

Issues: Group II Written Notice (unsatisfactory attendance, excessive tardiness) and Termination (due to accumulation); Hearing Date: 10/28/13; Decision Issued: 10/29/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10182; 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: 10182**

Hearing Date: October 28, 2013  
Decision Issued: October 29, 2013

**PROCEDURAL HISTORY**

On July 30, 2013, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory attendance/excessive tardiness. Grievant was removed from employment based on the accumulation of disciplinary action.

On August 28, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 24, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 28, 2013, a hearing was held at the Agency's office. Grievant did not appear at the hearing. After the hearing, the Hearing Officer received a voice mail message from Grievant that she left a workday prior to the hearing. Grievant asked for a continuance because she had started a new job. Although Grievant's request is understandable, it does not constitute just cause to grant a continuance. Grievant's request must be denied.

**APPEARANCES**

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 employed Grievant as a Forensic Mental Health Technician at one of its facilities. The purpose of her position was:

To provide competent nursing care to an adult population ranging from ages 18 to 64 in a Forensic/civil setting to maintain a safe, clean, and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs.<sup>1</sup>

Grievant worked for the Agency for approximately five years. Grievant had prior active disciplinary action. On November 29, 2012, Grievant received a Group I Written Notice for unsatisfactory attendance/excessive tardiness. On December 26, 2012, Grievant received a Group II Written Notice with a three workday suspension for excessive tardiness. On April 10, 2013, Grievant received a Group II Written Notice for failure to follow written policy.<sup>2</sup>

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<sup>1</sup> Agency Exhibit 3.

<sup>2</sup> Agency Exhibit 5.

For the pay period May 25, 2013 through June 9, 2013 and the pay period June 10, 2013 through June 24, 2013, Grievant was tardy on five days she was scheduled to work. Grievant was tardy on June 1, 2013, June 7, 2013, June 12, 2013, June 17, 2013, and June 19, 2013.

## 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>3</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.”

Human Resources Policy 8-2 governs Tardiness. Section III(C) defines “Tardy” as, “[l]ate arrivals of 3 to 60 minutes would constitute a ‘tardy’”. “Unacceptable Tardiness” is defined as:

Five 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.

Section IV(D) provides that:

First Offense – Written Counseling  
Second Offense – Group I Written Notice

Grievant was tardy five times during two pay periods. Grievant repeatedly demonstrated unacceptable tardiness. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Because Grievant had prior disciplinary action for similar behavior, the Agency was authorized to elevate the Group I to a Group II Written Notice. Accordingly, the Agency’s Group II Written Notice must be upheld.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. With the Group II Written Notice issued in this case, Grievant has accumulated three Group II Written Notices. Accordingly, the Agency’s decision to remove Grievant must be upheld based on the accumulation of disciplinary action.

*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

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Management ....”<sup>4</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.

During the Step Process, Grievant alleged favoritism, harassment, and violation of the Family Medical Leave Act. No credible evidence was presented to support these allegations.

## 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 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

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<sup>4</sup> Va. Code § 2.2-3005.

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>5</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>5</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.