Issue: Group I Written Notice; Hearing Date: 06/26/14; Decision Issued: 07/01/14; Agency: DPOR; AHO: William S. Davidson, Esq.; Case N. 10334; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10334

Hearing Date: June 26, 2014
Decision Issued: July 1, 2014

PROCEDURAL HISTORY

The Grievant was issued a Group I Written Notice on December 20, 2013, for:

> Excessive tardiness is in violation of DHRM Standards of Conduct Policy 1.60 the employee has incurred 18 incidents of tardiness for the period 8/1/13 through 12/17/13. See attached memo dated 12/18/13 for specific dates). [1]

Pursuant to this Written Notice, the Grievant received no punishment other than the issuance of the Written Notice. [2] The Grievant timely filed a grievance to challenge the Agency's actions on January 16, 2014. [3] On May 22, 2014, this appeal was assigned to a Hearing Officer. Due to calendar conflicts, the hearing was held on June 26, 2014, at the Agency's location.

APPEARANCES

Counsel for Agency
Party Representative for Agency
Grievant
Witnesses

ISSUE

Did the Grievant violate DHRM Standards of Conduct Policy 1.60, by being tardy an excessive number of times from the time period of August 1, 2013, through December 17, 2013?

[1] Agency Exhibit 1, Tab 2, Pages 1-5
[2] Agency Exhibit 1, Tab 2, Page 1
[3] Agency Exhibit 1, Tab 1, Page 1

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. [4] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. 5 However, proof must go beyond conjecture. 6 In other words, there must be more than a possibility or a mere speculation. 7

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing 23 tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

---

[4] *See* Va. Code § 2.2-3004(B)
[5] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[6] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[7] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Grievant provided me with a notebook containing 10 tabs. The Agency objected to all documents under Tab 9, that were subsequent in time to the issue date for the Written Notice of December 20, 2013. I sustained that objection. There was also an objection to the documentation set forth at Tab 3. My ruling was that I would allow that to remain in the record for so long as the Grievant used it in her evidence and addressed the relevancy issue as she presented evidence. The Grievant presented no evidence regarding the documentation contained at Tab 3, and accordingly, I did not rely upon Tab 3 to reach my Decision in this matter. Other than the above-stated objections, the Grievant's notebook was accepted in its entirety as Grievant Exhibit 1.

The Grievant is an Office Manager for this Agency and has four direct reports. [8] As such, I heard testimony from witnesses for the Agency that describe the importance of the Office Manager actually being in the office in a timely manner. From August 1, 2013, through December 17, 2013, the Grievant was tardy on 18 separate occasions. [9] The Grievant did not testify before me. Accordingly, she did not verbally state that there was any error in the Agency's finding of 18 tardy occurrences. The Grievant, through her questioning of Agency witnesses and through the documentation contained in Grievant Exhibit 1, seems to posit the argument that all of the tardy occurrences should have qualified for Family Medical Leave Act ("FMLA") exceptions.

On or about May 18, 2012, the Grievant asked one of her physicians to provide the Agency with an executed Form WH-380-E. On that form, the physician indicated that the Grievant suffered from insomnia and anxiety disorder. [10] Further, another physician for the Grievant sent a similar form to the Agency on or about May 2, 2012. This physician indicated that she referred the Grievant to other healthcare providers for sleep evaluation. These were the only documents regarding FMLA that the Agency had during the time frame for which the Written Notice was issued.

Prior to the issuance of the Written Notice, on June 25, 2013, the Grievant was issued a Counseling Memorandum that dealt with tardiness issues. [11] The Agency submitted into evidence a Summary of the Grievant's unscheduled leave from May 5, 2011, through December 17, 2013. [12] While this document provides some historical data, I am only concerned with tardiness that occurred in the time frame of August 1, 2013, through December 17, 2013.

