

Issues: Group I Written Notice (abuse of State time) and Group I Written Notice (unsatisfactory performance); Hearing Date: 07/08/09; Decision Issued: 07/09/09; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 9122; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9122

Hearing Date: July 8, 2009
Decision Issued: July 9, 2009

PROCEDURAL HISTORY

On February 20, 2009, Grievant was issued a Group I Written Notice of disciplinary action for sending text messages on her personal cellular telephone while working. On February 20, 2009, Grievant was issued a Group I Written Notice of disciplinary action for sending approximately 908 "To" messages, of which only approximately 230 were considered work-related.

On March 30, 2009, 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 June 15, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 8, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 State Police employs Grievant as a Dispatcher at one of its Facility. She has been employed by the Agency for approximately 12 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

As a Dispatcher, Grievant was responsible for answering telephone calls from private citizens or Agency staff seeking assistance. Grievant was responsible for communicating by radio with Troopers working on highways throughout the Region. The Agency as a communications system that enabled Grievant to send typewritten messages from her work console over the radio waves into a console to be read by other employees including Troopers. These messages are referred to as "To" messages.

On June 27, 2008 and June 28, 2008, Grievant was working overtime hours to assist the Agency with its additional workload on those days. Grievant sent approximately 908 "To" messages to other staff. Of those messages, only approximately 230 were work-related.

Trooper D sent a "To" message to the Investigator regarding Grievant sending him "To" messages. The Agency began an investigation.

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." General Order 19(12)(a). 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." General Order 19(13)(a). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." General Order 19(14)(a).

Group I Written Notice for Using Personal Cell Phone

The Agency contends that Grievant used her personal cell phone to send text messages while working in the radio room on June 28, 2008. The evidence presented is insufficient to support this conclusion. During this Step Process, Grievant wrote, "I used my personal cell phone, while on break from my dispatching duties, during my work shift on June 28, 2008." The Agency has not presented any witnesses to testify that they observed Grievant using her personal cell phone in the radio room while working. The Investigator concluded that Grievant used her cell phone during work as follows:

From approximately 0800 hours to 1230 hours, [Grievant] continually sent "TO" messages that were not Department related to [Trooper L]; a specific "TO" message sent from [Grievant] to [Trooper L] at 1226 hours stated, "Did u get my text?" At 1302 hours, [Trooper R] sent [Grievant] a "TO" message which advised, "We have bad communication through texting." This is in reference to cell phone texting while on duty in the communications center. I listened to the tapes for channel D507, both telephone and radio traffic, during the time span of 1226 hours to 1302 hours. [Grievant] is operating the channel during this time frame.

Trooper R testified she had never received a text from Grievant and did not know Grievant's personal cell phone number. Based on Grievant's "To" message sent at 12:26 p.m., it would appear that Grievant sent a text message from her personal cell phone prior to 12:26 p.m. The Investigator listened to telephone and radio traffic from the period of 12:26 p.m. to 1:02 p.m. This would be the time period after Grievant had sent a text message. Since the Investigator did not listen to the radio traffic for the time period from 8 a.m. until 12:26 p.m., it is not known whether Grievant was working at her console at the time she sent a text message from her personal cell phone. The Group I Written Notice must be reversed.

Group I Written Notice for Non-Work Related "To" Messages

"Inadequate or unsatisfactory job performance" is a Group I offense. "Abuse of state" is a Group I offense. The Agency contends that the number of "To" messages sent and received by Grievant show that she was "socializing" with other staff using the Agency's communication system instead of performing her job duties. This conclusion is supported by the evidence. Grievant sent and received approximately 908 "To" messages on June 27, 2008 and June 28, 2008. Of the 908 messages, only approximately 230 were work-related. This means that over two-thirds of the messages she sent using the Agency's communications system were of a personal nature. Grievant sent substantially more personal messages than business-related messages. Upon review of the content of the messages Grievant sent, it is clear that she engaged in ongoing conversations with numerous staff. Other dispatchers sent "To" messages of a personal nature, but none sent personal "To" messages to the same degree as did Grievant. Grievant was not attentive to her duties such as answering telephone calls. This is likely because she was more focused on her personal communications than her duties. She sent messages to another dispatcher stating:

"Stop answering the phones ... cuz it makes me look bad"
"We don't have to answer the phones"

Senior Dispatcher M sent a message to the Dispatcher Supervisor B stating,

"[Grievant] is not answering phones."

The Investigator testified that she was working on June 27, 2008 and June 28, 2008 and realized later that other dispatchers were answering the telephone more often than Grievant. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that she was attentive to her duties. She contends that the phones were answered on June 27 and June 28, 2008. This argument fails. Grievant was involved in personal conversations using the Agency's communications system when she was supposed to be working. The phones were answered because other staff were more attentive than was Grievant.

Grievant argued that the Agency's tabulation was overstated. Even if the Hearing Officer adopts the Grievant's tabulation of personal "To" messages, the conclusion remains the same. Grievant sent more non-work related "To" messages than work-related "To" messages. Grievant's use was excessive. Grievant argued that the Agency's tabulation included both messages sent by and received by Grievant and that only the messages sent by Grievant should be counted against Grievant. This argument fails. The reply messages are relevant because they were often in response to a question or comment made by Grievant. The reply messages were, in essence, generated by Grievant's behavior and a foreseeable response to her behavior.

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....”¹ 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 further reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action for use of her personal cell phone on June 28, 2008 is **rescinded**. The Agency’s issuance to the Grievant other Group I Written Notice of disciplinary action for sending “To” messages 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

¹ Va. Code § 2.2-3005.

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
600 East Main St. STE 301
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.²

[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

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.