Issue: Group I Written Notice (failure to follow instructions/policy); Hearing Date: 06/12/07; Decision Issued: 07/24/07; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8612; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8612

Hearing Date: June 12, 2007
Decision Issued: July 24, 2007

PROCEDURAL HISTORY

On January 18, 2007, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy. On February 21, 2007, 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 May 17, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 12, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Social Services employs Grievant as an Administrative Office Specialist III. The purpose of her position is:

> Researches, analyzes, and disburses through adjustments to APECS,[1] returned receipts, stop payments, and due diligence processing.[2]

Grievant's regular work hours were from 9 a.m. to 5:30 p.m. with a one half hour lunch break. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

When employees arrive at work, they are expected to write their time of arrival in a logbook. When they begin and end their lunch breaks, they are supposed to write these times in the logbook. They must also write their times of departure. The logbook is used by the Agency to determine the accuracy of its employee payroll.

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[1] APECS is an automated processing system.

[2] Agency Exhibit 5.

On June 7, 2006, Grievant received a written counseling from the Supervisor. The counseling memorandum stated, in part:

> You must get approval from your supervisor to leave early or to adjust your time. Never will leave be approved that would require you to work six hours and not take a lunch break. Your Weekly Time Report should match the daily sign in log.[3]

On November 1, 2006, several staff in Grievant's office intended to leave work in the afternoon to attend a funeral. Grievant's Supervisor wanted to ensure that the unit's work was done for the day. The Supervisor asked Grievant if she had completed her duties regarding check adjustments and was done for the day. Grievant said she had completed her work for the day. Later on, the Supervisor realized that not all of the checks Grievant should have processed on November 1, 2006 were completed.

On December 1, 2006, Grievant began her lunch break at 10:50 a.m. and ended her lunch break at 12:20 p.m. She ended her work at 6:30 p.m. She did not obtain approval from her Supervisor to extend her workday.

On January 3, 2007, Grievant started work at 9 a.m., began her lunch break at 1:30 p.m., ended her lunch break at 2 p.m., and ended work at 5:30 p.m. She did not write these times in the logbook.[4]

On January 4, 2007, Grievant started her lunch at 12:30 p.m. and ended her lunch at 1:45 p.m. She worked until 6:30 p.m. Although she listed her "Regular Pay Hours" as 8.0 she actually worked eight hours and 15 minutes. Grievant did not obtain permission from the Supervisor to take an extended lunch break or to work overtime on January 4, 2007.

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).[5] 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

[3] Agency Exhibit 2.

[4] The Agency alleged Grievant engaged in similar behavior on January 9, 2007. The Agency did not submit the Exception Processing Time Report for that date and thus has not established that allegation.

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

of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.[6] Grievant was instructed by her Supervisor that, "Your Weekly Time Report should match the daily sign in log." Grievant's Weekly Time Report did not match the daily sign in log for January 3, 2007 because she did not complete the sign in log. Grievant was instructed by her Supervisor that she must, "get approval from your supervisor to leave early or to adjust your time." Grievant extended her departure time on December 1, 2006 and January 4, 2007 without obtaining permission from the Supervisor. Accordingly, Grievant failed to comply with a Supervisor's instruction thereby justifying the issuance of a Group II Written Notice. The Agency reduced the disciplinary action against Grievant to a Group I Written Notice.[7]

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…."[8] 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 contends the disciplinary action should be mitigated because it is too severe.[9] Grievant's offense would otherwise be a Group II offense, but the Agency

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[6] DHRM § 1.60(V)(B)(2)(a).

[7] Grievant was advised not to use check stubs to process support checks returned to the Agency. Although Grievant used check stubs to process her work on November 1, 2006, she only did so because of a problem with the computer system. Grievant was not trained or instructed regarding how to process checks when the computer system was not functioning properly. There is no basis to discipline Grievant regarding how she processed checks on November 1, 2006. In addition, it is not clear that Grievant understood the Supervisor's question regarding whether she had completed her work for the day. There is no basis to discipline Grievant regarding that communication. When this case is considered as a whole, however, there remains sufficient evidence to support Agency's disciplinary action.

[8] *Va. Code § 2.2-3005.*

[9] Grievant also argued that the disciplinary action was not taken as soon as Agency Managers were aware of her improper behavior in November 2006. Although it would have been a better practice for the Agency to have issued the Written Notice on a more timely basis, the delay between November 2006 and January 2007 is insufficient to support mitigating the disciplinary action. There is no reason to believe

mitigated the discipline. No further mitigation would be appropriate. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[10] (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant contends the Supervisor retaliated against her. No credible evidence was presented showing Grievant engaged in a protected activity or that the Agency's discipline resulted from an intent to retaliate against Grievant.

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.

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that the quality of Grievant's defenses was affected by the delay or that Grievant would have altered her behavior in January 2007 had she been disciplined in November 2006.

[10] *See* Va. Code § 2.2-3004(A)(v*)*. Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

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.[11]

[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

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