Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 03/13/07; Decision Issued: 05/04/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8533; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8533

Hearing Date: March 13, 2007
Decision Issued: May 4, 2007

PROCEDURAL HISTORY

On September 8, 2006, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to record leave time for multiple partial day absences from work.

On September 21, 2006, 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 February 13, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 20, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

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 Virginia Department of Transportation employs Grievant as a Policy and Planning Specialist I. Her regular work schedule was from 9:30 a.m. until 6 p.m. with a 30 minute lunch. Grievant was allowed to telecommute on occasion but had to obtain prior written approval before telecommuting. Grievant was not permitted to work from home at night to make up for missed time from work. Grievant reported to Mr. Pr until May 25, 2006 when Ms. Po began supervising Grievant.

The Agency provided Grievant with a unique badge number. Each time she "swiped" the badge to enter a gate or door, her badge number, name, and location of the entry point was recorded in a computer database. Grievant usually drove to work and parked in a facility operated by the Department of General Services. When Grievant entered her parking area, she would have to swipe her badge to gain entry. When she entered a secure part of the building in which she worked, she would have to swipe her badge to gain entry. Grievant required approximately 8 minutes to walk from the parking area to her office.

On August 1, 2006, the Agency's Acting Inspector General received a complaint from someone alleging that Grievant was missing time from work and not entering her

absences in the Agency's leave recording system. The person provided the Agency with specific dates in May, June, and July 2006.

The Agency reviewed Grievant's badge transaction history report for the month of May, June, July 2006, and through August 9, 2006. The Agency also reviewed Grievant's leave records to determine if she was absent from work because she took leave. The Agency also interviewed Grievant and her supervisor.

Based on the Agency's initial review, Agency Investigator's concluded that Grievant worked at lease one hour less than she recorded on her time sheet for 29 days during the time period May 1, 2006 to August 9, 2006. Agency managers reviewed the Investigator's reports and information to make sure there were no logical explanations regarding her absences. For example, the Agency disregarded those times Grievant had received approval to telecommute. The Agency also disregarded Grievant's absence on June 8, 2006 when she left the office to attend training in another city. After giving Grievant the benefit of the doubt, the Agency concluded Grievant had unexcused absences totaling 41.5 hours.[1]

On August 23, 2006, Grievant wrote a statement saying, "If I have left early or came in late without charging leave, I will pay it back."[2] Agency investigators considered the statement to be an admission by Grievant that she had erred.

CONCLUSIONS OF POLICY

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).[3] 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).

"Failure to … otherwise comply with established written policy" is a Group II offense.[4] Full time salaried employees are expected to work "40 hours per week for 12 months per year."[5] Grievant developed a pattern and practice of failing to work 40

[1] Absences for periods of less than 1.5 hours were disregarded by the Agency.

[2] Agency Exhibit 10.

[3] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

[4] DHRM § 1.60(V)(B)(2)(a).

[5] DHRM Policy 1.25, *Hours of Work.*

hours per week. Because of this pattern, Grievant acted contrary to DHRM Policy 1.25, *Hours of Work*, thereby justifying the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Thus, Grievant's five work day suspension must be upheld.

Grievant argues that the Agency unfairly applied or misapplied State policy as part of the disciplinary process. She contends the information used to discipline her was unreliable and that her personal privacy was violated. She contends the Agency improperly brought into the investigation the personal, confidential, medical history of a family member.

Although there may have been some instances during which the Agency's estimate of the time Grievant's was absent from work was inaccurate, the method of assessing Grievant's arrival times was reasonable and provided sufficient evidence to show that Grievant was absent from work for a significant period of time. Employees do not have a right of privacy with respect to information about their entry into parking facilities and buildings owned or leased by the Commonwealth of Virginia regardless of which agency actually owns the parking facility. An employee has no ownership interest in data maintained by an agency to measure when an employee enters or exits a State building or facility.

Grievant contends her rights under the Family Medical Leave Act were violated because one of her supervisors told an investigator that she had a sick child and was offered the option to telecommute.[6] Grievant has not cited any State policy or specific federal statutes that she believes were violated by the Agency. If the Hearing Officer assumes for the sake of argument that the Family Medical Leave Act applies to Grievant's case, the Code of Federal Regulations sets forth some confidentiality requirements that may be relevant. 29 CFR § 825.500 provides:

> (g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR Sec. 1630.14(c)(1)), except that:
>
> (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

---

[6] The investigators were attempting to determine reasons why Grievant may be absent from the office. These reasons could have included Grievant being sick or her children being sick and needing medical leave.

> (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
> (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Disclosing that Grievant had a sick child is not the same as disclosing that child's medical history. It is not clear that the Agency violated the FMLA with respect to Grievant's child's medical history. Grievant did not present sufficient evidence to show what information was contained in her child's medical history, where that information was retained by the Agency, what details of that medical history were obtained and by whom, and how that any such information may have been disseminated to other Agency employees. A general discussion among employees that Grievant had a sick child and needed to telecommute, without any additional detail, is not sufficient to violate the FMLA record keeping requirements.

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…."[7] 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 the Grievant of a Group II Written Notice of disciplinary action with suspension 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:

[7] *Va. Code § 2.2-3005.*

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 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 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.[8]

[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

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