

Issues: Group II Written Notice (excessive tardiness), Group II Written Notice (failure to comply with policy) and Termination (due to accumulation); Hearing Date: 07/22/13; Decision Issued: 07/23/13; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10086, 10115; 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: 10086 / 10115**

Hearing Date: July 22, 2013

Decision Issued: July 23, 2013

#### **PROCEDURAL HISTORY**

On January 30, 2013, Grievant was issued a Group II Written Notice of disciplinary action for excessive tardiness. On March 12, 2013, Grievant was issued a Group II with removal for failure to comply with established written policy.

On March 1, 2013, Grievant timely filed a grievance to challenge the first Group II Written Notice. On April 11, 2013, Grievant timely filed a grievance to challenge the second Group II Written Notice. The matter proceeded to hearing. On June 17, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 22, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
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?

### **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 Transportation employed Grievant as a Program Administrative Specialist III that one of its Facilities. She had been employed by the Agency for approximately 21 years prior to her removal effective March 12, 2013. Grievant had prior active disciplinary action. On November 20, 2012, Grievant received a Group I Written Notice for excessive tardiness/unsatisfactory attendance.<sup>1</sup>

Grievant was absent from work in 2012 while she was on short-term disability. She returned to work and presented the Agency with a letter from her mental health provider stating, "[s]he is released to return to work on October 9 at her full work schedule."<sup>2</sup>

On November 2, 2012, the Supervisor sent Grievant an email stating, "I expect you to comply with the current approved work schedule (8:30 a.m. – 5:15 p.m. Monday through Friday)."<sup>3</sup>

On December 7, 2012, Grievant received a performance improvement plan instructing her to "[r]eport to work on time."<sup>4</sup>

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<sup>1</sup> Agency Exhibit 11.

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

<sup>3</sup> Agency Exhibit 7.

Grievant's work shift began at 8:30 a.m. She began her shift from her workstation inside the Building. Grievant had to pass through a gate requiring her to swipe her identification badge to gain entry to the Building. It took her approximately five minutes to get to her desk once she passed the gate entry. The Supervisor observed that Grievant continued to be late to work despite counseling Grievant several times and giving her a Group I Written Notice for tardiness. Grievant reported to work late on November 28, 2012, December 11, 2012, December 12, 2012, December 28, 2012, January 8, 2013, January 14, 2013, and January 17, 2013. In each instance, she was late by at least 15 minutes.

Grievant was responsible for processing invoices the Agency received from cities who had spent money on VDOT projects. Under Agency policy and State law, the Agency was obligated to pay those invoices within 30 days of receipt. If the Agency failed to pay the invoices, the Agency might have to pay an interest penalty to any cities untimely paid.

Grievant received approximately 14 invoices in November 2012. She misplaced the invoices under clutter on her desk. Grievant paid the 14 invoices late. For six of those invoices, she asked the cities to resend her the invoices for processing. In December 2012, Grievant failed to timely process approximately four invoices because she misplaced them in the clutter on her desk. In January 2013, Grievant failed to timely process approximately five invoices because she misplaced them in the clutter on her desk. The total value of the invoices Grievant failed to timely process was approximately \$1.9 million.

## **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>5</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."

### Group II Written Notice – Tardiness

Tardiness is a Group I offense.<sup>6</sup> Grievant was scheduled to work beginning at 8:30 a.m. She had been counseled several times about the importance of reporting to

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<sup>4</sup> Agency Exhibit 10.

<sup>5</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>6</sup> See, Attachment A, DHRM Policy 1.60.

work on time. Grievant reported to work late on November 28, 2012, December 11, 2012, December 12, 2012, December 28, 2012, January 8, 2013, January 14, 2013, and January 17, 2013. In each instance, she was late by at least 15 minutes. The Agency has presented sufficient evidence to show that Grievant displayed tardiness contrary to the Standards of Conduct.

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.<sup>7</sup> Grievant had a prior active Group I Written Notice for tardiness. Accordingly, the Agency has presented sufficient evidence to elevate Grievant's behavior to a Group II Written Notice.

#### Group II Written Notice Failure to Comply with Policy

Failure to comply with written policy is a Group II offense.<sup>8</sup> Agency policy and State law required Grievant to process invoices she received from localities within 30 days of receipt. Grievant received approximately 14 invoices in November 2012. She misplaced the invoices under clutter on her desk. Grievant paid the 14 invoices late. In December 2012, Grievant failed to timely process approximately four invoices because she misplaced them in the clutter on her desk. In January 2013, Grievant failed to timely process approximately five invoices because she misplaced them in the clutter on her desk. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to comply with policy.

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

#### Americans with Disabilities Act and Family Medical Leave Act

To the extent Grievant may have been a qualified individual with a disability, the Agency retained the right to discipline her for violating the Standards of Conduct. The Americans with Disabilities Act covers individuals with disabilities. In Jones v. Am. Postal Workers Union, 192 F.3d 417, 429 (4<sup>th</sup> Cir. 1999), the Court held:

The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability.

Grievant did not request leave under the Family Medical Leave Act or otherwise put the Agency on notice of her need for Family Medical Leave prior to receiving

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<sup>7</sup> See, Attachment A, DHRM Policy 1.60.

<sup>8</sup> See, Attachment A, DHRM Policy 1.60.

disciplinary action. She was returned to work without restriction on October 8, 2012.<sup>9</sup> She did not request intermittent leave under the FMLA or otherwise inform the Agency of her need to take leave because of a serious health condition. For example, on November 28, 2012 and December 11, 2012, Grievant reported to work late and informed the Agency that she had overslept without mentioning any serious health condition.

### Mitigation

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>10</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.

Grievant submitted documents showing she suffered from depression, general anxiety disorder, alcoholism, and other mental health concerns. This evidence may help explain Grievant’s poor work performance, but it does not excuse it. Grievant’s evidence regarding her medical condition was not sufficient to establish that her medical condition caused her poor work performance such that she lacked sufficient control and ability to correct her poor performance. She was returned to work without restriction by her mental health provider on October 8, 2012.

Grievant argued that other employees were arriving late but not disciplined. No credible evidence was presented to support this allegation. Grievant did not identify the employees who were late and not disciplined.<sup>11</sup>

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<sup>9</sup> Grievant requested an alternate work schedule that was denied by the Agency. The work schedule requested by Grievant did not include any shift start times after 8:30 a.m.

<sup>10</sup> Va. Code § 2.2-3005.

<sup>11</sup> Grievant asserted that she could have established her point had she been given more time to review the Agency’s records showing when employees arrived for work. The Hearing Officer denied Grievant’s request for continuance. The Agency timely responded to Grievant’s request for documents and to the Hearing Officer’s order for the production of documents. To the extent Grievant lacked sufficient time to review the documents, it was because she failed to timely follow up on her requests for documents.

In light of the standard set forth in the Rules, 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 for tardiness is **upheld**. The Agency's issuance to the Grievant of the Group II Written Notice of disciplinary action for failure to comply with policy is **upheld**. 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 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 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>12</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>12</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.