Issues: Group II Written Notice (excessive tardiness), Group III Written Notice with Termination (excessive tardiness); Hearing Date: 05/15/12; Decision Issued: 05/16/12; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9805, 9816; Outcome: Partial Relief; **Administrative Review: EDR Ruling requested 05/31/12; EDR Ruling No. 2012-3364 issued 07/27/12; Outcome: Remanded to AHO; Remand Decision issued 10/22/12; Outcome: Original decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9805 / 9816

Hearing Date: May 15, 2012
Decision Issued: May 16, 2012

PROCEDURAL HISTORY

On February 22, 2012, Grievant was issued a Group II Written Notice of disciplinary action for excessive tardiness. On February 29, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for excessive tardiness.

On March 5, 2012, Grievant timely filed two grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On April 18, 2012, the EDR Director issued Ruling No. 2012-3321, 2012-3322 consolidating the two grievances for a single hearing. Also on April 18, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 15, 2012, 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 Notices?

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?

5. Whether the Agency retaliated against Grievant?

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 Registered Nurse II at one of its Facilities.

Grievant had prior active disciplinary action. On January 21, 2011, Grievant received a Group I Written Notice of disciplinary action. On June 1, 2011, Grievant received a Group I Written Notice of disciplinary action for the accumulation of unplanned leave. On January 30, 2012, Grievant received a Group I Written Notice of disciplinary action for excessive tardiness. Grievant was tardy for work on December 12, 2011, December 13, 2011, December 15, 2011, December 16, 2011, December 27, 2011, and December 28, 2011.

Grievant's regular work shift began at 7 a.m. Grievant was expected to report to work and sign in at precisely 7 a.m. On February 7, 2012, Grievant reported to work tardy at 7:12 a.m. As part of the disciplinary process, the Supervisor met with Grievant a few days after February 7, 2012 and before February 20, 2012. Grievant told the Supervisor that she would not be late again. The Supervisor could have removed Grievant from employment based on the accumulation of disciplinary action. The Supervisor issued Grievant a Group II Written Notice dated February 22, 2012 but did not remove Grievant from employment based on her assurances that she would not

report to work late again. On February 20, 2012, Grievant reported to work tardy at 7:08 a.m. The Agency chose to issue Grievant a Group III Written Notice of disciplinary action with removal dated February 29, 2012.

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."

Policy 053-19 governed Attendance at the Facility. The Policy provided, in part:

> Late reporting is the arrival at assigned station anytime 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 up late reporting.
>
> If an employee has two (2) or more incidents of late reporting in a three (3) month period, he/she receives counseling. When there are three additional incidents (total of 5 incidents) occurring in the same three-month period, the employee will receive a Group I Written Notice.
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> Tardiness is a Group I offense.[2]

Group II Written Notice.

On February 7, 2012, Grievant was scheduled to begin her shift at 7 a.m. She reported to work 12 minutes late. Under the Agency's policies and practices she was considered to be tardy. Grievant was tardy for work six times in December 2011. For the three-month period beginning with December 2011 and ending February 2012, Grievant's tardiness on February 7, 2012 represented a seventh tardy during a three-month period thereby justifying the issuance of a Group I Written Notice.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant received a Group I Written Notice on

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

[2] See, Attachment A, DHRM Policy 1.60.

January 30, 2012 for excessive tardiness. Grievant was tardy on February 7, 2012 which is the same offense for which she was disciplined on January 30, 2012. The Agency was authorized to elevate the first disciplinary action in this case from a Group I to a Group II Written Notice.

Group III Written Notice.

On February 20, 2012, Grievant was scheduled to begin her shift at 7 a.m. She reported to work 8 minutes late. Under the Agency's policies and practices she was considered to be tardy. Grievant was tardy for work six times in December 2011 and one time in February 2012. For the three-month period beginning with December 2011 and ending February 2012, Grievant's tardiness on February 20, 2012 represented an eighth tardy during a three-month period thereby justifying the issuance of a Group I Written Notice.

The Agency was authorized to elevate the second disciplinary action in this case from a Group I to a Group II Written Notice. DHRM policy 1.60 does not authorize elevation of an offense simply because it has been elevated previously. The Agency was not authorized to elevate an elevated Group II to a Group III offense. Accordingly, the Group III Written Notice must be reduced to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. 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…."[3] 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 disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because she was tardy due to her medical condition. Insufficient evidence was presented to show the nature Grievant's medical condition and why that medical condition would cause Grievant to be a few minutes late to work on February 7, 2012 and February 20, 2012.[4]

[3] Va. Code § 2.2-3005.

[4] Grievant did not testify.

