



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12073

Hearing Date: April 11, 2024

Decision Issued: May 16, 2024

PROCEDURAL HISTORY

On December 11, 2023, Grievant was issued a Group II Written Notice of disciplinary action with termination for failure to follow policy related to excessive tardiness.¹

On January 8, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 29, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On April 11, 2024, a hearing was held at the Facility.

APPEARANCES

Grievant
Agency Advocate
Agency Party Designee
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Group II Written Notice of disciplinary action?

¹ Agency Ex. at 1-3.

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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:

Prior to her dismissal, Grievant was a correctional officer at a Department of Corrections Facility. Grievant had been employed by the Agency for more than eight years. At the time of her dismissal, Grievant had one prior active Group II Written Notice of disciplinary action for excessive tardiness which was issued on July 7, 2023.² Grievant had a prior Group I Written Notice of disciplinary action for excessive tardiness that was issued on September 30, 2022.³

Superintendent testified that when he became Superintendent at the Facility, he had a meeting with all shift commanders about ensuring that all staff were reporting to work on their scheduled days and reporting to work at the time they were scheduled to be at the Facility. Superintendent also advised the shift commanders that staff that were not reporting to work on time should be held accountable.⁴

Grievant testified that Superintendent changed Grievant's work schedule at the end of July 2023, such that Grievant was moved from a shift that required her to work from 7:00 am to 3:30 pm each day, Monday through Friday to a shift that required her to work from 5:30 am to 6:00 pm seven days per week with the following seven days off. Grievant described the 7-days-on/7-days-off shift as challenging for her because she was unable to take the medication that she used to manage her insomnia during the weeks when she worked a daily twelve-hour shift.⁵

² Agency Ex. at 41-43.

³ Agency Ex. at 38-39.

⁴ Hearing Recording at 9:45-10:26.

⁵ Hearing Recording at 49:14-51:08.

The Agency's exhibits included a Correctional Officer Procedural Guarantee Investigation Notice dated October 16, 2023 which stated that the Agency was investigating Grievant reporting late to work on October 5, 2023, October 15, 2023 and October 16, 2023.⁶ The Agency's exhibits also included an Administration of Employee Discipline: Due Process Notification dated October 19, 2023 which identified the dates that the Agency alleged Grievant was late reporting to work as: October 5, October 15, October 16 and October 18. The Due Process Certification also alleged that Grievant had accumulated six tardies since receiving the Group II written notice on July 7, 2023.⁷

A "[Facility] Tardy Form" dated November 14, 2023, was issued to a "Major/Asst. Supt." from "[a Facility Lieutenant] Re: [Grievant]." The November 14, 2023 Tardy Form also provided the following information: "The above named officer reported late for duty on the date listed above. Time Signed In: 0533. Reason (if any given): Got up late, missed my 1st alarm."⁸ The November 14, 2023, Tardy Form appeared to have been signed by Grievant and a "witness" on November 14, 2023. The Form also appeared to have been signed by a Major at the Facility.⁹

A "[Facility] Tardy Form" dated December 8, 2023, was issued to a "Major/Asst. Supt." from "[a Facility Sergeant] Re: [Grievant]." The December 8, 2023 Tardy Form included the following information: "The above named officer reported late for duty on the date listed above. Time Signed In: 0534. Reason (if any given): slow traffic."¹⁰ The December 8, 2023, Tardy Form appeared to have been signed by Grievant and a "witness" on December 8, 2023.¹¹

On December 11, 2023, the Agency issued to Grievant a Group II Written Notice of disciplinary action with termination for failure to follow policy. The Agency described the offense as follows:

On August 8, 2023, a NOI was issued due to being tardy for the 3rd time since the issuance of a Group II July 2023. [Grievant] has received tardy slips four more times since the NOI was issued (10/5, 10/15, 10/16 and 10/18) [Grievant] has accumulated 6 tardies since receiving a Group II for the same issues. [Grievant] has been late and issued an additional tardy slip since her Due Processing meeting on 10/30/23. DOC OP 110.1 states in part "Failure to reach acceptable levels of attendance or ensure proper, prudent use of time are violations under Operating Procedure 135.1, Standards of Conduct, and will be dealt with through appropriate disciplinary action." Therefore, since this is her 3rd noted violation for the same offense, this Group II, for Failure to follow instructions and/or policy with termination is being issued.¹²

⁶ Agency Ex. at 8.

⁷ Agency Ex. at 9-10.

⁸ Agency Ex. at 14.

⁹ Agency Ex. at 14.

¹⁰ Agency Ex. at 14.

¹¹ Agency Ex. at 15.

¹² Agency Ex. at 1-3.

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." 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."¹³

The responsibility of the Hearing Officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).¹⁴

Employees are expected to report to work as scheduled, seek approval from supervisors in advance for any changes to the established work schedule; including the use of leave and late or early arrivals and departures, and report hours of work and leave accurately.¹⁵

Operating Procedure 110.1, Hours of Work and Leaves of Absence, states the following with respect to the "Starting/Ending Time" for Security Staff:

- a. For purposes of determining work hours, work begins with muster, when equipment is picked up or when the post is manned, whichever condition is the earliest and authorized.
- b. Work hours end when count is cleared, equipment is turned in, or when relieved from post; whichever condition is the latest and authorized.
- c. Time utilized to enter or exit the facility or waiting to clock in/out at the time clock does not count as work time as long as the conditions outlined in this section have been met.¹⁶

Operating Procedure 110.1, Hours of Work and Leaves of Absence, defines "DOCTime" as "DOC's web-based time, attendance, leave and scheduling system that automates the time capture, roster management and leave administration processes." Operating Procedure 110.1 also states that.

DOCTime is the official time, attendance, and leave system for the Agency.
1. As the official time, attendance, and leave system, all time, attendance, and leave is submitted in DOCTime.

¹³ See Virginia Department of Corrections Operating Procedure 135.1.

¹⁴ See Rules for Conducting Grievance Hearings § VI. B.1.

¹⁵ See Virginia Department of Corrections Operating Procedure 135.1, Procedure I, G.1.

¹⁶ See Virginia Department of Corrections Operating Procedure 110.1, Procedure I, G.1.

2. DOCTime clock in methods will vary depending on employee position and location.

a. Security staff will generally use their state issued ID card and fingerprint to sign in on the wall mounted clock.¹⁷

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

To support the allegations in the Written Notice, the Agency relied primarily on the testimony of Superintendent. Reviewing the Written Notice, Superintendent testified that following receipt of a Notice of Improvement Needed in August, Grievant received tardy slips for arriving late to work on the following dates: October 5, 2023, October 15, 2023, October 16, 2023 and October 18, 2023.¹⁸ But Superintendent did not testify that he observed Grievant arriving to work late on any of those dates or describe how the Agency determined that Grievant was late to work and that her late arrival was unexcused on any of those dates. Superintendent also did not testify regarding any impacts Grievant's tardiness had to Facility operations.

The Agency did not provide any evidence of Grievant's late reporting on October 5, 2023, October 15, 2023, October 16, 2023, or October 18, 2023, to corroborate the testimony of Superintendent who simply noted from the Written Notice that Grievant had "received tardy slips" on those dates. The Agency did not provide any "tardy slips" that showed that Grievant was tardy on October 5, 2023, October 15, 2023, October 16, 2023, or October 18, 2023. The Agency did not provide any information from DOCTime or any other documentation that would provide additional or corroborating information to show or explain how or why the Agency determined that Grievant was tardy on October 5, 2023, October 15, 2023, October 16, 2023, or October 18, 2023. Although the Agency included the Correctional Officer Procedural Guarantee Investigation Notice¹⁹ and the Administration of Employee Discipline: Due Process Notification²⁰ regarding the offenses alleged in the Written Notice, this Hearing Officer does not consider those documents to provide evidence of the underlying offenses in this case. The Administration of Employee Discipline: Due Process Notification indicated that the Agency had evidence supporting the charges alleged in the form of "Excessive tardy forms and punch times on DOC Time," but if such information exists, it was not attached to the Due Process Notification form and was not provided among the Agency's exhibits.²¹

As evidence of Grievant's tardiness, the Agency provided "[Facility] Tardy Forms" for the following dates: November 14, 2023,²² December 8, 2023,²³ and December 9, 2023.²⁴ The December 9, 2023 Tardy Form did not appear to have been signed by Grievant (or a witness) and did not appear to be complete. If Grievant was late arriving to

¹⁷ See Virginia Department of Corrections Operating Procedure 110.1, Procedure II.

¹⁸ Hearing Recording at 4:17-5:07.

¹⁹ See Agency Ex. at 8.

