

Issue: Group I Written Notice (excessive tardiness); Hearing Date: 09/22/15;
Decision Issued: 10/07/15; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10667; Outcome: No Relief – Agency Upheld; **Administrative Review**: **EDR
Ruling Request received 10/21/15; EDR Ruling No. 2016-4256 issued 11/10/15;
Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling
Request received 10/21/15; DHRM Ruling issued 12/04/15; Outcome: AHO's
decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10667

Hearing Date: September 22, 2015
Decision Issued: October 7, 2015

PROCEDURAL HISTORY

On April 2, 2015, Grievant was issued a Group I Written Notice of disciplinary action for excessive tardiness.

On May 1, 2015, 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 August 17, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 22, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency's 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?
5. Whether the Agency discriminated against Grievant based on race?

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. Grievant has the burden to show she was discriminated against based on her race. 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 Virginia Employment Commission employs Grievant as a Workforce Services Representative. Grievant's work hours were from 8 a.m. until 5 p.m. with an hour lunch break. She has been employed by the Commonwealth for approximately 27 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant and other staff in her Office must report to work by 8 a.m. in order to participate in a staff meeting during which Office duties are discussed and the Supervisor makes any work duty changes. The Supervisor repeatedly instructed staff including Grievant to report to work by 8 a.m. She sent emails reminding staff of the importance of reporting to work by 8 a.m. The Supervisor advised staff that they could take their lunch hour between 11 a.m. and 2 p.m. as long as someone remained in the office when other employees were at lunch.

The Supervisor measured whether employees were late to work using a wall clock and her cell phone. The time on her cell phone was set through her carrier and she believed it to be accurate. She ensured that the clock on the wall was accurate.

Grievant worked in two office locations. The Agency only considered Grievant's attendance at Location W.

On December 19, 2013, Grievant was three minutes late to work.
On January 31, 2014, Grievant was late to work.
On February 3, 2014, Grievant was 15 minutes late to work.
On March 7, 2014, Grievant was five minutes late to work due to traffic delay.
On April 7, 2014, Grievant was five minutes late to work.
On April 10, 2014, Grievant was one hour late.
On April 28, 2014 Grievant was five minutes late.
On May 12, 2014, Grievant was 15 minutes late.
On May 21, 2014, Grievant was 2 hours late.
On May 22, 2014, Grievant was 15 minutes late.
On May 30, 2014, Grievant was five minutes late.
ON June 2, 2014, Grievant did not report to work.
On June 9, 2014, Grievant was ten minutes late because of "stomach issues."
On June 18, 2014, Grievant was five minutes late.
On July 9, 2014, Grievant was five minutes late because she overslept.
On July 30, 2014, Grievant was ten minutes late.
On August 6, 2014, Grievant was 20 minutes late.
On August 11, 2014, Grievant was five minutes late.
On August 18, 2014, Grievant was 30 minutes late.
On September 10, 2014, Grievant was ten minutes late.
On October 22, 2014, Grievant was ten minutes late.
On October 24, 2014, Grievant arrived as the staff meeting began.
On October 29, 2014, Grievant arrived as the staff meeting began.
On November 7, 2014, Grievant was 30 minutes late because she did not sleep well.
On November 12, 2014, Grievant arrived as the staff meeting began.
On November 19, 2014, Grievant was late to work.
On November 21, 2014, Grievant was late to work because she was not feeling well.
On December 1, 2014, Grievant was late to work.
On December 2, 2014, Grievant was three hours late to work because of "stomach problems."
On December 10, 2014, Grievant was five minutes late to work due to traffic delay.
On December 15, 2014, Grievant was late to work due to "neck problems."
On December 29, 2014, Grievant was three minutes late to work because she was stopped in traffic.
On January 5, 2015, Grievant was ten minutes late due to traffic delay.
On February 3, 2015, Grievant was ten minutes late to work due to "car trouble."
On February 11, 2015, Grievant arrived as the staff meeting was starting.
On February 23, 2015, Grievant was 20 minutes late because of "transportation issues."
On March 2, 2015, Grievant arrived as the staff meeting was starting.

