

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 09/03/02;
Decision Date: 09/25/02; Agency: University of Virginia; AHO: Carl Wilson Schmidt,
Esq.; Case No. 5515; **Administrative Review: Hearing Officer Reconsideration
Request received 10/02/02; Reconsideration Decision dated: 10/17/02; Outcome:
Request does not identify any newly discovered evidence or any incorrect legal
conclustions. Request to reconsider denied.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5515

Hearing Date: September 3, 2002
Decision Issued: September 25, 2002

PROCEDURAL HISTORY

On December 17, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

Behavior disruptive to the business of the [Division] and rude behavior to a fellow employee.

On January 15, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 14, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 3, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
University Counsel
Administrative and Program Specialist III

Executive Secretary
Chief Operating Officer
Program and Administrative Specialist

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action.

BURDEN OF PROOF

The burden of proof is on the University 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 University of Virginia employs Grievant as a Fiscal Tech Senior. She has been employed by the University for approximately 22 years. Grievant works within a division where some of the employees are located in a main administrative building and others including Grievant are located in a nearby Hall. Grievant speaks loudly on a regular basis. She attributes her loud speaking voice to her diminished hearing capacity.¹

The Department Head supervises the Division Director and the Administrative and Program Specialist III (“ASP III”). Grievant reports to the Division Director. The ASP III provides reception and secretarial assistance to the Department Head.

On December 11, 2001, the ASP III² arrived at work at 6:45 a.m. She received a call from the Division Director³ at 7 a.m. asking the ASP III to inform the Department Head that the Division Director would be absent from work due to illness.⁴ The

¹ In other words, she speaks loudly because her ability is diminished to determine whether she is loud at any given time.

² The ASP III began working in her position on October 29, 2001.

³ The Division Director began working for the unit in July 2001.

⁴ December 11th was the first time the Division Director had been absent from work due to illness since the ASP III started working in her position.

Department Head was out of his office that morning so the ASP III left him a message and then notified other unit secretaries that the Division Director was ill and would not be coming into the office that day.

The ASP III had a 9 a.m. appointment outside of the office so she left her office at approximately 8:30 a.m. Before leaving she coordinated telephone coverage with the other secretaries. She adjusted her telephone to forward to the other secretaries any calls made to her telephone number.

Grievant learned of the Division Director's absence from another employee and was concerned that she had not been notified by the ASP III. She walked into an office area next to a copy machine and asked the person at the copier if she had been notified that the Division Director was absent and then questioned why Grievant had not been notified. Grievant picked up a nearby telephone and announced that she would call the Human Resource Officer and notify her that Grievant had not been notified of the Division Director's absence as required by unit policy. On prior occasions, Grievant had been instructed by supervisors to notify the Human Resource Officer of her concerns.

Grievant approached the ASP III who had recently returned from her appointment and asked the APS III why her telephone rang busy and why she had not called Grievant to tell Grievant that the Division Head was absent from work. Grievant's voice reflected anger and she spoke loudly.⁵

The APS III sent Grievant an email⁶ stating:

I would appreciate it if you would not speak to me in the tone and disrespectful manner in which you did when calling me this morning. I have always treated you with respect and been polite when addressing you, but you did not extend the same respect to me.

Further, having only been in [the unit] for approximately a month, I was not aware of the complete proper protocol to follow in employees' absences. However, I did ensure that the telephones were maintained, appropriate people were notified, and although you did not receive a special telephone call from me, all business was taken care of. There were no unattended telephones, etc. In other words, the Division did not fall apart.

Upon receiving the email, Grievant called the APS III and apologized to her. The APS III accepted Grievant's apology and considered the matter resolved.

⁵ The ASP III did not realize Grievant had difficulties with her hearing.

⁶ Agency Exhibit 3.

Grievant believed that the APS III had failed to follow the unit's established practice of notifying all secretaries including Grievant when the Division Director is absent from work.⁷ Before the APS III became secretary to the Department Head, the practice was for the Department Head's secretary to notify all secretaries and Grievant if the Division Director was absent. The various secretaries would then notify other staff in their areas.⁸ The primary purpose of this practice was to overcome the physical separation of the unit's employees being located in different buildings.

CONCLUSIONS OF LAW AND 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." DHRM § 1.60(V)(B).⁹ 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." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Disruptive behavior" is a Group I offense.¹⁰ The University has not established that Grievant's behavior rises to the level requiring disciplinary action. A significant part of Grievant's behavior that the University considered disruptive was her accusation that another employee had failed to follow policy. Although it is unclear what the telephone contact practice was at the time of the incident, it is clear that the practice in effect before Grievant's job duties changed in late 2001 was that the secretary notify all other secretaries including Grievant.¹¹ Grievant had not been informed of the change in practice. Thus, Grievant believed she was properly identifying a breach in the University's business practice. She attempted to contact the Human Resource officer

⁷ Prior to October or November of 2001, Grievant shared several duties with the Division Director. If the Division Director was absent, Grievant's work could be affected. Thus, being notified of the Division Director's absence would be of significance to Grievant. Once Grievant's job duties were revised, the duplication of duties was eliminated and Grievant would not need to know when the Division Director was absent. When Grievant's duties were being revised, she was not informed that she no longer needed to know when the Division Director was absent.

