Issue: Group I Written Notice (excessive tardiness); Hearing Date: 10/18/12; Decision Issued: 10/22/12; Agency: VDOT; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9919; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

Department of Human Resource Management

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9919

Hearing Date: October 18, 2012
Decision Issued: October 22, 2012

PROCEDURAL HISTORY

Grievant is a compliance officer with the civil rights division of the Department of Transportation ("the Agency"), and she challenges the Group I Written Notice issued on March 28, 2012 for excessive tardiness. The Grievant has no other active Written Notices.

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 September 24, 2012, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer to hear the grievance. A pre-hearing conference was held by telephone on October 2, 2012. The hearing ultimately was scheduled for the first date available date, October 18, 2012, on which date the grievance hearing was held, at the Agency's facility.

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

APPEARANCES

Grievant
Counsel for Grievant
Advocate for Agency
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the termination memorandum?

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 under applicable policy)?
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 of the Written Notice.

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.

DHRM Policy Number: 1.25 - Hours of Work states:

Employees are expected to:

- adhere to their assigned work schedules,
- take breaks and lunch periods as authorized,
- notify management as soon as possible if they are unable to adhere to their schedules, such as late arrivals or early departures, and
- work overtime hours when required by management.

Agency Exh. 4.

The State Standards of Conduct, DHRM Policy 1.60, provides that Group I offenses include acts of minor misconduct that require formal disciplinary action. The policy specifically identifies a Group I offense to include tardiness. Agency Exh. 3.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

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 Grievant has worked for the Agency for over 20 years. The Grievant's immediate supervisor testified that after she became the Grievant's supervisor she asked she asked the Grievant and other employees directly reporting to her to provide their scheduled work hours. By email notification on December 12, 2011, the Grievant identified her work schedule to be 8:30 to 5:15, with 45 minutes for lunch. Agency Exh. 5. The supervisor also testified that she instructed her staff to notify her in the event they would be more than 15 minutes late for work. The supervisor admitted that she told her staff that she expected an 8 hour workday, but if an employee was late or needed a long lunch they had to work late to make up the time or take leave. The supervisor, after noticing low production of report activity by the Grievant, was unable to reach the Grievant by telephone at her remote office location during the work day. The supervisor works in the central office and the Grievant works at a district office. The supervisor

inquired of other Agency employees regarding the Grievant's work schedule. Based on apparent hesitancy or uncertainty by others to detail the Grievant's actual work hours, the supervisor initiated an investigation and asked the Office of the Inspector General, Investigative Division, to conduct an investigation.

The investigator testified regarding his investigation, and his report is part of the grievance record. Agency Exh. 5. The investigator interviewed the Grievant and used tools such as the access card reader records and the Grievant's computer activity. For the period August 19, 2011, to March 7, 2011, the investigator identified that the Grievant arrived late (16 minutes or later) 34 out of 93 days observed, or 37% of the time. The pattern of card swipes for ingress and computer activity in the mornings showed a strong consistency of computer activity within minutes after most ingress card swipes. The investigator reported that the Grievant told him the first thing she does upon coming to work is to turn on her computer. The investigator testified that the Grievant admitted to him that she came and left work at her discretion, but she insisted she put in her 8 hours per day as expected. The Grievant acknowledged that her supervisor expected to be notified for tardiness in excess of 15 minutes. The only tool available to the investigator for when the Grievant stopped or left work was computer activity, since use of a card reader was not used for egress.

The supervisor testified that she felt the report of the Grievant's persistent tardiness was egregious, but that she "mitigated" the discipline to a single Group I, considering the Grievant's good work record with the Agency for over 20 years. The supervisor testified that the staff members definitely have expected work schedules and she only recalled being notified twice of the Grievant's expected tardiness. She insisted that her employees were not allowed to come and go as they pleased, as that is contrary to State policy and does not provide a positive impression. The supervisor felt a counseling memo was insufficient for the extensive tardiness and routinely not working her expected work schedule. The supervisor testified that, because of the circumstances, she did not consider for discipline anything but the Grievant's start times—not the work ending times that were based only on computer activity. However, the Written Notice refers to early departures and falsified timesheets, and the discipline included a charge of 19 hours to the Grievant's leave balances.

On cross-examination, the supervisor admitted that she has not been in a position to provide fully executed Employee Work Profiles or Employee Work Profile Performance Evaluation for the Grievant or any of her staff members.

