

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 10/03/18; Decision Issued: 10/17/18; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11248; Outcome: Partial Relief; **Administrative Review Ruling Requests received from Grievant and the Agency on 11/01/18; EDR Ruling No. 2019-4804, 2019-4805 issued on 11/29/18; Outcome: Remanded to AHO; Reconsideration Decision issued 01/02/19; Outcome: Group II Written Notice reinstated.**



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11248**

Hearing Date: October 3, 2018  
Decision Issued: October 17, 2018

#### **PROCEDURAL HISTORY**

On September 5, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions.

On October 10, 2017, 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 26, 2018, the Office of Equal Employment and Dispute Resolution issued Ruling 2018-4746 qualifying this matter for hearing and narrowing the issues in dispute. On August 7, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 3, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's 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?
5. Whether the Agency retaliated against Grievant?

### **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 raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Department of Behavioral Health and Developmental Services employs Grievant as a Policy Review Specialist. She has been employed by the Agency for approximately four years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 1, 2016, Grievant received a counseling memorandum from Dr. B advising her:

Pursuant to the Department of Human Resources Management Policy 1.60, Standards of Conduct, employees are to contribute to the success of the agency's mission by demonstrating respect for the agency and towards agency coworkers, supervisors, and managers. \*\*\* Please ensure that you maintain professionalism, are respectful to your coworkers and supervisors, and apply appropriate discretion within the workplace.<sup>1</sup>

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<sup>1</sup> Agency Exhibit C.

Grievant reported to the Supervisor, Ms. M, who reported to Dr. B. Dr. B left the Agency in January 2018.

On August 17, 2017, Dr. B walked out of Ms. T's office to walk to the conference room near Ms. T's office. Ms. T had complimented Dr. B on her clothing outfit. Grievant overheard Ms. T complimenting Dr. B. Ms. T was standing at the door of her office while Grievant was at the door of her office a few feet away. Grievant looked at Ms. T and began kissing the back of her hand. Grievant said to Ms. T, "Keep kissing." Ms. T asked Grievant what she meant by her gesture and comment. Grievant responded, "Why don't you just go in there and kiss her on the cheek?" Ms. T went into her office. Ms. T felt that Grievant's comment was inappropriate and unprofessional. Grievant's behavior upset Ms. T. Ms. T complained to Dr. B about Grievant's behavior.

On November 17, 2017, the Supervisor called Grievant and several other employees into a meeting. The Supervisor was loud, belligerent, and threatening to employees as she accused management of never being satisfied with her work. The Supervisor said someone was undermining her authority by communicating with management. She cursed as she spoke and said d—k, s—t, and a—hole as she yelled at the employees. Ms. T was also in the meeting and testified that it appeared the Supervisor was having a "break down" or "melt down". The Supervisor transferred to another Unit within the Agency in December 2017.

## **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."<sup>2</sup> 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. On July 1, 2016, Grievant was instructed to be respectful and professional towards other employees. On August 17, 2017, Grievant was unprofessional and disrespectful towards Ms. T. Grievant kissed her hand and suggested Ms. T kiss Dr. B. Grievant's actions were inappropriate in the Agency's workplace and caused Ms. T to feel demeaned and offended. The Agency has presented sufficient evidence to show that Grievant failed to follow a supervisor's instructions.

Grievant argued that she did not kiss her hand and tell Ms. T to kiss Dr. B. Ms. T's testimony was credible. Grievant did not establish a motive for Ms. T to be

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

untruthful. Ms. T's credible testimony was sufficient to show Grievant's behavior towards Ms. T and support the disciplinary action.

Grievant disputed the facts giving rise to the July 1, 2016 written counseling. For the purpose of this grievance, it does not matter whether the underlying facts supporting the counseling were accurate. What does matter is the nature of the counseling. Grievant was instructed to be respectful towards coworkers. Grievant received the July 1, 2016 counseling memorandum.

Grievant asserted that she was denied procedural due process for several reasons including the Agency's failure to have a witness testify in person. The hearing process cures Grievant's procedural due process concerns. The Hearing Officer allowed one of Grievant's witnesses to testify by telephone because that witness was not an eye-witness to the events in dispute. That witness refused to participate fully in the questioning and ended the telephone conference call early. A Hearing Officer does not have contempt authority and any witness may refuse to participate in a hearing. Thus, Grievant's concerns do not form a basis to reverse the disciplinary action.<sup>3</sup>

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>4</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"<sup>5</sup> cause of the alleged adverse action by the employer.<sup>6</sup>

Grievant engaged in several protected activities including filing a grievance in order to have her salary increased. Grievant suffered an adverse employment action because she received disciplinary action. Grievant has not established a connection

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<sup>3</sup> Grievant initially asserted her actions were protected speech but appears to have abandoned that defense. There is no basis for the Hearing Office to believe Grievant's statements to Ms. T were protected from disciplinary action.

<sup>4</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>5</sup> This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

<sup>6</sup> See, *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

between her protected activity and the disciplinary action. The Agency took disciplinary action because it believed her behavior was inappropriate following a complaint from one of Grievant's co-workers. The Agency's disciplinary action was not a pretext for retaliation.

*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 ...."<sup>7</sup> 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 has presented sufficient evidence to show that the Agency did not consistently apply disciplinary action. In November 2017, the Supervisor called her subordinates into a meeting. She cursed, yelled, and displayed anger towards Agency employees. The Supervisor's behavior was more offensive and disruptive to other Agency employees than was Grievant's behavior. It appears that the Agency only counseled the Supervisor. Because of the Supervisor's position of authority and her combative behavior, she should have received at least a Group II Written Notice. It does not appear that the Agency took any disciplinary action against the Supervisor thereby treating Grievant and the Supervisor differently without a reasonable explanation. Accordingly, Grievant's Group II Written Notice must be mitigated to a Group I Written Notice.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

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<sup>7</sup> Va. Code § 2.2-3005.

## 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
**Office of Equal Employment and Dispute Resolution**

**DIVISION OF HEARINGS**  
**DECISION OF HEARING OFFICER**

In re:

**Case No: 11248-R**

Reconsideration Decision Issued: January 2, 2019

**RECONSIDERATION DECISION**

On November 29, 2018, the EEDR issued rulings 2019-4804 and 2019-4805 making alternative weighing of evidence and conclusions of policy and directing the upholding of a Group II Written Notice against Grievant. Accordingly, the Group II Written Notice issued to Grievant is upheld.

**APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer