Issues: Group I Written Notice (unsatisfactory attendance/excessive tardiness), Group II Written Notice (unsatisfactory attendance/excessive tardiness), and Termination (due to accumulation); Hearing Date: 12/14/10; Decision Issued: 12/17/10; Agency: DVS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9446, 9465; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 12/29/10; Outcome pending; Administrative Review: DHRM Ruling Request received 12/29/10; Outcome pending.**

# *COMMONWEALTH of VIRGINIA*
## *Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION**

In the matter of: Case Nos. 9446; 9465

Hearing Date: December 14, 2010
Decision Issued: December 17, 2010

## PROCEDURAL HISTORY

Grievant was a certified nursing assistant for the Department of Veterans Services ("the Agency"), and she challenges two Written Notices. On April 22, 2010, the Agency issued the Grievant a Group I Written Notice for three absence occurrences (on 3/13/10, 3/18/10 and 4/20/10). On September 17, 2010, the Agency issued the Grievant a Group II Written Notice for five instances of tardiness and two unapproved absences. The Group II Written Notice resulted in termination, based on the accumulation of active Written Notices. The Grievant had two prior Group I Written Notices, one of which was for absences and tardiness.

Grievant timely filed a grievance to challenge the Agency's disciplinary actions. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On November 15, 2010, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer to hear the consolidated grievances. A pre-hearing conference was held by telephone on November 22, 2010. The hearing ultimately was scheduled for the first date available between the parties and the hearing officer, December 14, 2010, on which date the grievance hearing was held, at the Agency's facility.

The hearing officer denied the Grievant's motion for recusal, and EDR also denied the motion. *See* EDR Ruling No. 2011-2848 (December 9, 2010).

The Agency submitted documents for exhibits that were, without objection from the Grievant, accepted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant also submitted documents for exhibits that were, without objection from the Agency, accepted into the grievance record and will be referred to as the Grievant's Exhibits. The hearing officer has carefully considered all evidence presented.

## APPEARANCES

Grievant
Advocate for Grievant

Representative/Advocate for Agency

## 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?

The Grievant requests rescission or reduction of the two Written Notices, reinstatement to her position, and back pay.

## BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

## APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of

> employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.
>
> The Agency's Policy HR-01 addresses attendance. It provides that
>
> Regular attendance is a condition of employment. Once an employee exceeds eight (8) occurrences of unscheduled time away from work as defined by this policy, within a twelve (12) consecutive month period, or (3) occurrences in a 90 day period, or have established a pattern of absence as define by policy, their attendance will be considered unsatisfactory and will warrant appropriate corrective action. All disciplinary actions shall be taken in accordance with the Commonwealth of Virginia's Standards of Conduct Policy.

Agency Exh. 4. For multiple day absences, the policy states that a doctor's note does not eliminate the original occurrence of one to three days, but it may limit the number of occurrences to one for absences that extend beyond three days.

> The Agency's Policy HR-02 addresses tardiness. It provides that
>
> Regular attendance as well as promptness in reporting to work is a condition of employment. Because non-exempt employees have assigned duties where they are frequently required to provide relief for other non-exempt employees and are eligible for overtime for any hours worked beyond the 40 hour workweek, the criteria for determining excessive tardiness for non-exempt employees is different from the criteria used for exempt employees.

The policy provides that "tardy" is "[m]ore than six (6) minutes late in reporting for work. Late arrivals of six (6) minutes to sixty (60) minutes constitutes a "tardy" by policy." The specific guidance and procedure provided in the policy for non-exempt employees is:

> If a non-exempt employee reports late for work six (6) minutes or more, but less than sixty (60) minutes they shall be considered tardy for work unless they were given prior approval by a supervisor before the end of their previous shift the preceding workday. When an employee is tardy for work for three (3) or more times over the course of ninety (90) days, he/she shall be deemed excessively tardy and eligible for a counseling or Group I Written Notice for "Excessive Tardiness" in accordance with the Commonwealth of Virginia's Standard of Conduct Policy.

Agency Exh. 4.

