

Issue: Group I Written Notice (unsatisfactory performance, abusive language); Hearing Date: 04/11/17; Decision Issued: 04/24/17; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 10975; Outcome: Full Relief; Administrative Review Ruling Request received 05/01/17; EDR Ruling No. 2017-4540 issued on 05/16/17; Outcome: Remanded to AHO; Remand Decision issued on 05/23/17; Outcome: Original decision reversed, Group I upheld.

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: DEDR CASE NO.: 10975

DECISION OF HEARING OFFICER

HEARING DATE: APRIL 11, 2017

DECISION DATE: APRIL 24, 2017

I. PROCEDURAL BACKGROUND

The grievant initiated this matter by filing his Form A on September 8, 2016. Due to agency errors in processing the paperwork, I was not appointed as Hearing Officer until March 8, 2017. I conducted a prehearing conference by telephone on March 17, 2017. The hearing was held on April 11, lasting approximately 70 minutes.

II. APPEARANCES

The agency was represented by legal counsel. It presented two witnesses and eight exhibits.

The grievant represented himself. He testified and presented one additional witness.

III. ISSUE

Whether the agency acted appropriately in issuing a Group I Written Notice on August 11, 2016?

IV. FINDINGS OF FACT

The grievant has been employed by the agency for approximately 20 years. On June 2, 2016 he was serving in a supervisory position at a Correctional Facility operated by the agency.

On that date he observed an inmate (hereafter Inmate A) whose facial hair was not in compliance with agency guidelines. He asked the inmate who was responsible for the violation.

The inmate identified the responsible person as being “the ugly black barber.” The grievant went to the area where hair is cut in that unit. He saw a black inmate cutting hair. He asked that inmate if he was “the ugly black barber” who was responsible for the violation of the policy for Inmate A. Three other inmates were present when the statement was made, at least two of them being black.

The grievant left that immediate area. Shortly thereafter he spoke with Chief of Housing at the facility and told her of the exchange. The Chief of Housing is a black female. She recommended he return to the barbershop area and apologize. The grievant promptly went to that area. He apologized to the barber. According to another employee of the agency who overheard the apology, the grievant said “I’m sorry; you are not the only ugly one.” The barber responded “you can call me ugly, but why do you have to say something about my being black?” Complaints were filed by the other inmates who were present and overheard the exchanges between the grievant and the barber. Correspondence was received by the agency from a family member and a friend of the barber. An investigation ensued resulting in the issuance of a Group I Written Notice, the subject of this proceeding, on August 11, 2016. The grievant was cited for unsatisfactory performance and obscene or abusive language.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a

preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The grievant readily admits asking the barber whether he was the “the ugly black man” who caused Inmate A to be in violation of the agency policy regarding facial hair. He maintains that he was merely using the words chosen by Inmate A. I discount the hearsay evidence from the other inmates present which are at variance with the version of events given by the grievant. I do give weight to the hearsay evidence from the employee who heard the apology.

The agency issued the discipline to the grievant pursuant to Operating Procedure 135.1. That procedure is commonly referred to and titled “Standards of Conduct.” A Group I offense is described in that policy as including “types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well managed workforce.” The use of obscene or abusive language is specifically listed as a Group I offense. Unsatisfactory job performance is similarly listed. I will review these alleged violations separately.

The agency is relying on Operating Procedure 135.2, RULES OF CONDUCT GOVERNING EMPLOYEES RELATIONSHIPS WITH OFFENDERS. The language used by the grievant was in no way obscene. Operating Procedure 135.2 defines abuse as “the improper use or treatment of an individual that directly or indirectly affects an individual negatively.” Abuse is stated to include, without being limited to, any improper intentional act that causes physical, mental, or emotional injury to an individual. Correctly referring to the barber as black fails this test. It was a statement of uncontradicted fact.

The use of the word “ugly” as an adjective is more problematic. Although the evidence from the unit manager was presented by hearsay testimony and included in Exhibit 8, I find it to be entitled to great weight. Her relating that the barber told the grievant that it was okay to call him ugly shows that the barber did not consider that language to be abusive. Therefore, I do not find the grievant to have used abusive language as contemplated by Operating Procedure 135.2.

