

Issues: Group II Written Notice (excessive tardiness, failure to report without notice, failure to follow instructions, insubordination), and Termination due to accumulation; Hearing Date: 01/30/17; Decision Issued: 02/02/17; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10917; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10917**

Hearing Date: January 30, 2017

Decision Issued: February 2, 2017

#### **PROCEDURAL HISTORY**

On November 9, 2016, Grievant was issued a Group II Written Notice of disciplinary action for attendance/excessive tardiness, failure to report to work without notice, failure to follow policy, insubordination, and other. He was removed based on the accumulation of disciplinary action.

On November 9, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 6, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 30, 2017, 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 Virginia Community College System employed Grievant as a Fiscal Technician at one of its Colleges. He began working for the Agency in February 2014. Grievant had prior active disciplinary action. On February 12, 2016, Grievant received a Group I Written Notice for attendance/excessive tardiness, unsatisfactory performance, and other reasons. On April 25, 2016, Grievant received a Group II Written notice for attendance/excessive tardiness, unsatisfactory performance and other reasons.

The Agency has several facilities located several miles from each other. Grievant worked at Location 1 but conflict arose between him and his supervisor. Grievant complained about his supervisor. The Agency decided to move Grievant from Location 1 to Location 2 and have him report to a different supervisor. The change in location increased the distance of Grievant's morning commute from his home to his work place.

Grievant was one of three fiscal technicians working at Location 2 and responsible to ensure that College customers were able to pay tuition and perform other financial transactions. The office opened to receive customers at 8:30 a.m. In order to provide good customer service, the Agency required that the office open at 8:30 a.m. without delay. Grievant was assigned the work shift beginning at 8:15 a.m. and ending at 4:45 with a 30 minute lunch and two 15 minute breaks. By arriving fifteen minutes before the office opened, Grievant would have sufficient time to prepare a cash drawer and perform other duties to be ready for customers by 8:30 a.m.

Grievant had a history of tardiness. On October 13, 2016, Grievant received a Notice of Improvement Needed/Substandard Performance specifying that he had been tardy 16 times from August 26, 2016 to October 11, 2016. He received an Improvement Plan requiring:

Adhere to your designated work schedule (8:15 a.m. – 4:45 p.m.) which means that you are to arrive and be prepared to begin work by 8:15 a.m. to serve our customers.<sup>1</sup>

The Supervisor observed when Grievant reported to the office and recorded those times. Grievant was late as follows:

October 17, 2016 – 4 minutes late with notification to supervisor via text.  
October 18, 2016 – 20 minutes late with notification to supervisor via text.  
October 19, 2016 – 19 minutes late with no notification to supervisor via text.  
October 20, 2016 – 6 minutes late with no notification to supervisor.  
October 21, 2016 – 12 minutes late with notification to supervisor via text.  
October 24, 2016 – 4 hours and 26 minutes late; sent notification to supervisor via text at 10:35 a.m., 2 hours and 20 minutes after scheduled start time.  
October 25, 2016 – 13 minutes late with notification via text.  
October 26, 2016 – 12 minutes late with notification via text.  
October 27, 2016 – 15 minutes late with no notification to supervisor.

### **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.”<sup>2</sup> 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.”

Excessive tardiness is a Group I Offense. Grievant was tardy nine days from October 17, 2016 to October 27, 2016. His tardiness was excessive thereby justifying the issuance of a Group I offense.

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. On February 12, 2016, Grievant received a Group I

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<sup>1</sup> Agency Exhibit 2.

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Written Notice for the same offense of excessive tardiness. The Agency has presented a sufficient basis to elevate the Group I Written Notice to a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

*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 Human Resource Management ...."<sup>3</sup> 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that the Agency retaliated against him for engaging in protected activity. Grievant claimed the Agency moved him to another campus to set him up for failure. No credible evidence was presented to support the allegation that the Agency retaliated against Grievant. The evidence is clear that Grievant had a long history of tardiness and that the Agency took disciplinary action because his behavior did not change. It appears Grievant usually was late because he did not plan for routine traffic congestion on his route to work.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based on 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 believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management

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<sup>3</sup> *Va. Code § 2.2-3005.*

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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>4</sup>

[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

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<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.