

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 10/11/07;
Decision Issued: 10/12/07; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8689; 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: 8689

Hearing Date: October 11, 2007
Decision Issued: October 12, 2007

PROCEDURAL HISTORY

On May 17, 2007, Grievant was issued a Group I Written Notice of disciplinary action because she did not notify her Supervisor regarding her absence from work on May 16, 2007. On June 11, 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 September 16, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 11, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representatives
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 a Payroll Accountant. The purpose of her position is:

To demonstrate working knowledge of policies and procedures and perform analysis of data and applications received governing employee's pay.

Ensure accurate processing of payment, VDSP, Worker' Comp and VRS for DSS employees by avoiding overpayments, researching discrepancies, applying state, federal and internal rules and regulations, correctly interpreting policies and adherence to mandated schedules.

Possess and demonstrate excellent verbal and written communication skills with internal and external customers; interact with State officials analyzing and explaining deductions.

To ensure proper cost allocation by correctly establishing programmatic screens in CIPPS.¹

¹ Agency Exhibit 2.

She has been employed in that position for approximately six years. She began reporting to the Supervisor in August 2006. Grievant's work performance was satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On May 16, 2007, Grievant arrived at work at 8 a.m. She began feeling poorly. At 11:15 a.m., Grievant did not feel well and left the building to get some fresh air. On her way out she told a coworker that she would be right back.² Instead of her health improving from the fresh air, it worsened.³ Grievant believed she needed immediate medical treatment. She walked to her car located two blocks away and then drove to the doctor's office. She received treatment from the doctor who took x-rays and prescribed three medications for her. Grievant had to wait while the x-rays were developed. She drove back to her parking lot, parked her vehicle, and walked back to her office. She arrived there at approximately 2:15 p.m.⁴

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

The Agency presents two reasons for Grievant to receive disciplinary action. First, "[l]eaving the work site during work hours without permission" is a Group II offense under DHRM Policy 1.60, *Standards of Conduct*. Grievant left worksite from 11:15 a.m. until 2:15 p.m. She did not have permission from her Supervisor to be away from her worksite. Second, DHRM Policy 1.25, *Hours of Work*, provides that employees are expected to, "notify management as soon as possible if they are unable to adhere to their schedules, such as late arrivals or early departures." Grievant was scheduled to work in her office from 8 a.m. until 4:30 p.m. with a 30 minute lunch break to be taken sometime between noon and 1 p.m. She departed from the Agency at 11:15 a.m. She

² Grievant did not notify the Supervisor at 11:15 a.m. when she left the building because Grievant expected to return to her office.

³ Grievant experience pain from the left side of her neck down to the left side of her leg.

⁴ Grievant later submitted her request for sick leave while she was absent. Her request was approved.

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

did not notify management of her absence until approximately 2:47 p.m. that day. "Failure to ... otherwise comply with established written policy" is a Group II offense.

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...."⁶ 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's absence from work does not form a basis to discipline her in this case. She left the worksite due to a medical emergency requiring her to act immediately. If she had contacted her Supervisor and asked for permission to leave, but the Supervisor refused, such refusal would have been unreasonable under the circumstances. Thus, whether Grievant obtained permission to leave the worksite is of little significance in this case. Grievant's medical emergency provides a basis to mitigate discipline issued to her for the reason that she was absent from the worksite without permission.

Grievant was obligated by DHRM policy 1.25 to notify the Supervisor "as soon as possible" once she realized she would be departing early from her office building. Grievant carried a cell phone with her when she left the building. She was able to walk to her vehicle and drive to the doctor's office. The doctor took x-rays and Grievant waited in the doctor's office while the x-rays were developed. Grievant drove her vehicle back to the office building and return to her station at approximately 2:15 p.m. Grievant checked her emails and listen to her voicemail. After approximately one half hour, she notified the Supervisor that she had been absent from the office. The Supervisor noticed the Grievant was absent sometime prior to Grievant's expected lunch break. Only after being questioned by the Supervisor, did Grievant inform the Supervisor that she was absent from work. Grievant did not notify the Supervisor "as soon as possible". At a minimum, Grievant could have called the Supervisor while she was waiting for her x-rays to develop. Grievant could have notified the Supervisor at 2:15 p.m. when she returned. Instead, Grievant began reading her mail and listening to her voice messages. If Grievant was able to return to work, then surely she was able physically to notify the Supervisor upon her return. The Agency has present sufficient evidence to show the Grievant acted contrary to DHRM policy 1.25 thereby justifying the

⁶ Va. Code § 2.2-3005.

issuance of a Group II Written Notice.⁷ The Agency mitigated the disciplinary action and issued a Group I Written Notice.⁸

Grievant's medical condition does not provide a basis to mitigate the disciplinary action with respect to DHRM Policy 1.25. Grievant's medical condition created stress for her and distracted her; however, it was not sufficiently severe to have prevented her from contacting the Supervisor. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action below a Group I offense.

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
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

⁷ Grievant argued she did not intend to violate policy. It is not necessary for an agency to show specific intent to violate a policy in order to take disciplinary action against the employee who has violated the policy. This is especially true given that the Agency is asking the Hearing Officer to uphold a Group I offense rather than a Group II offense. As a general rule, an employee's intent becomes less significant as the level of discipline decreases.

⁸ Grievant also argued that she and the Supervisor had a poor working relationship and that the Supervisor took disciplinary action against her because of that relationship. This argument fails. A poor working relationship, by itself, is not a sufficient basis to show that a Supervisor took disciplinary action for an improper motive. The evidence showed that the Supervisor was a strict supervisor, but there is no reason to believe she treated Grievant any differently from other employees. In other words, there is no reason to believe that the Supervisor singled out Grievant for disciplinary action.

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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.