

Issue: Group II Written Notice with Suspension (excessive tardiness); Hearing Date: 03/07/13; Decision Issued: 03/12/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10025; 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: 10025

Hearing Date: March 7, 2013
Decision Issued: March 12, 2013

PROCEDURAL HISTORY

On November 14, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for tardiness.

On December 12, 2012, 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 she requested a hearing. On January 30, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 7, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 employs Grievant as a Registered Nurse Clinician A at one of its facilities. The purpose of her position is to provide quality nursing support to provide optimal health of individuals at the Facility. Although Grievant's position was exempt under the Fair Labor Standards Act, she was subject to overtime compensation under the Agency's compensation pay practices.

Grievant was one of several Registered Nurses whose shift began at 6:42 a.m. each day. She was expected to arrive at work by 6:42 a.m. so that she could receive a briefing from the Registered Nurse whose shift was ending at 7 a.m. Grievant was provided a unique badge which enabled her to "swipe" the badge to indicate the time she reported for work. The Agency maintained an electronic database showing the date and time Grievant swiped her badge to show when she began working.

The Agency maintained a strict tardiness policy because each time an employee was late for his or her shift, that employee might cause the employee on the outgoing shift to remain working and incur an overtime obligation.

For the events giving rise to this Written Notice, Grievant's first pay period began on September 25, 2012 and ended on October 9, 2012. Her second pay period began on October 10, 2012 and ended on October 24, 2012. Grievant was tardy for work 13 times during these two pay periods as follows:

Date:	Minutes Tardy:
09/26/12	4
09/27/12	5
09/28/12	6
10/01/12	3
10/02/12	5
10/03/12	8
10/04/12	33
10/07/12	3
10/19/12	4
10/20/12	5
10/21/12	6
10/23/12	6
10/24/12	8

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 8-2 governs Tardiness for non-exempt employees. Section III of this policy defines “Tardy” as, “[late] arrivals of 3 to 60 minutes would constitute a ‘tardy’.” “Unacceptable Tardiness” is defined as, “[f]ive tardies in a two-pay period timeframe is unacceptable and will result in corrective action. The acceptable threshold is 4 Tardies in a two-pay period timeframe.” Under this policy, “[t]ardies of 1 to 2 minutes will be referred to as Incidental Tardies and will not be held against the employee unless it is determined that the employee has a “pattern” of arriving 1 to 2 minutes late.”

“Tardiness” is a Group I offense.² Grievant was counseled that the Agency defined tardiness to mean being tardy five or more times in two pay periods. Grievant was late to work 13 times during two pay periods. The Agency has presented sufficient evidence to support the issuance of a Group I offense for tardiness. An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if 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 See, Attachment A, DHRM Policy 1.60.

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 April 25, 2012 for unsatisfactory attendance and tardiness. In this case, Grievant has received a Written Notice for a repeat offense thereby justifying the Agency's decision to elevate the disciplinary action to a Group II Written Notice with a three workday suspension.

Grievant argued that Policy 8-2 did not apply to her because she was an exempt employee under the Fair Labor Standards Act. She wanted to be treated like other exempt employees who do not have to report for work at specific times. Grievant's argument is correct that Policy 8-2 does not apply to her as written. The Purpose of Policy 8-2 states:

To communicate to all employees the expectation of reporting to work on time as scheduled. Tardiness interferes with the operation and causes an extra burden to co-workers. Punctuality is expected of all employees; however, the guidance and procedures outlined below are **directed to non-exempt employees.**" (Emphasis added).

Given that the policy is directed at non-exempt employees and Grievant is an exempt employee, she is not subject to the wording of the policy if only the policy is considered. DHRM Policy 1.60, Attachment A also applies but it does not define the term "Tardiness." Although the wording of Policy 8-2 is not directed at Grievant, the counseling she received informed her that the Agency defined tardiness for exempt employees who are registered nurses as being absent five or more times during two pay periods. Grievant was repeatedly advised that the Agency considered her to be tardy if she was tardy more than five times during two pay periods. On October 17, 2011, Grievant was counseled because she was tardy six times from 9/10/11 through 10/9/11. On April 25, 2012, Grievant was counseled because she had 11 occurrences. She received a Group I Written Notice for accumulating 11 occurrences and for receiving "5 tardy to work arrivals within 2 pay periods". She was advised that, "Any additional occurrences or tardies may lead to further disciplinary action." In other words, the Agency advised Grievant that it interpreted DHRM Policy 1.60, Attachment A's use of the word Tardiness to be measured by being tardy five or more times in two pay periods. The Agency gave Grievant adequate notice of how it interpreted DHRM Policy 1.60 regarding the Group I offense of "Tardiness."

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"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

³ *Va. Code § 2.2-3005.*

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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with a three day suspension 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 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.⁴

[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

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