

Issue: Group II Written Notice with Termination (excessive tardiness/absences);
Hearing Date: 05/03/11; Decision Issued: 05/03/11; Agency: DBHDS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9556; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9556

Hearing Date: May 3, 2011
Decision Issued: May 3, 2011

PROCEDURAL HISTORY

On January 28, 2011, Grievant was issued a Group II Written Notice of disciplinary action for continuous "accumulation of tardies". He was removed based on the accumulation of disciplinary action.

On February 14, 2011, 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 4, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 3, 2011, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

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 employed Grievant as a Licensed Practical Nurse at one of its Facilities.

Grievant had prior active disciplinary action. On February 27, 2009, Grievant received a Group I Written Notice of disciplinary action for the accumulation of 81.4 hours of unplanned leave. On May 6, 2009, Grievant received a Group I Written Notice of disciplinary action for excessive tardiness within a three month period. On June 10, 2009, Grievant received a Group II Written Notice of disciplinary action for excessive tardiness.

Grievant received numerous counselings regarding his tardiness. On December 6, 2010, Grievant was notified that he had violated the Agency's Attendance Policy. The Human Resource Department conducted an audit of Grievant's time records. By the end of December 2010, Grievant had accumulated 84.9 hours of unplanned leave. In January 2011, Grievant was tardy for work on at least eight days which generated additional 15 hours of unplanned leave. He was absent from work for the full day on six work days.

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.”¹ 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.”

Agency Policy 053–19 governs Attendance. “Late Reporting” is defined as “the arrival at assigned station at a time later than scheduled. All employees are expected to work the full complement of assigned hours. Departments may promulgate remedies for late reporting, such as working later on a day, to allow an employee to make out late reporting.” Under this policy:

If an employee has two or more incidents of late reporting in a three-month period, he/she receives counseling. When there are three additional incidents (total of five incidents) occurring in the same three-month period, the employee will receive a Group I Written Notice.

In the month of January 2011, Grievant was late at least eight times. Grievant has been counseled and disciplined for being tardy. Because Grievant previously received prior disciplinary action for the being tardy, the Agency was authorized to elevate the disciplinary action from a Group I offense to a Group II offense. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action.

Upon the accumulation of four Group I Written Notices of disciplinary action or two Group II Written Notices, an agency may remove an employee. With the disciplinary action giving rise to this grievance, Grievant has received two Group I Written Notices and two Group II Written Notices. Accordingly, Grievant’s removal 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....”² 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

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² Va. Code § 2.2-3005.

disciplinary action was free of improper motive. In light of this standard, 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

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.³

[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

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.