⁸ Alternatively, the ASP III could have sent an email to all unit staff.

⁹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

¹⁰ DHRM § 1.60(V)(B)(1)(e).

¹¹ The Chief Operating Officer testified that a staff meeting was held to inform staff of a change in the unit's notification practice, but Grievant did not attend that staff meeting. She was not separately informed of the change in practice.

as she had been instructed to do in the past.¹² Grievant spoke loudly because of her hearing loss and her voice was consistent with her normal tone. Those who heard Grievant speak loudly assumed she was doing so in order to be disruptive when in fact she normally speaks in a loud voice. Had Grievant intended to be disruptive she likely would not have apologized to the ASP III.

The University contends Grievant is a difficult employee to manage and one who has problems dealing with others, especially dealing with supervisors. The University's conclusion is well supported by the evidence. During the hearing, Grievant testified that on several occasions she had been instructed by a supervisor to perform a task in a certain way and Grievant responded to her supervisor "That is not how I do things" and then would proceed to complete the task as she deemed appropriate. When an employee is given an instruction by a supervisor, the employee should follow that instruction unless the instruction is unlawful or unethical. Refusing to perform a supervisor's instruction because it is "not how I do things" is improper.¹³ In addition, Grievant expressed contempt for her supervisor because her supervisor did not know all fiscal policies with the same detail that Grievant knew those policies. Grievant concluded her supervisor was incompetent without first affording her supervisor a reasonable period of time to adapt to a new position. Although Grievant may be difficult to manage, this incident is not one which confirms the University's conclusion.

Grievant contends the University retaliated against her. No credible evidence was presented of retaliation by the University. Grievant's request for relief regarding retaliation is denied.

DECISION

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

¹² The Chief Operating Officer testified that staff were encouraged to express their opinions within and outside of the chain of command.

¹³ On September 19, 2001, Grievant sent her supervisor an email reflecting what may rise to the level of insubordination. She was not issued a written notice for sending the email, but it reflects her approach to her supervisor. The email states:

You are my supervisor and I respect that BUT you can't tell me who to email. That is MY right. I know [the COO] asked that we go through channels but he did nothing before when all of us went running to him. If necessary I will go all the way to [the University President] and take along with me that dumb picture of them fishing that my father displays and ask him in front [of] my father why people are allowed to treat people any kind of way in a university that [he] is president.

Agency Exhibit 13.

APPEAL RIGHTS

You may file an administrative review request within **10 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.
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 state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-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.¹⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5515-R

Reconsideration Decision Issued: October 17, 2002

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

The University argues that the Hearing Officer’s decision is not supported by the facts in evidence and disregards the evidence of disruptive behavior. In support of its position, the University references Grievant’s loudness, mean tone and the reaction of two coworkers to show Grievant’s behavior was disruptive.

The key point overlooked by the University is that Grievant’s anger was to some extent justified by the University’s changing its employee absence notification practice without informing Grievant of the change. She reasonably believed the University was acting contrary to a long-standing notification practice in which she had been centrally involved.

Part of the reason the ASP III was upset with Grievant’s behavior was that the ASP III felt she was being falsely accused of failing to follow proper procedures. As an employee new to the position, the ASP III did not know of the prior notification practice. If the prior practice had been in effect on December 11, 2001 and the ASP III knew of the practice but failed to follow it, the ASP III’s response to Grievant likely would not have been one of challenging Grievant’s behavior. In other words, part of the ASP III’s

reaction to Grievant was based on a false assumption that Grievant's allegation about the correction notification procedure was incorrect.

Not every disagreement, conflict or rude behavior in the workplace rises to the level of disruptive behavior. The University argues that Grievant's apology to the ASP III serves as an admission that Grievant's behavior was disruptive. The Hearing Officer, however, looks from an objective position and sees one employee making statements that upset another employee and then apologizing to the employee with both employees considering the matter resolved. When employees resolve minor conflicts by themselves, the need for disciplinary action lessens.

The University relies on the testimony of the Executive Secretary to show that Grievant's behavior was disruptive. Before the incident involving Grievant, the Executive Secretary had already formulated an adverse opinion about Grievant. When Grievant began speaking to the woman at the copier and expressing her objection to the breach of practice, the Executive Secretary left her workspace and walked to Grievant in order to confront Grievant. The Executive Secretary's testimony that Grievant's behavior was disruptive is lessened because the Executive Secretary aggravated the situation.

The University questions whether Grievant speaks loudly because of her loss of hearing. Grievant's testimony, however, was not rebutted. No evidence was presented suggesting the University has asked Grievant to speak in a lower tone of voice. Grievant's loudness does not support the University's contention that her behavior was disruptive.

The University contends the Hearing Officer's ruling leaves it with "the inability to control and supervise its staff." Grievant's past behavior is not before the Hearing Officer. Assuming the allegations about Grievant's prior behavior are true, it would appear the University has overlooked numerous opportunities to discipline Grievant. The University cannot use this Group I Written Notice to discipline Grievant for her prior behavior.

The University's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. The University simply restates the arguments and evidence presented at the hearing. For this reason, the University's request for reconsideration is **denied**.

APPEAL RIGHTS

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

1. The 10 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 EDR or 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.

Carl Wilson Schmidt, Esq.
Hearing Officer