Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 09/06/18; Decision Issued: 09/21/18; Agency: DOA; AHO: William S. Davidson, Esq.; Case No. 11237; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11237

Hearing Date: September 6, 2018
Decision Issued: September 21, 2018

PROCEDURAL HISTORY

On March 22, 2018, the Grievant was issued a Group II Written Notice for:

> On at least four different occasions, you have raised your voice and/or been disrespectful to your supervisor or other coworkers. This has caused concern for your coworkers about potential safety issues and demonstrated your apparent lack of respect for your supervisor. These incidents were discussed with you when they occurred, and you were warned that further instances would result in formal disciplinary action. [1]

On April 10, 2018, the Grievant timely filed a grievance challenging the Agency's actions. [2] On July 17, 2018, the grievance was assigned to a Hearing Officer. A hearing was held on September 6, 2018 at the Agency's location.

APPEARANCES

Counsel for Agency
Grievant
Witnesses

ISSUES

Did the grievant fail to follow supervisory instructions and cause disruptive behavior in violation of DHRM Standards of Conduct Policy 1.60?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. 3 Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the

[1] Agency Exhibit 1, Tab 2, Page 1
[2] Agency Exhibit 1, Tab 1, Page 2

employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. 4 However, proof must go beyond conjecture. 5 In other words, there must be more than a possibility or a mere speculation. 6

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing 29 tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with a notebook containing 13 tabs. Tab 13 consisted of an audio recording. That notebook was accepted in its entirety as Grievant Exhibit 1, without objection.

The Grievant did not testify before me, nor did he call any witnesses.

For purposes of identification, Agency employee "AB" is the Assistant Director of Financial Accounting and Grievant's first-line supervisor; "EF" is the Director of Financial Accounting and Grievant's second-line supervisor; and "CD" is the Deputy State Comptroller and Grievant's third-line supervisor. The Grievant is a Financial Reporting Analyst.

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[3] *See* Va. Code § 2.2-3004(B)
[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

On June 29, 2017, EF prepared a Memorandum to File which stated in part, "...communication must occur in a professional manner...[Grievant] was confrontational and belligerent. [EF] stated that was unacceptable...[EF] stressed that going forward, she expects [Grievant] to express his opinion in a professional manner to everyone..." 7

On November 14, 2017, AB prepared a Memorandum to File, which stated in part as follows:

> ...[CD] also stressed that this was the second counseling session...[Grievant] was also argumentative and belligerent with [CD]. [CD] informed him that he would be written up under Standards of Conduct if another conversation is required concerning his behavior...[Grievant] acknowledged what [CD] had said and the expectations of him going forward. 8

This was the first time Grievant was told he would be "written up" if he was "argumentative and belligerent." On November 15, 2017, AB again prepared a Memorandum to File which stated in part as follows:

> ...[CD] and [EF] both enforced the fact that any physical violence or threats of violence would not be tolerated... 9

The threat appears to have been the Grievant making the following statement, "If you keep talking to me this way, we are going to have a problem." Grievant addressed this to AB. By way of explanation, Grievant offered:

> ...[Grievant] explained that he meant filing a grievance or some other administrative action and not any physical violence. [EF] acknowledged this and told him that the phrase could have more than one meeting(sic). [Grievant] disagreed that there could be more than one meaning. When [EF] responded by telling him that it was reasonable that [AB] and [MN] could, and did, interpret it differently and were afraid of physical harm, [Grievant] refused to acknowledge this possibility... 10

This statement seems to be the only example of threatening language that the Agency claims was made by Grievant. There was no other evidence to justify fear of "physical harm" other than a "raised voice."

Neither the Memorandum of June 29th, nor the Memorandum of November 14th nor the Memorandum of November 15th was given to the Grievant.

DHRM Policy 1.60 sets forth that supervisors may keep employment-related files on employees that would document the employee's work performance or performance evaluation. Also, such files may contain documentation of counseling sessions with employees or such things as performance or behavior problems or departmental policies or procedures. That policy

[7] Agency Exhibit 1, Tab 11, Page 1
[8] Agency Exhibit 1, Tab 14, Page 1
[9] Agency Exhibit 1, Tab 14, Page 2
[10] Agency Exhibit 1, Tab 14, Page 2

states that employees normally should be given a copy of the information at the time it is placed in the file. Employees may attach rebuttals to the information in a supervisor's file.

AB testified that he had never been trained on Human Resource policy and that was why he had never provided the Grievant with either of these Memorandum that he prepared.

On March 9, 2018, the Grievant while in his cubicle, had a meeting with a coworker ("XY"). Grievant and XY had been assigned a joint project. During the course of working on this project, they had arrived at different approaches as to how the project paper should be written. XY came to the Grievant's cubical to discuss this. During the course of this discussion, XY testified that the Grievant became red in the face, raised his voice, was belligerent, and that the Grievant's eyes were threatening and caused her to be frightened. Based on XY's allegations, on March 13, 2018, EF provided the Grievant with what amounted to a Due Process Memorandum. In that document, she stated in part that "...Failure to Follow Supervisory Instructions and Disruptive Behavior are violations under the DHRM Standards of Conduct Policy 1.60..." [11] Based on this Memorandum, it would appear that the Agency's allegation is that the Grievant failed to follow supervisory instructions and/or that his behavior on March 9th was disruptive.

EF prepared a Memorandum to File dated March 12, 2018. In that Memorandum, based on XY's discussion with her, she stated in part that, "...[Grievant] became very frustrated and visibly angry. Additionally, his voice became increasingly loud and frightened [XY]..." [12] This categorization is based solely on XY's statements to EF, as EF was not present during the conversation.

Subsequently, on April 18, 2018, in the Second Grievance Response, EF stated in part that, "...The second meeting of March 9, in which you raised your voice in an unacceptable manner, is a failure on your behalf to follow a direct instruction from the Deputy State Comptroller about communicating professionally. This is the basis for the Group II written notice for Failure to Follow Supervisory Instructions..." [13] Accordingly, it appears that the basis for this Group II Written Notice has now morphed to a failure to communicate professionally, as previously directed.

It appears that the communication of March 9, 2018 between the Grievant and XY was recorded by the Grievant. While counsel for the Agency raised concerns regarding the authenticity of this recording, based on the evidence before me, it appears that the Agency was in possession of this recording on or before May 22, 2018, and had ample opportunity to test the veracity of this recording. Apparently, no attempt was made to have any State professional review the tape. Accordingly, it is accepted as presented to me. Almost every agency witness testified that he or she had listened to the recording. Indeed, the Third Resolution Step respondent stated in part that, "...The additional information included audio recordings of two conversations, neither of which are relevant to the behavior cited in [Grievant's] Group II Written Notice..." [14]

[11] Grievant Exhibit 1, Tab 10, Page 2
[12] Grievant Exhibit 1, Tab 10, Page 11
[13] Grievant Exhibit 1, Tab 12, Page 11
[14] Grievant Exhibit 1, Tab 12, Page 14

On its face, such a statement would appear to be absurd. The entire conversation between Grievant and XY, which spawned this Written Notice, was recorded. To indicate that the recording was not relevant, suggests that the Third Step Respondent did not listen to the recording. The recording was played at the hearing and I paid particular attention to tone, timbre and volume of the Grievant's voice. As I listened to the recording, the Grievant's volume did not go up at any time during the entirety of the recording. It began at a certain volume and stayed, essentially, at that volume. I heard no threats, I heard no abuse, and I heard no derogatory comments. Perhaps the most persuasive witness for the Agency was CD, the highest supervisory witness that the Agency presented. He testified that he too had listened to the recording and that he did not find it abusive or threatening. When asked why he authorized the Written Notice, he stated that the grievant was not "**collaborative**." Failure to be collaborative does not justify a group notice.

Based on the three Memoranda to File, the Grievant was instructed to communicate professionally, not be belligerent, and not make physical threats. As a shadow overhanging the evidence in this matter, there was testimony about fellow employees being threatened. One employee testified that she had devised a personal escape plan which would require her to climb on top of her desk; scale her cubicle wall; and crawl out to an area where she could trigger a fire alarm. She also testified that she had determined a way to "weaponize" a paper clip. A second employee testified that she brought a can of yellow jacket spray into the office and that she intended to spray the Grievant with the spray should he come for her. Management witnesses testified as to ignorance of these plans, albeit they also simultaneously testified to employees being frightened by the Grievant. There was no testimony presented to me to indicate that the Grievant threatened any employee, either physically or verbally. I also note that management testified that after becoming aware of one employee having a personal escape plan, including a weaponized paper clip, and another employee having a caustic poisonous spray on her desk, in preparation of needing to use it against a fellow employee, management effectively did nothing from the time the Written Notice was issued until the time this Grievant left this Agency, which was approximately 100 days. One can only wonder how concerned management actually was of alleged threats.

I find that the recording was highly relevant. It provided an unbiased glimpse of the conversation that led to the Group Notice. I heard no threats made; I heard no abuse, I did not hear the Grievant raise his voice from start to finish. The Grievant, based on the manner in which he questioned witnesses before me, has a loud voice, but a loud voice in and of itself, is not sufficient to be a threat, belligerent or unprofessional. Based on EF's statement in her Second Level Grievance Response of, "...you raised your voice in an unacceptable manner...is a failure on your behalf to follow a direct instruction from [CD]...about communicating professionally," and this is the basis for the Group II Written Notice of Failure to Follow Supervisory Instructions, I find that the Grievant's conversation with XY was not unprofessional and his voice was not raised above its normal tone. Accordingly, the Group II Written Notice fails.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

I find no reason to mitigate this matter.

DECISION

For reasons stated herein, I find that the Agency has not bourne its burden of proof in this matter and that the issuance of the Group II Written Notice to the Grievant was improper and that it should be removed from his record.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued.**

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

[1] Agencies must request and receive prior approval from EEDR before filing a notice of

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

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William S. Davidson
Hearing Officer

appeal.