Grievant argued that the Agency inconsistently disciplined employees. She presented evidence that for an approximately three months period in 2012 two employees, Mr. Sa and Ms. Sm, were permitted to begin their shifts approximately 30 minutes late without consequence. The evidence showed that the Agency permitted employees at the Facility to request flexibility with the start times of their shifts when the employees believed there was a basis to do so. Mr. Sa and Ms. Sm were parents of a child requiring day care. They worked different shifts. When one parent ended a shift, the other began a shift. When both parents work in the same building it was easy for them to transfer their child from one parent to the other. The Agency moved one of the parents to another building which made it more difficult for them to transfer the child. Mr. Sa testified that he asked his supervisor for permission to begin his shift approximately 30 minutes late and end his shift approximately 30 minutes later. The supervisor granted that request. Grievant was also afforded flexibility with her work shift. In August or September 2011, she asked her supervisor for leniency when arriving late to work due to circumstances she explained to a supervisor. The supervisor granted Grievant's request for a 30 day period and continued the practice until December 1, 2011 after Grievant had advised a supervisor that she no longer needed flexibility in her schedule. During the three-month period from December 2011 through February 2012, Grievant had not requested a flexible arrival time from her supervisor. There is no reason for the Hearing Officer to believe that the Agency treated Grievant differently from the way it treated other employees.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[5] (2) suffered a materially adverse action[6]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a

[5] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[6] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[7]

Grievant argued that she submitted a claim to the EEOC and that the Agency may have taken disciplinary action against here because she filed that claim. The filing of a claim with the EEOC is a protected activity. Grievant suffered a materially adverse action because she received disciplinary action. No credible evidence was presented to show that the Agency issued disciplinary action to Grievant in response for her engaging in a protected activity. The Agency took disciplinary action against Grievant because it believed she had engaged in behavior contrary to the Standards of Conduct. The Agency did not retaliate against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant on February 22, 2012 of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant on February 29, 2012 of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

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

[7] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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

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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.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9805 / 9816-R

Reconsideration Decision Issued: October 22, 2012

RECONSIDERATION DECISION

Employment Dispute Resolution issued Ruling No. 2012-3364 remanding the matter to the Hearing Officer. EDR wrote:

> A review of the hearing record indicates that only six of the ten witnesses ordered to appear actually testified at the hearing, and the four absent witnesses were all agency employees. As the agency presented no evidence to the contrary, it appears that the agency failed to require the employees to attend the hearing. Moreover, there is no record evidence of extenuating circumstances preventing the agency employees from attending. Therefore, because it was the agency's responsibility to have their employees appear for the hearing as witnesses, the hearing officer had the authority to draw an adverse inference against the agency if warranted by the circumstances. ***
>
> Accordingly, EDR remands the decision for further consideration by the hearing officer, with instruction to conduct a telephone conference with the grievant and the agency representative for the limited purpose of establishing the expected content of the testimony from each of the witnesses who failed to appear for the hearing. The hearing officer shall then determine whether the proffered testimony should be taken as true based upon the drawing of an adverse inference against the agency, and if so, consider to what extent the outcome of this case would be affected by that testimony. To this end, at the telephone conference, the agency shall have the opportunity to respond as to the underlying reason for the unavailability of its four employees who were subpoenaed to attend the May 15, 2012 hearing but did not appear.

The Hearing Officer will not draw an adverse inference with respect to Ms. Mo. She was to be Grievant's representative and not a witness.

The Hearing Officer will not draw an adverse inference with respect to Ms. S. Ms. S had permission from her supervisor to arrive at work 30 minutes after the beginning of her shift. Mr. S had the same agreement with his supervisor. If the time of Ms. S's shift changed, she was not tardy when she arrived at work 30 minutes later than other staff. She was not an Agency employee at the time of the hearing and the Agency was not obligated to make her available for the hearing.

The Hearing Officer will not draw an adverse inference with respect to Ms. C. She was not Grievant's supervisor at the time of the facts giving rise to this grievance. She was on short term disability during the hearing and did not receive the order to attend. As part of the disciplinary process, the Supervisor met with Grievant a few days after February 7, 2012 and before February 20, 2012. Grievant told the Supervisor that she would not be late again. The Supervisor did not give approval to Grievant to report late to work.

The Hearing Officer will not draw an adverse inference with respect to Ms. Mu. She was on annual leave on the day of the hearing. During the relevant time period, Ms. Mu was not Grievant's supervisor and did not have the authority to grant Grievant a variance to arrive late or to excuse her tardiness when it occurred.

The Hearing Officer does not believe the Agency took any actions to dissuade any witnesses from appearing at the hearing.

Grievant again raises her medical condition to show that her medical condition made her susceptible to Chronic Fatigue Syndrome. No credible evidence was presented to show that on February 7, 2012 and February 20, 2012, Grievant was tardy because of her medical condition.

Grievant had adequate knowledge of her obligation to report at the beginning of her shift. There is no basis to alter the original hearing decision.

APPEAL RIGHTS

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 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.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer