

Issue: Group I Written Notice (excessive tardiness); Hearing Date: 04/04/12;  
Decision Issued: 04/05/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9782; Outcome: Full Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9782**

Hearing Date: April 4, 2012  
Decision Issued: April 5, 2012

**PROCEDURAL HISTORY**

On November 4, 2011, Grievant was issued a Group I Written Notice of disciplinary action for being late to work nine times beginning in January 2011.

On December 2, 2011, 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 March 6, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 4, 2012, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Representative  
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 Corrections employs Grievant as a Corrections Officer at one of its facilities. She has been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant's work shift is from 6 p.m. until 6 a.m.

Grievant has a seven year old son who has autism and attention deficit disorder. Because of his mental health condition, he experiences sudden, unpredictable, and extreme behavior. For example, he will become violent and begin attempting to destroy furniture in Grievant's house. He will attempt to leave his house or school and begin running in any direction away from Grievant or his teacher. Grievant and the child's teacher testified regarding several occasions when they had to drive down streets attempting to find the child after he had run away. Grievant testified how she has people sleep at the foot of each door of her home in order to ensure that child does not open the doors and begin running. The child's teacher testified that the child was unable to be transported to school by bus because he would often try to lower the bus windows and attempt to climb out regardless of his safety.

Grievant was tardy to work on January 25, 2011, February 22, 2011, March 12, 2011, March 13, 2011, March 21, 2011, August 22, 2011, August 31, 2011, September 9, 2011, and September 20, 2011. Each time she was tardy, she called the Agency and informed her supervisors that she would be arriving late. Grievant was late because

she was unable to leave her son and arrive at work as scheduled. On those days, Grievant's child experienced an outburst relating to his medical condition and Grievant had to attend to his needs, for example, by giving him medication to calm him and waiting until he had responded to the medication.

The Agency provided Grievant with notice of her rights under the Family Medical Leave Act by posting notices in several places at the Facility and by discussing the policy during in-service training. Nevertheless, Grievant did not realize her tardiness to care for her son could be qualified as intermittent Family Medical Leave. Grievant applied for and received approval for intermittent Family Medical Leave after the disciplinary action was taken.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>1</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

Local Operating Procedure 110.A governs hours of work and leave of absence at the Facility. Section IV provides that an employee who is tardy four times in a six month period will receive a Group I Written Notice. Tardiness is not counted if the employee's tardiness qualifies as intermittent Family Medical Leave. Grievant was tardy for work on at least four occasions within a six month period in 2011. Because she had not yet applied for Family Medical Leave, her tardiness was not excused under the FMLA. The Agency has established a *prima facie* case to support the issuance of a Group I Written 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 Employment Dispute Resolution...."<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

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

<sup>4</sup> Va. Code § 2.2-3005.

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.

Employees are sometimes tardy for reasons beyond their control. For example, an employee who drives to work may have no control over whether he or she is delayed due to a traffic accident. This delay may not be a mitigating circumstance because it is a routine occurrence and an employee could plan to leave for work earlier in order to account for any possible delay.

In this case, Grievant was tardy for work nine times beginning January 2011 for unusual, extraordinary, and unpredictable circumstances. Grievant's child suffered from autism which caused him to engage in unusual, erratic, and violent behavior. Her child did not suffer from routine illness such as having a cold. The child was unresponsive to Grievant's instructions to a much greater degree than most children because of the child's medical condition. Grievant worked in the evening when child care options were limited.<sup>5</sup> Her child's medication condition created a daily risk (not an occasional risk) of causing her delay. Her child's behavior was so extreme that she had no option but to take care of her child when the child experienced violent behavior. As Grievant explained, if she left her child while he was having a behavioral episode, her actions would constitute "child neglect." Grievant always called in advance of her shift to inform the Agency that she would be tardy. Grievant's daily burden of arriving at work on time was far greater than the burden on most employees due to no fault of her own. Grievant has presented sufficient evidence to show that the disciplinary action in this case exceeded the limits of reasonableness. The Hearing Officer finds mitigating circumstances exist to reverse the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

## 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:

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<sup>5</sup> Grievant sought to have the Agency change her shift so that she could work on day shift and have more options for child care for her special needs child. The Hearing Officer lacks the authority to order the Agency to place Grievant on a particular work shift.

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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

3. 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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
600 East Main St. STE 301  
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 the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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>6</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>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.