The Grievant testified that she did not respond with any information during the grievance steps because of legal advice not to do so. The Grievant acknowledged her supervisor's policy of expecting notification for tardiness in excess of 15 minutes, but the Grievant insisted her supervisor told her it was satisfactory to adjust her work schedule daily, as long as she worked 8 hours per day. The Grievant testified that she often turned off her computer in the afternoons and continued working, doing such tasks as returning telephone calls and filing. She also testified that she would, on occasion, attend required meetings away from work and outside normal working hours.

A retired employee from another division of the department, but working in the same district office, testified for the Grievant that her office was close to the Grievant's. She also testified that the Grievant often worked past 5:30. However, she did not have specific knowledge of the Grievant's work hours covered by the investigation.

Another retired employee testified for the Grievant. She worked in the same division and in the same district office. She testified that the supervisor told them that they were free to work hours of their choice daily, as long as they worked the expected 8 hours per day. This retired employee denied there was an instruction to notify the supervisor if they expected to be more than 15 minutes late coming to work. This employee's testimony was that there was no particular work schedule required, and that she often came to work later than her official starting time. She was never disciplined. The supervisor, however, testified that she was unaware of this conduct.

Both the Grievant and this supporting witness testified that the supervisor spoke to them abruptly. The Grievant testified that the supervisor had ill will against her for speaking up and asking questions about her job.

When asked on cross-examination the purpose of the policy for notifying her supervisor for tardiness in excess of 15 minutes, the Grievant did not explain how that policy was consistent with a purported policy allowing her to come and go at any time.

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*. As long as it acts within law and policy, the Agency is permitted to apply exacting standards to its employees.

I find that the Agency has met its burden of showing the claimant was chronically tardy for work during the investigated time period, August 19, 2011, to March 7, 2012, without obtaining authorization or providing notice. Upon weighing the credibility of the witnesses' testimony, I find that the Grievant had established work hours of 8:30 to 5:15, confirmed by the Grievant. While the supervisor's policy emphasizing that her staff should normally work 8 hours per day, I find it incredible for the Grievant (and the retired co-employee) to believe they had the

discretion to establish varying work hours daily. The policy requiring notification for tardiness in excess of 15 minutes cannot be reconciled with such a lenient belief on work schedules, and it would be rendered meaningless if such an interpretation of policy was credible. Although the retired co-employee did not even recall the 15 minute notification policy, the Grievant was aware of the policy. Grievant's assertion that she was confused or somehow not on notice of expectations is not credible.

However, I find the Agency has not borne its burden of proof that the Grievant failed to work 19 hours, or any specific number of hours, because the tools and evidence of such proof were not presented at the grievance hearing. For this reason, I find that the aspect of the Written Notice asserting falsification and requiring 19 hours charged to the Grievant's leave is unsupported.

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.

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 supervisor testified that she already mitigated the discipline by not choosing a more severe level of discipline. Agency presents a position in advance of its need to manage the important affairs of the Agency. The hearing officer accepts, recognizes, and upholds the Agency's important expectation of employee attendance and notification. I find that the Agency has acted reasonably in its discipline of the Grievant. While the Grievant was otherwise considered a good employee, the Agency demonstrated a legitimate business reason to enforce its attendance and notification policy and procedure. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group I Written Notice outside the bounds of reasonableness.

Retaliation

The Grievant asserts that the Agency's action is motivated by retaliation. 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's description of the protected activity is vague and non-specific. She testified that she asked questions and that her supervisor was abrupt when replying. The Grievant asserts that the retaliation she has experienced stems from the supervisor's alleged ill will against her. From the evidence presented, I find insufficient basis for this allegation.

There is nothing to suggest that the Agency's handling of this discipline was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show 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 unapproved tardiness without notice, all of which was solely within the control of the Grievant.

While informal counseling could be an appropriate management response, the Agency has the discretion to issue a Group I Written Notice.

DECISION

For the reasons stated herein, the Agency's issuance of the Group I Written Notice is **upheld**. However, the discipline of 19 hours charged to the Grievant's leave balance is reversed, as is the reference in the Written Notice to falsification. The Agency shall correct the Written Notice, accordingly.

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 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

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

   Office of Employment 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 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 provide a copy of all of your appeals to the other party, EDR, 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.

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]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.