²⁰ See Agency Ex. at 9-10.

²¹ Agency Ex. at 9-10.

²² Agency Ex. at 14.

²³ Agency Ex. at 15.

²⁴ Agency Ex. at 16.

work on December 9, 2023, the Tardy Form provided did not indicate whether there was a reason for Grievant's late arrival that might have made it an "approved" tardy.²⁵

The Tardy Form dated November 14, 2023, indicated that Grievant arrived late to work by three minutes with the reason given as "got up late, missed my 1st alarm." The Tardy Form dated December 8, 2023, indicated that Grievant arrived late to work by four minutes due to "slow traffic." Although the Written Notice did not specifically list November 14, 2023, or December 8, 2023, as specific dates on which Grievant was tardy, the Written Notice included in the description of the nature of the offense a reference to Grievant receiving "an additional tardy slip" following the due process meeting on October 30, 2023.

Grievant admitted that she "has a problem with being late."²⁶ However, Grievant did not testify specifically regarding her arrival to work on the dates listed in the Written Notice; indeed, much of Grievant's testimony appeared to be related to the tardies she had accumulated that led to the written notice of disciplinary action she received on July 7, 2023. Grievant noted that the tardy forms that the Agency submitted as part of its exhibits reflected that she was tardy by less than five minutes.²⁷

Grievant asserted that her tardiness did not have an adverse impact on Agency operations because, although Grievant may on occasion be a few minutes late reporting for work, Grievant would go directly to post and begin her workday whereas other employees who may clock-in on time would not actually report to their post until sometime after Grievant.

There is insufficient evidence in the record for the Hearing Officer to determine that Grievant was late reporting to work on October 5, 2023, October 15, 2023, October 16, 2023, or October 18, 2023. The Agency has, however, proved by a preponderance of the evidence that Grievant was late reporting to work on November 14, 2023, and December 8, 2023.

The Agency's policies do not specifically define tardiness. The Agency's Standards of Conduct identify "excessive tardiness" as a Group I offense.²⁸ Based on the information provided on one version of the [Facility] Tardy Form included in the Agency's exhibits; the Facility appears to define "excessive tardiness" as "four (4) late reporting events within a twelve (12) month period."²⁹ The [Facility] Tardy Form also notes that "Accumulation of three (3) late to duty incidents within a twelve-month period will result in the issuance of a Notice of Improvement/Sub-Standard Performance" form. Any additional incidents of lateness will be referred for disciplinary actions in accordance with Operating Procedure 135.1-Standards of Conduct."³⁰

²⁵ Agency Ex. at 16.

²⁶ Hearing Recording at 31:44-32:00

²⁷ Hearing Recording at 37:00-37:18.

²⁸ See Virginia Department of Corrections Operating Procedure 135.1, Procedure XII.B.1.

²⁹ See e.g., Agency Ex. at 15.

³⁰ Agency Ex. at 15.

The burden is on the Agency to show that the Grievant acted contrary to policy by being excessively tardy. Based on the Facility's standard for determining excessive tardiness, that is "four (4) late reporting events within a twelve (12) month period," the Agency has not met its burden of proving that Grievant's late arrival to work on November 14, 2023, and December 8, 2023, rose to the level of "excessive tardiness." This Hearing Officer does not consider the late arrivals that contributed to the excessive tardiness for which Grievant had been disciplined on July 7, 2023, as late reporting events that could be included for a new offense of excessive tardiness.

The Agency has not met its burden of proving that Grievant engaged in the misconduct as charged on the Group II Written Notice.

Based on the evidence presented, the Agency has proved, however, that Grievant's conduct was unsatisfactory performance.

Whether the Agency's discipline was consistent with law and policy

Because the Agency has not met its burden of proving that the Grievant engaged in the misconduct as charged, the Agency's discipline was not consistent with policy. However, the Agency has proved that Grievant's behavior constituted unsatisfactory performance, a Group I offense.

Mitigation

Virginia 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..."³¹ 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.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice of disciplinary action. Because a Group I Written Notice does not support termination by accumulation of disciplinary action under DHRM Policy 1.60, the Agency is ordered to **reinstate**

³¹ Va. Code § 2.2-3005.

Grievant to Grievant's same position prior to removal, or if that position is filled, to an equivalent position. The Agency is directed to provide **back pay** less any interim earnings that the employee received during the period of removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.³²

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

³² 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.