The Group I Written Notice had attached to it a Memorandum that set forth the 18 times that the Grievant was tardy from August 1, 2013, through December 17, 2013. [13]

One of the Agency witnesses was the Director of Human Resources for this Agency. This witness testified that, prior to the issuance of the Group I Written Notice, she reviewed all of the times that the Grievant was tardy and paid particular attention to the reasons given for being tardy. She eliminated from the list any occurrences that she felt were possibly related to

[8] Grievant Exhibit 1, Tab 4, Page 2
[9] Agency Exhibit 1, Tab 2, Pages 3-4
[10] Agency Exhibit 1, Tab 19, Pages 6-9
[11] Agency Exhibit 1, Tab 10, Pages1-2
[12] Agency Exhibit 1, Tab 14, Pages 1-5
[13] Agency Exhibit 1, Tab 2, Pages 3-5

the medical documentation which the Grievant had filed with the Agency. As I read the list of 18 tardies, even if I eliminate all tardies that even remotely deal with being sick, much less dealing with the medical documentation on file with the Agency, the Grievant was tardy more than 10 times during the time frame set forth in the Written Notice.

The Counseling Memorandum of June 25, 2013, set forth in part as follows:

> During your tenure as an Office Manager, reporting for work on time and absenteeism have been ongoing issues. During the current performance cycle, you were advised that improvement was needed with regard to adherence to the attendance and tardiness issues. Since that meeting of April 1, 2013 and despite allowing you additional flexibility in altering your work hours, these same issues are occurring and continue to be disruptive to the section's work and do not serve as a good example to your staff. It is understood that circumstances can arise that cause an employee to be late for work or, to be absent from work. Your management team has attempted to be patient and flexible with the various issues that you have encountered and ultimately led to the late arrivals/absences.
>
> Additionally, the Human Resource Office has been consulted regarding these issues, generally, and also to specifically determine if any of the stated reasons for absences listed above were related in any way to the medical documentation you previously provided to that Office. This was done because of the statements you made during the April 1, 2013 meeting, in which you asserted that tardiness issues/absences due to illness were covered by this documentation. The Human Resource Director has advised us that the reasons you provided to me, with regard to various illnesses, do not appear related to the information you previously submitted to that Office.
>
> It has been determined that the amount of unscheduled leave you have taken is excessive and you must take immediate action to correct and improve your adherence to the relevant policies. Accordingly, you are being issued this written Counseling Memorandum to address your failure to report for work in compliance with the established work hours, and to reduce or eliminate the amount of unscheduled leave. These issues continue to be problematic for the section and are not consistent with the expected performance of a supervisor. **Further instances related to these issues may result in disciplinary action, as provided for in the Standards of Conduct Policy 1.60.** [14] (Emphasis added)

In the very recent past, the Grievant has received annual Performance Evaluations and Interim Evaluations, all of which put her on notice as to issues of her attendance and tardiness. [15]

---

[14] Agency Exhibit 1, Tab 10, Page 2

[15] Agency Exhibit 1, Tab 15, Pages 5, 9, 15, and 19

It is clear to me that the Grievant was fully aware that her tardiness was an issue with this Agency.

Policy 1.60, Standards of Conduct, sets forth tardiness as an example of a typical Group I offense. [16]

While the Grievant did not testify before me, she seemed to imply in her questioning of Agency witnesses, that the Agency had an affirmative duty to come to her and question her as to whether or not she had any other illnesses or conditions for which she should notify the Agency. The Grievant did not point me to any policy that requires an Agency to question its employees to confirm that they have placed in their HR records statements from all doctors for all possible illnesses.

The Grievant, in Grievance Form A, stated that her "civil rights were compromised." The Grievant presented no evidence to me regarding her civil rights.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

On May 5, 2011, the Grievant received a Counseling Memorandum regarding issues with tardiness. Considering that the Grievant received two Counseling Memorandum forms regarding tardiness, multiple Performance Evaluations and multiple Interim Assessments regarding her issues with tardiness, I find no reason to mitigate in this matter.

DECISION

I find that the Agency has bourne its burden of proof in this matter and that the issuance of a Group I Written Notice was appropriate.

APPEAL RIGHTS

[16] Agency Exhibit 1, Tab 3, Page 22

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
Richmond, VA 23219

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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[17] 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.[18]

[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]

William S. Davidson
Hearing Officer

[17] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[18] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.