On March 3, 2015, Grievant was late to work because she overslept.
On March 4, 2015, Grievant arrived as the staff meeting was starting.
On March 9, 2015, Grievant was four minutes late due to "traffic tie ups."
On March 24, 2015, Grievant was two and a half hours late because she was not feeling well.

No evidence was presented showing that Grievant requested protection under the Family Medical Leave Act or placed the Agency on notice of a possible claim under the FMLA.

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."

Tardiness and poor attendance are Group I offenses.² Grievant was informed that she was to report to work by 8 a.m. and that the Agency strictly monitored her arrival time. Grievant demonstrated a pattern of tardiness sufficient to justify the issuance of a Group I Written Notice for excessive tardiness.³

Grievant argued that the Agency failed to destroy a previous counseling. On September 24, 2014, the Former Supervisor counseled Grievant regarding her excessive tardiness.⁴ Grievant's assertion does not affect the outcome of this case. DHRM Policy 1.60 provides:

Counseling may be documented by a letter or memorandum, but not on the Written Notice form. Documentation regarding counseling should be retained in the supervisor's files, and not in the employee's personnel file, except as necessary to support subsequent formal disciplinary action.

DHRM Policy provides:

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.

³ This pattern existed even if the Hearing Officer disregards those dates Grievant arrived as the meeting was starting.

⁴ See, Agency Exhibit 3.

Supervisors' records are considered working files and information in them should be maintained only as long as it is useful to the supervisors. When employees or supervisors transfer or separate, supervisors' files should be destroyed in a manner that prevents accidental disclosure of personal information. (See section IX below.) EXCEPTION: If these records contain information related to grievances, the information should be transmitted to the agency human resource office for appropriate retention. Interim evaluations performed to provide input for the evaluation of employees who are transferring laterally, or to provide information to new supervisors (when supervisors transfer) should be forwarded to the agency human resource office for proper transmittal.

When the Former Supervisor moved to another location within the Agency, it was no longer necessary for her to maintain a copy of the September 2013 written counseling of Grievant. Accordingly, the Hearing Officer will disregard the Former Supervisor's written counseling. Indeed, to the extent the Supervisor relied on the Former Supervisor's counseling to draft her December 2013 written counseling, the Hearing Officer can disregard that counseling without affecting the outcome of this case. It is not necessary for an agency to counsel an employee regarding tardiness in order to take disciplinary action. Grievant demonstrated a pattern of excessive tardiness based on the standard for attendance set by the Agency and of which she had notice.

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"⁵ 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 argued she was not treated the way other employees were treated. She argued that other employees were tardy but not disciplined. The evidence showed that the Agency did not discuss disciplinary action of other employees with Grievant and, thus, if another employee was tardy, Grievant would not know whether that employee was disciplined. Grievant has assumed that the other employees were not disciplined but has not established that fact. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁵ Va. Code § 2.2-3005.

Grievant alleged the Agency discriminated against her because of her race that the Agency created a hostile work environment based on her race. No credible evidence was presented to support this allegation. Grievant's perception that she was discriminated against because of her race is not supported by the evidence. Grievant presented examples of alleged racial discrimination. In one example, Grievant and Ms. P, who is also of Grievant's race, were left to work at the front counter when employees of other races left for lunch. No evidence was presented to show that any manager singled them out to remain at the counter and did so because of their race. The evidence showed that employees were permitted to take lunch between 11 a.m. and 2 p.m. as long as someone remained at the front desk to assist the public. Grievant argued that she was referred to as a prisoner when she wore black and white clothing to the office. The evidence showed that most of the employees at the Office intentionally wore black and white clothing at the request of another work unit in their building. Employees made fun of each other regardless of race for wearing clothing that looked like prison uniforms. Since Grievant was wearing black and white, the Supervisor made fun of Grievant. Once the Supervisor realized she had offended Grievant, she apologized to Grievant. The Supervisor did not make fun of Grievant's clothing because of Grievant's race.

Grievant argued that the Agency only took action against her after she complained to Mr. S. No credible evidence was presented to show that the Agency retaliated against her for complaining to Mr. S.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's request for relief regarding discrimination and retaliation is **denied**.

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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.