

Issue: Group I Written Notice (abuse of State time and failure to follow supervisor's instructions); Hearing Date: 12/30/04; Decision Issued: 02/07/05; Agency: Taxation; AHO: Carl Wilson Schmidt, Esq.; Case No. 7935



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7935

Hearing Date: December 30, 2004
Decision Issued: February 7, 2005

PROCEDURAL HISTORY

On August 24, 2004, Grievant was issued a Group I Written Notice of disciplinary action for:

Abuse of State time. Failure to follow supervisor's instructions.

On September 20, 2004, 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 December 1, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 30, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Attorney
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for abuse of State time and failure to follow a supervisor's instructions.

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 Virginia Department of Taxation employs Grievant as a Senior Programmer Analyst. She has been employed by the Agency for approximately four years and six months. The purpose of her position is to:

Independently perform highly complex analytical and programming tasks relating to the development, testing, implementation, and maintenance of business applications. Solve complex business issues and problems.¹

Grievant reports to the Supervisor. The Supervisor has delegated many of his supervisory tasks to the Team Leader. The Team Leader acts on the Supervisor's behalf when supervising Grievant's daily duties. No evidence of prior disciplinary action was submitted during the hearing.

Grievant's workspace consists of an office cubicle with walls approximately five feet tall. Other employees have cubicles adjacent to Grievant's workspace. An employee working in one cubicle can easily overhear the conversation of another employee working in an adjacent cubicle. Grievant has been provided with a telephone to use as part of her duties.² She purchased a mobile telephone for her personal use.

Grievant's work hours are from 9 a.m. to 5:45 p.m., Monday through Friday. On March 11, 2004, the Team Leader instructed Grievant that she should only make

¹ Agency Exhibit 2.

² The State owned telephone does not have caller identification to enable Grievant to know who is calling before she answers the telephone.

personal telephone calls during her designated two 15 minute breaks and during her 45 minute lunch break. Grievant was instructed that her morning break could not begin after 11:30 a.m. and her afternoon break could not begin after 4:30 p.m.³ Grievant usually took her lunch break beginning at 2 p.m. or 2:30 p.m. Grievant understood she could not use her morning 15 minute break to arrive to work late or use her afternoon break to depart early. Grievant was told that if she received a personal call during the time she should be working, she should tell the person that she would return the call at another time.

On March 29, 2004 at 9:31 a.m. Grievant received an incoming telephone call on her State telephone. She talked for approximately 45 minutes regarding problems she was having with an insurance company.⁴ The conversation was unrelated to State business. An employee sitting in a cubicle next Grievant complained to the Team Leader.

On March 29, 2004, the Team Leader sent Grievant an email stating,

I explicitly stated and discussed with you in great detail that you could not make phone calls during the day and then take your morning and afternoon breaks. I have noticed that you are not following these guidelines and continually make phone calls and then you also take your break. Also, as I have clearly pointed out to you, verbally and in writing, personal phone calls should be to a minimum since they can be distracting to your coworkers. *** If for some reason you need to make a phone call that is not during your break then you must have permission from either [Team Leader] or [Supervisor]."⁵

On April 27, 2004 at approximately 11:30 a.m. Grievant used her State telephone to speak with her insurance company about matters unrelated to State business. She spoke for at least one half hour. No evidence was presented showing she took leave for the additional 15 minutes beyond her break time.

On April 30, 2004 at approximately 4:30 p.m., Grievant engaged in a personal telephone conversation with her insurance company. The call lasted at least 26 minutes.

³ On September 29, 2003, the Team Leader told Grievant that she should take her breaks in the mid-morning and mid-afternoon, but if she did not take a break during that time, she would have foregone the break.

⁴ Grievant asserted that she took an hour of compensatory leave to account for the 45 minute telephone call. The Agency contends Grievant's decision to take leave occurred only after her improper behavior was identified.

⁵ Agency Exhibit 1.

On May 12, 2004 at approximately 1:15 p.m., Grievant engaged in a personal telephone conversation with the "insurance board". The call lasted for approximately 31 minutes. Immediately after this call, Grievant called her insurance company.

The Team Leader sent Grievant an email on May 12, 2004 stating, "If you have a personal call that extends for more than three or four minutes please use your cell phone and carry on the conversation away from the office."

Grievant received an Interim Evaluation from her Supervisor on May 28, 2004. The Supervisor informed Grievant that she "still spends too much time on the phone"

On June 15, 2004, Grievant made a personal telephone call beginning at 1:30 p.m. This was later than the time permitted for her morning break.⁶

On June 22, 2004 at approximately 4:59 p.m. Grievant made a personal telephone call lasting until approximately 5:29 p.m. The call was interrupted for about five minutes while Grievant spoke to the Team Leader.