The question next to be addressed is whether the use of the phrase “ugly black man” was unsatisfactory performance. Again, referring to one’s race as an identifying feature is proper in these circumstances. Ugliness, like beauty, is in the eye of the beholder. Although the barber was not offended by the use of the word ugly, that word is objectively insulting.

Section IV (B) of Operating Procedure 135.2 sets forth what constitutes professional conduct when dealing with offenders. Subpart 8 of that section proscribes the use of insulting language. The grievant focused his argument and evidence on the racial aspect of his inquiry. He does not seem to appreciate the inherent nature of the other adjective used to describe the black barber. I find that he was guilty of improper work performance in describing the barber with that word. Its use, even in merely repeating what had been said by another inmate, was a poor choice by the grievant. It easily could have been avoided by him in his investigation of the

grooming policy. He simply could have asked the barber whether he had cut the hair of Inmate A. A discussion regarding the grooming policy could have been ensued without any disparagement of the appearance of the barber.

To summarize, I do not believe the actions of the grievant constitute the use of abusive language. I do find, however, that it constitutes unsatisfactory performance, a violation of Operating Procedure 135.2. The agency is entitled to rely on unprofessional conduct or unsatisfactory work performance as an alternative theory to more specific alleged violations. See e.g. *Virginia Department of Corrections v. Compton*, 47 Va. App. 202 (2005).

The grievant has no prior history of being disciplined by the agency in his long tenure there. He has risen through the ranks to a leadership position. A hearing officer is entitled to mitigate or remove the punishment given by an agency under circumstances such as promote the interest of fairness and objectivity and in light of an employee's satisfactory work performance. See Rules, Section VI(B)(2). In this case, I am presented with an incident that had little impact on agency operations. What was a non-racist comment was the subject of an attempt to turn the event into something that it wasn't. The grievant made a poor decision in repeating the language used by Inmate A, but he did not act maliciously. I believe his comment was nothing more than negligent. The fact that the barber was not personally insulted is a mitigating factor as well.

Fundamental fairness also requires me to take note of an incident during the hearing. The agency's attorney at one point inquired of an agency witness (referring to the other involved inmates): "Are any of them ugly"? I am convinced that the attorney did not intentionally invite the witness to insult the other inmates, but rather acted flippantly. Nevertheless, it shows that the grievant should not be punished, under these specific circumstances, for the unthinking choice of words.

The grievant also complained that prior to the issuance of the Written Notice he was not made aware of the specific words he was alleged to have used. As part of the disciplinary process, he was given ample opportunity to respond to the event. Therefore, I reject his challenge to any deficiency in the notice given to him of the exact allegation against him.

VI. DECISION

For the reasons stated above, I hereby direct that the agency rescind the Group I Written Notice and remove it from the appropriate records.

VII. 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 this final.

RENDERED this 24th day of April, 2017.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer

**IN THE COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

CASE NO.: 10975

HEARING DATE: APRIL 11, 2017

DECISION DATE: APRIL 24, 2017

SUPPLEMENTAL DECISION DATE: MAY 23, 2017

SUPPLEMENTAL DECISION OF HEARING OFFICER

I rendered my decision in this matter on April 24, 2017, issuing my written decision on

that date. The agency appealed my decision to the Director of the Office of Human Resource Management, as well as the Director of the Office of Employment Dispute Resolution. On May 10, 2017, the Director of the Office of Employment Dispute Resolution issued his decision in this matter (Ruling #2017-4540). He remanded the case to me for reconsideration.

I have reviewed the ruling by the Director and the findings therein. I find that, in light of the findings made by the Director, insufficient grounds for mitigation of the discipline imposed on the grievant are present in the record. Therefore, I uphold the issuance of the Group I Written Notice to the grievant.

The grievant is referred to the written ruling by the Director for his appeal rights.

RENDERED this May 23, 2017.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer