

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 04/15/16; Decision Issued: 05/03/16; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10781; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 05/18/16; EDR Ruling No. 2016-4260 issued 05/23/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/18/16; DHRM Ruling issued 06/07/16; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10781

Hearing Date: April 15, 2016

Decision Issued: May 3, 2016

PROCEDURAL HISTORY

On January 14, 2016, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow instructions.

On January 19, 2016, 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 March 14, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 15, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
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 Veterans Services employs Grievant as a Unit Secretary. She began working for the Agency in November 2012.

The Agency has a time clock for employees to "clock in" and "clock out" when they arrive and depart the Facility. The time clock displays the current time and an employee who uses the system and who looks at the time clock display will know the time he or she is clocking in or clocking out.

Employees are instructed to clock in when they begin their shifts and clock out when the end their shifts for the day. Non-Exempt employees who work more than 40 hours in a work week are entitled to receive overtime compensation. Employees are expected to take at least a 30 minute lunch break.

The Agency's time keeping system automatically deducts a 30 minute meal break from an employee's hours worked once an employee has worked six consecutive hours. If an employee clocks out and clocks in for lunch with fewer than 30 minutes, the time keeping system records the actual time taken for lunch and that time is used for payroll computations. In other words, an employee who clocks out and clocks in for lunch overrides the 30 minute automatic deduction for meal breaks. For example, if a Non-Exempt employee clocks out at noon and returns at 12:15 p.m., the time keeping system shows the employee taking only a 15 minute lunch. If the employee otherwise worked 40 hours, the additional 15 minutes resulting from the shortened lunch would result in overtime compensation.

Grievant established a pattern of clocking out and clocking back in for fewer than 30 minutes.

On May 14, 2015, the Director of Nursing counseled Grievant:

to always take lunch break. Don't need to clock out if not leaving bldg. If clock out need to be at least 30 minutes.¹

On November 13, 2015, Grievant received a Notice of Improvement Needed/Substandard Performance because Grievant had taken a lunch break but clocked out and clocked in for fewer than 30 minutes. Grievant was given an improvement plan stating:

If you clock out for lunch you must clock out for a period of 30 minutes. Failure to do so will lead to further disciplinary action (Group Written Notice).

In the Employee's Comments section of the Notice of Improvement Needed/Substandard Performance, Grievant wrote:

I clock out when I leave and clock in when I return – I didn't know I had to wait to clock back in after 30 minutes.²

On January 4, 2016, Grievant was working at the Facility. At 12:45 p.m., Grievant clocked out for lunch. At 12:56 p.m., Grievant clocked in and resumed working. She did not take a full 30 minute lunch.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."³ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow instructions is a Group II offense. Grievant had been told verbally and in writing that when taking a lunch break, she was to clock out and clock

¹ Agency Exhibit 1.

² Agency Exhibit 1.

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

back in for no fewer than 30 minutes. On January 4, 2016, Grievant clocked out and clocked back in after 11 minutes instead of waiting for at least 30 minutes. Her action was contrary to instruction thereby justifying the issuance of disciplinary action. The Agency issued Grievant a Group I Written Notice. That disciplinary action must be upheld.

Grievant argued that she did not intend to violate policy and her failure to take a full 30 minute lunch break was accidental. It is not necessary for an agency to show an intention to violate policy in order to justify the issuance of a Group I Written Notice. Grievant's inattentiveness supports the issuance of disciplinary action.

Grievant argued that her actions did not negatively affect the Facility. The evidence showed that Grievant's failure to comply with instruction created a risk that she would be paid overtime contrary to the Agency's preference to avoid unnecessary overtime. Grievant's behavior had a sufficient impact on the Agency to support the issuance of disciplinary action.

Grievant argued that policy did not require that she wait a full 30 minutes before clocking in after lunch. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is correct, Grievant remained obligated to comply with the Supervisor's instruction to wait a full 30 minutes before clocking in after lunch.

Grievant presented evidence that on some occasions her supervisor permitted her to take lunches shorter than 30 minutes. Grievant was not disciplined for these dates. Grievant did not show that she was approved to take a short lunch on January 4, 2016.

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 Human Resource Management"⁴ 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 argued that the Agency inconsistently applied disciplinary action. Grievant must show similarly situated employees were treated differently from the way she was treated by Agency managers. Grievant was counseled twice without receiving

⁴ Va. Code § 2.2-3005.

disciplinary action and only disciplined when she engaged in the same behavior for the third time.

The evidence showed that another Unit Secretary took fewer than 30 minutes for lunch on two occasions in January 2016 without being counseled. The other Unit Secretary was not counseled because she had been asked by her supervisor to perform additional duties preventing her from taking a full 30 minute lunch. In other words, the other Unit Secretary did not engage in inappropriate behavior. How the Agency treated the other Unit Secretary did not show the inconsistent application of disciplinary action. Grievant and the other Unit Secretary were not similarly situated.

Grievant presented evidence of two Certified Nursing Assistants who did not take full 30 minute lunch periods. Ms. H1 clocked out two times in January 2016 but failed to take a full 30 minute lunch period. She was counseled regarding her behavior. Ms. H2 clocked out numerous times in January 2016 but failed to take a full 30 minute lunch period. Ms. H2's supervisor counseled her after January 2016 about the requirement to take a full 30 minute lunch. The evidence showed that Grievant and Ms. H1 and Ms. H2 were treated similarly. Each was first counseled for taking a short lunch period. Grievant did not present evidence that Ms. H1 and Ms. H2 acted contrary to their counseling two additional times but were not disciplined on the third occasion even though Grievant was disciplined on the third occasion. In light of the standard set forth in the Rules, 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 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

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

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.