## The Offenses

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

The Agency employed Grievant as certified nursing assistant for over two years. A certified nursing assistant is responsible for providing direct care to residents during their shift and for maintaining the quality of services to fulfill the objective of the facility in accordance with the policies and procedures set forth by the facility administration and established nursing standards. The Certified Nursing Assistant is responsible for ensuring the needs of the residents are met and or providing treatments and care as instructed. *See* Employee Work Profile, Agency Exh. 3.

The Agency operates a 160-bed long-term care facility. The Agency issued the Grievant an informal counseling for violating the attendance policy of three absences within a 90-day period. The Agency issued a Group I Written Notice on October 14, 2009, for violating the attendance and tardiness policies. The Grievant also has a Group I Written Notice for disruptive behavior from October 14, 2009. The Agency also issued the Grievant a Notice of Improvement Needed on February 12, 2010, for violating the tardiness policy of three tardies in a 90-day period.

The Standards of Conduct, DHRM Policy 1.60, provides that a Group I offense, such as tardiness or poor attendance, may be a Group II Written Notice for repeated violations of the same offense. The Standards of Conduct also provide that a fourth active Group I Written Notice normally results in discharge. Agency Exh. 4.

Group I (4/22/10)

The Grievant stipulates the occurrences of the absences noted in the Group I Written Notice issued on April 22, 2010. In the Agency's Notice of Improvement Needed issued on Feburary 12, 2010, the Agency put the Grievant on notice, in writing, as follows:

> Per policy, tardiness is anytime 6 minutes or more past her scheduled time of arrival (7am). Per policy, anything over 61 minutes is considered an occurrence and could be considered per HR 01 Attendance policy. Any further tardiness or occurrences over the next 90 days will result in further disciplinary action.

The Notice bears the Grievant's signature. Agency Exh 2. The Grievant did not factually dispute the three unscheduled absences contained in the Group I Written Notice of April 22, 2010, and they all occurred within 90 days of the Notice of Improvement Needed issued on February 12, 2010. The Grievant, however, asserts that the issuance of the Group I Written Notice was disparate treatment and retaliatory. The Grievant had challenged two previous Written Notices, and the prior Group II was reduced to a Group I. The Grievant, however, was successful in showing that the Agency engaged in a hostile work environment, and the Grievant asserts that the Agency is retaliating for that finding of a hostile work environment.

Group II (9/17/10)

The Grievant challenges the facts of the five tardies charged in this Group II Written Notice, for the following dates:

- June 15, 2010 six minutes late
- June 19, 2010 eight minutes late
- August 6, 2010 six minutes late
- August 16, 2010 six minutes late
- August 18, 2010 eleven minutes late

Grievant's Exh. 7. The Grievant does not challenge the accuracy of the clock-in times—she asserts that six minutes late is not tardy pursuant to applicable policy. The Grievant points to the drafting inconsistency in HR-02, stating in one place that *more than six minutes* is considered tardy. The Grievant also points to the timekeeping clock policy that includes the "more than six minutes" language. Grievant's Exh. 2.

The Grievant asserts that the issuance of the Group II Written Notice was disparate treatment and retaliatory for the same reasons stated above.

Other Agency employees testified that their understanding of the tardiness policy is that six minutes or more constitutes tardy, and they have been disciplined for tardiness. The Grievant's supervisor testified that the Grievant did a good job, but she had counseled the Grievant on tardiness issues and the importance of getting to work on time.

The Agency's human resources director testified that he had reviewed all nursing staff records and found 20 in violation of the tardiness and attendance policies. He testified that all had been disciplined in one form or another, depending on the specific circumstances of each case. He practiced progressive discipline with the Grievant and all employees. He also testified that he had specifically counseled the Grievant that the policy was that six minutes was considered tardy—not more than six minutes. The director testified that the Grievant only challenged the ambiguity of the tardiness policy for the first time in this grievance, although she had prior written notices and counseling for tardiness. The written policies ultimately were revised to remove the ambiguity created by the six minutes and more than six minutes language.

The Agency's director of nursing testified that all employees who have violated the attendance and tardiness policies have received counseling or other disciplinary action, depending on the circumstances specific to each case. She testified that some employees engage her in a plan of action to address any problems or circumstances, but that the Grievant never sought to address any concerns or special circumstances with her. The director of nursing testified that the Agency practices progressive discipline and takes into account the circumstances specific to each case. She denied that the discipline was retaliatory and explained that the discipline levied to all employees who violated the attendance and tardiness policies was tailored to each specific case.

