Issue: Group II Written Notice with Suspension (excessive tardiness); Hearing Date: 10/31/13; Decision Issued: 11/01/13; Agency: DBDHS; AHO: Cecil H. Creasey, Jr.; Case No. 10180; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10180

Hearing Date: October 31, 2013
Decision Issued: November 1, 2013

PROCEDURAL HISTORY

Grievant is a forensic mental health technician ("FMHT") for the Department of Behavioral Health and Development Services ("the Agency"), serving ("facility"). On May 30, 2013, the Grievant was charged with a Group II Written Notice for excessive tardiness and suspended for three days. The grievant has a prior, active Group I Written Notice for excessive tardiness.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On September 16, 2013, the Office of Employment Dispute Resolution, Department of Human Resource Management, ("EDR") appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for October 31, 2013, on which date the grievance hearing was held, at the Agency's facility. This was the first available date available to the parties.

Both the Grievant and the Agency submitted documents for exhibits that were 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
Representative for Agency
Advocate for Agency
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?

Through her grievance filings, the Grievant requested rescission of the Group II 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.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group II Offenses to include acts of misconduct of such a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. Absent mitigating circumstances, a repeat of the same, active Group I Offense should result in the issuance of a Group II Offense notice. Agency Exh. 6.

The Agency's Joint Instruction 8-2 defines "tardy" as late arrivals of 3 to 60 minutes. Agency Exh. 4. The policy dictates that five tardies in a two-pay period timeframe is unacceptable and will result in corrective action. Tardies of 1-2 minutes are considered incidental tardies and are not held against employees unless it is determined that the employee has a pattern of arriving 1 to 2 minutes late.

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 Agency employed Grievant as a FMHT, with over 5 years tenure. The Grievant had a formal counseling notice issued to her in September 2012 and February 2013 for excessive tardiness. There is an active Group I Written Notice, issued April 15, 2013, for excessive tardiness for pay periods of 2/25/13 through 3/24/13. Agency Exh. 5.

The current written notice charged:

> Unsatisfactory Attendance/Excessive Tardiness: The Employee Tardy Policy (Joint Instruction 8-2) considers an employee to be excessively tardy if they have more than four (4) tardies in a two (2) pay period work cycle. For the two (2) pay periods (3/25/13 thru 4/9/13 and 4/10/13 thru 4/24/13) you were tardy nine (9) workdays. Total number of tardies = 9.

Agency Exh 1.

The Agency's witnesses testified consistently with the charge in the Written Notice of the conduct in question.

The chief nurse executive testified that tardy arrivals have a negative impact on Agency operations, and that the Agency followed the prescribed course of progressive discipline in issuing the current Group II Written notice. She also testified that mitigation was applied that resulted in less than the 10-day maximum suspension for a Group II Written Notice. The chief nurse executive also testified concerning her role and decision as the second step respondent. She testified that she considered mitigating circumstances in the Grievant's personal life, and in light of the hardship that the suspension caused offered to eliminate the three-day suspension to end the grievance. However, the Grievant did not accept, preferring to press her grievance to overturn the Group II Written Notice.

On cross-examination, the chief nurse executive testified that the tardy policy is applied consistently to all staff.

The employee relations manager testified that all staff are disciplined consistently under the tardy policy. She could only speak to instances that are referred for discipline. She presented a log of discipline that has been levied to employees for excessive tardiness from July 2012 through September 2013. Agency Exh. 7.

Testifying on the Grievant's behalf, a LPN corroborated the hardship conditions the Grievant experienced, being homeless for a time and having to travel long distances depending on where she was staying. The LPN also testified that another employee, D.G., was chronically tardy without any apparent discipline.

An RNC testified that the tardiness policy is consistently applied, and the example raised by the Grievant, D.G., was terminated in 2012 for tardiness related discipline.

The Grievant testified to her belief that the tardiness policy is not consistently applied, and that there is a clique of personnel who are not disciplined for tardiness. The Grievant did not challenge the tardiness instances, but she indicated that she was not permitted enough time to show improvement between the Group I Written Notice issued on April 15, 2013, and the Group II Written Notice issued on May 30, 2013.

The Agency recalled as a rebuttal witness the employee relations manager. She testified that the Grievant was given a written counseling in September 2012 concerning tardiness. Again, in February 2013, the Grievant was issued a written counseling for excessive tardiness.

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).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. What is clear from the evidence is that the Grievant had a tardiness problem. Given the circumstances of the established tardiness and the progressive nature of the discipline, I find that the conduct merited the Agency's disciplinary action of a Group II Written Notice. With the active Group I Written Notice for the same conduct, the repeat nature gives rise to a Group II offense. Such decision falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offense (excessive tardiness) and level of discipline—Group II with three days suspension.

Mitigation

The Agency had leeway to impose discipline along the continuum less than Group II with suspension. However, the Agency expressed its inability to mitigate the discipline further than a Group II because the Agency has exercised progressive discipline with prior counseling memos and issued less than the maximum suspension. Further, the Agency witnesses testified that this is the consistent approach when issuing discipline for excessive tardiness. The Grievant asserts, reasonably, that her mitigating circumstances could have been used to reduce the Group II Written Notice or to issue no discipline at all. The level of discipline in this situation is fairly debatable. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

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 Office 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.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law

and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

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).

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also* Bigham v. Dept. Of Veterans Affairs, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee). While the Grievant raised a couple of instances she believed were excessive tardiness undisciplined, one such employee was terminated. As for the other employee raised by the Grievant as an example, the Grievant admitted she was unaware of discipline, or the lack thereof. To the contrary, the Agency presented evidence of its policy of consistently enforcing the tardiness policy.

The Agency expressed its position that the prior notices of improvement needed are aggravating circumstances more so than any mitigating circumstances. The hearing officer accepts, recognizes, and upholds the Agency's important role in ensuring the facility is properly staffed, which includes employees reporting to work on time. The applicable standards of conduct provide stringent expectations of hospital staff. The Grievant asserts that there was not enough time between her Group I Written Notice and the Group II Written Notice for her to

improve her tardiness. However, the Grievant was well aware of the Agency's expectations regarding her chronic tardiness, and there is no lack of notice to the Grievant given the prior counseling. Further, regarding the Grievant's contention that the policy is not applied consistently, the two anecdotal instances brought up by the Grievant lack sufficient evidence to determine how, if at all, the Agency acted inconsistently. We must keep in mind that each disciplinary matter is subject to variable disciplinary action, dependent especially upon gravity and mitigating circumstances present on an individual basis.

There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group II Written Notice with three days suspension outside the bounds of reasonableness. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. 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. In this case, the Agency's action of imposing a Group II Written Notice is within the limits of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency's Group II discipline with three days suspension.

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.