On June 23, 2004 at approximately 9:10 a.m., Grievant engaged in a personal telephone conversation with her insurance agent. She also took a 15 minute break beginning at 11:28 a.m.

On June 28, 2004 at approximately 9:26 a.m., Grievant engaged in a personal telephone conversation with her insurance company regarding her insurance claim. This call began prior to what would be considered a mid-morning break.

On July 7, 2004, Grievant made a personal telephone call beginning at 3:55 p.m. and ending at 4:15 p.m. She exceeded her 15 minute break period.

On July 9, 2004 at approximately 12:36 p.m., Grievant engaged in a personal telephone conversation concerning repairing electrical wires for one of her rental properties. The call lasted until at least 12:53 p.m. with a one minute break at 12:45 p.m. At 1:59 p.m., Grievant began another telephone conversation regarding electrical work on her rental properties. Two employees working in cubicles near Grievant sent emails to the Team Leader complaining about Grievant's telephone calls. Grievant took a 15 minute break beginning at 4 p.m. Beginning at approximately 5 p.m., Grievant engaged in a personal telephone call.

CONCLUSIONS OF POLICY

⁶ Grievant contends that the events did not occur on June 15, 2004 but rather on June 14 or June 18, 2004. The Agency's evidence is sufficient to establish that the events occurred on June 15, 2004.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).⁷ Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

On June 15th, 22nd, 23rd, 28th, and on July 9th, 2004, Grievant made personal telephone calls outside of the latest time permitted for her to take a break. Grievant admitted, “I do recall making personal phone calls outside of my break time on July 9th, and thus am guilty of failing to follow instructions on that day.” Grievant’s actions were contrary to her supervisor’s instructions.

Grievant admits that “Of the eight dates cited during the five month period covered by this written notice, on only three did I make calls that were outside of break times and on only one of those three did I make calls while the agency was paying me.” This admission alone is sufficient to support the Agency’s issuance of a Group I Written Notice.

“Failure to follow a supervisor’s instruction” is a Group II offense.⁸ The Agency has mitigated the offense to a Group I Written Notice. This mitigation is appropriate.

Grievant contends she understood the Team Leader’s instruction to be that if she received a telephone call outside of her break time, she could take the telephone call (even though not during her normal break time) and the call would be in lieu of a break. The weight of the evidence, however, shows that to the extent Grievant made such an assumption, she did so at her own risk. Furthermore, Grievant admits to initiating telephone calls outside of her normal break time. For example, Grievant states, “On a few occasions when my cell phone battery was dead, I made my calls in the morning from my desk before he [a coworker whose cubicle was next to Grievant’s] came in around 9:30.” The Agency adequately informed Grievant of her obligation to make personal telephone calls during her mid-morning and mid-afternoon breaks.

Grievant argues that she had to take some of the personal telephone calls because they involved emergencies such as electrical wiring problems and insurance claims arising because of hurricane damage from a hurricane occurring in September 2003. Grievant’s argument fails because even for personal emergencies the Agency has the authority to determine whether to grant an exception. Grievant could have sought and used annual leave to enable her to address these personal emergencies.

⁷ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ DHRM § 1.60(V)(B)(2)(a).

None of the emergencies were so imminent that she lacked the opportunity to seek annual leave prior to addressing the emergencies.

Grievant contends that she worked additional hours to compensate for the time she spent during work hours devoted to making personal calls. The Agency is not obligated to disregard Grievant's failure to follow her supervisor's instructions simply because Grievant worked additional hours.

Grievant argues that the restrictions imposed on her are unreasonable and excessive.⁹ She believes she has been singled out by the Agency for unusual treatment. Although the evidence is clear that the Agency treats Grievant differently from other employees, Grievant's inability to correct poor behavior over an extended period of time forms a sufficient reason for the Agency's unique treatment of Grievant. The Agency has given Grievant ample notice of its expectations regarding her performance. None of the Agency's restrictions are contrary to State policy.

On July 30, 2004, the Agency began requiring Grievant to comply with a written PROGRAM governing her Behavior and Work. Grievant argues that this PROGRAM should be rescinded. Grievant has not presented evidence showing that the Agency has acted contrary to policy by issuing the PROGRAM. Accordingly, there is no basis to rescind the Agency's action.

DECISION

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

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 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

⁹ Grievant described feeling as if she were a caged animal.

Department of Human Resource Management
101 North 14th St., 12th 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
830 East Main St. STE 400
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 your appeal to the other party. 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.¹⁰

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.