

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 02/27/08;
Decision Issued: 02/28/08; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8759; 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: 8759

Hearing Date: February 27, 2008
Decision Issued: February 28, 2008

PROCEDURAL HISTORY

On June 7, 2007, Grievant was issued a Group I Written Notice of disciplinary action for using her cell phone outside of her scheduled break. On June 14, 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 December 12, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 27, 2008, 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:

Virginia Commonwealth University employs Grievant as a Housekeeper. She has been employed by the Agency for approximately 25 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Supervisor had received complaints about Grievant's phone use. On May 23, 2006, the Supervisor verbally counseled Grievant that, "I have to request that you no longer use your phone during work hours with the exception of your breaks and lunch time."

On December 5, 2006, the Supervisor met with all Housekeeping Staff and advised them of certain guidelines to be followed at all times. He drafted the guidelines in the form of a memorandum and had the Housekeeping Staff sign that they had received the memorandum. Paragraph 17 of the memorandum states:

I have noticed the increase in the use of personal cell phones during work hours. [A]s of 12/5/06 cell phones will no longer be permitted during work hours. Phone should be turned off when you enter the building. Phones can be checked on your breaks and lunch. All phone calls should come through your supervisor's office [telephone number] or the department office [telephone number] there are no exceptions. If this rule is not followed further disciplinary action will be taken up to and including termination.

Grievant's scheduled morning break began daily at 10 a.m. On June 6, 2007, the Lead Housekeeper walked from the ground floor of the Building to the fourth floor where Grievant was working. The Lead Housekeeper opened the door to the hallway and walked down the hall to the fourth floor lounge. At 9:50 a.m., the Lead Housekeeper observed Grievant speaking on her cell phone. The Lead Housekeeper gave Grievant a list of rooms for Grievant to begin working on. Grievant continued her telephone conversation as the Lead Housekeeper walked away. The Lead Housekeeper walked down the stairs to the ground floor and immediately told the Supervisor that Grievant was speaking on her cell phone prior to beginning of Grievant's break. Grievant finished her telephone call and walked down the stairs to the ground floor. At 10:01 a.m., Grievant swiped her identification badge to gain entry to the ground floor.

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."¹ 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

"Failure to follow a supervisor's instructions" is a Group II offense. The Supervisor instructed Grievant to use her cell phone only during scheduled breaks. Grievant's scheduled morning break began at 10 a.m. On June 6, 2007, Grievant used her cell phone at 9:50 a.m. prior to the beginning of her scheduled break. She acted contrary to the Supervisor's instruction. The Agency mitigated the disciplinary action from a Group II to a Group I offense. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argues that the Agency has incorrectly judged the time that she was on the telephone. Grievant contends she began her telephone call at 10 a.m. Grievant's assertion is unsupported by the evidence.

The Lead Housekeeper testified she determined that Grievant was speaking on the cell phone at 9:50 a.m. by looking at the time appearing on her VCU cell phone. She regularly sets that time to match the time on the Agency's time clock. The time clock is used to record when employees begin and end their work shifts.

The Supervisor testified Grievant had finished her cell phone call and walked to the ground floor by 10:01 a.m. He determined that Grievant was on the ground floor at 10:01 a.m. based on the Agency's security system. Grievant had to swipe her badge in

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

order to enter the ground floor. The Agency's security system recorded her badge number and the time she swiped her badge. The Supervisor concluded Grievant was speaking on her cell phone before 10 a.m. because it would take more than one minute for (1) the Lead Housekeeper to observed Grievant speaking on a cell phone, (2) the Lead Housekeeper to walk down four flights of stairs to the ground floor, (3) the Lead Housekeeper to speak with the Supervisor about Grievant's behavior, and (4) Grievant to walk down four flights of stairs and swipe her badge to enter the ground floor.

Based on the testimony of the Lead Housekeeper and the Supervisor, there exists a preponderance of the evidence for the Hearing Officer to conclude that Grievant was speaking on her cell phone at 9:50 a.m. and, thus, prior to her scheduled 10 a.m. break.

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...”² 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 the Agency is singling her out for discipline and because the Supervisor and the Lead Housekeeper do not like Grievant. The Supervisor denied singling out Grievant for disciplinary action. He testified credibly that he holds all of the Housekeepers to the same standard regarding cell phone use. Other than Grievant's assertion, Grievant did not present any evidence showing that other employees were permitted to use their cell phones outside of their scheduled breaks. Although there appeared to be some personal conflict between the Lead Housekeeper and Grievant, the disciplinary action was issued by the Supervisor. Grievant has not presented sufficient evidence to show that the Supervisor issued the disciplinary action for any reason other than his belief that Grievant had acted contrary to his instruction. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.³

² *Va. Code § 2.2-3005.*

³ Grievant raised several other assertions such as a failure of due process and unfair employment practices. No credible evidence was presented to support these assertions.

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

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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.