inconsistency was pointed out, the Agency indicated that it relied upon Campus Instruction number 4, Attendance Policy effective February 1, 2010. The Supervisor testified that both Operating Procedure 9.12 and Campus Instruction number 4 were in effect at the time of the disciplinary action. The Manager, however, testified that only Campus Instruction number 4 was in effect. In addition, the Manager incorrectly defined the term "occurrence" under Campus Instruction number 4. He considered an occurrence to arise whenever an employee failed to attend Muster at 3 p.m. The policy defines occurrence as "Reporting to work late beyond the limits of the department flextime policy." The department's flextime policy became applicable only after an employee was more than six minutes late for his or her shift. Thus, for there to be an occurrence under Campus Instruction 4, an employee would have to arrive at 3:07 p.m.⁷ In other words, if an employee arrived at 3:03 p.m. and was late for Muster which began at 3 p.m., an occurrence would not arise under Campus Instruction 4.

The difficulty with Grievant's defense is that although he asserted he was confused by the Agency's policies and had not been notified of the Agency's concern regarding his time in this, Grievant did not present any testimony or other evidence that would support this assertion. The Agency's witnesses, however, testified that beginning in January 2010, the Supervisor spoke with Grievant several times and advised him that he was expected to be at muster at 3 p.m. The Supervisor testified that the Agency's policies such as Campus Instruction number 4 were available to employees through the

⁶ Operating Procedures 9.13 has a separate section on "Late Arrivals".

⁷ This consideration disregards the additional two to three and a half minute requirement to walk from the time clock to the muster location.

Agency's intranet. When the evidence before the Hearing Officer is considered as a whole, it is clear that the Agency advised Grievant that he was expected to be at muster at 3 p.m. and that his continued tardiness would not be tolerated. Grievant had sufficient notice of the Agency's expectation that he arrive at muster by 3 p.m. and that his failure to do so might result in corrective action. 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 I Written Notice of disciplinary action 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

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.