The Grievant asserts that the discrepancy in the policy language that states both that tardiness is six or more minutes late or more than six minutes. The Grievant testified that the tardiness policy was confusing and she understood that more than six minutes late was considered tardy. The Grievant did not discuss her specific circumstances causing tardiness with

the director of nursing because of privacy.[1] The Grievant also asserts disparate treatment and retaliation. As discussed and addressed in this decision, I find no merit to the Grievant's claims of policy confusion, disparate treatment and retaliation.

The Agency's witnesses credibly testified that they specifically informed the Grievant that six minutes late was considered tardy under the policy. The Notice of Improvement Needed, issued to the Grievant on February 12, 2010, specifically stated in unambiguous terms that six minutes or more was considered tardy. The direct advice provided to the Grievant is the better evidence, and I do not find credible the Grievant's assertion that she was confused on the six-minute threshold for tardiness.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to applicable policy, management has the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id*.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." 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.

[1] The Grievant has not asserted any implication of the Family and Medical Leave Act (FMLA) for her absences or tardiness. In order for a Grievant possibly to claim the use of FMLA, she must first establish that she has a serious medical condition and then she must notify her employee of that condition and of her need to use the FMLA. *See Carter v. Ford Motor Co.*, 121 F. 3d 1146, 1148 (8th Cir. 1997). While it is true that she does not have to use the magic word "FMLA," she must provide timely notice of a need for leave. This Grievant presented none of this before the Hearing Officer at the hearing.

While the hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if, and only if, it exceeds the limits of reasonableness. There is no authority that requires an Agency to exhaust all possible lesser sanctions or, alternatively, show that termination was its only option. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency presents a position in advance of its role as providing reliable nursing care for residents of its facility. The hearing officer accepts, recognizes, and upholds the Agency's important role in providing nursing care and the Agency's requirement for attendance when scheduled. I find that the Agency has acted reasonably in its discipline of the Grievant. The Agency practiced progressive discipline, especially considering the issuance of the Notice of Improvement Needed on February 12, 2010. That notice followed a previous Group I Written Notice for tardiness and gave the Grievant a fresh start to change her tardy behavior. While the Grievant was otherwise considered a good employee, the Agency demonstrated a legitimate business reason to enforce its tardiness policy. As to the notice of the policy providing that six minutes late was considered tardy, I do not find credible the Grievant's assertion of lack of notice or confusion on the policy. Accordingly, I find no mitigating circumstances that render the Agency's action outside the bounds of reasonableness.

It is unfortunate that the Agency is losing an otherwise valuable employee, but there are no factors that would make it unreasonable to impose the Agency's choice to remove Grievant.

Disparate Treatment/Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. It appears that the grievant's theory of unfair or disparate treatment is in essence the same as her retaliation argument, and challenges the same management actions. As such, her claims of unfair/disparate treatment will be analyzed under a retaliation theory. For a claim of retaliation to succeed, the Grievant must show (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); s*ee, e.g*., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant engaged in protected activity by initiating a prior grievance, in which she prevailed in reducing a written notice and showing that the Agency created a hostile work environment. The Grievant asserts that the retaliation she has experienced stems from this prior grievance. Further, she could be viewed as having potentially suffered a materially adverse action due to the agency's discipline and termination. However, as explained below, the Grievant does not satisfy the burden of proof of showing that the materially adverse actions were taken because of her protected activity.

The Agency's evidence is that virtually all employees who had repetitions of tardiness or absences were disciplined in one form or another. While the Grievant may dispute these actions, she has presented no evidence that would counter the Agency's stated non-retaliatory explanations. There is nothing to suggest that the Agency's handling of these selections was in any way retaliatory beyond the Grievant's mere allegation.

Grievant has not presented sufficient evidence of a causal link between her protected activities and the materially adverse action she suffered. Grievant has not presented sufficient evidence that the Agency's discipline was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual conduct of absences and tardiness, all of which is solely within the control of the Grievant. Accordingly, Grievant's request for relief must be denied.

## DECISION

For the reasons stated herein, the Agency's issuance of the Group I and Group II Written Notices and termination is **upheld**.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer