

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 10/03/02;
Decision Date: 10/04/02; Agency: VCU; AHO: David J. Latham, Esq.; Case
No.: 5531



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5531

Hearing Date: October 3, 2002
Decision Issued: October 4, 2002

APPEARANCES

Grievant
One witness for Grievant
Executive Director for Physical Plant
Three witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for physically threatening an employee.¹ At the third resolution step, the agency unilaterally decided to reduce the level of discipline to a Group I Written Notice. A Group I Written Notice for disruptive behavior was given to grievant.² Notwithstanding the reduction in the level of discipline, grievant requested qualification of the grievance for hearing and the agency head qualified the grievance for a hearing.³ Virginia Commonwealth University (hereinafter referred to as "agency") has employed the grievant as a locksmith for nine years.

On July 15, 2002, the executive director of the physical plant had asked grievant to make a specific key and deliver it to him. Grievant made the key and went to his office but the executive director was in a meeting. Grievant spoke instead with an administrative assistant. He advised her that he had brought a key for the executive director and asked the assistant to give it to him. The assistant asked what the key was for and grievant said he had just told her. The assistant seemed to be somewhat confrontational towards grievant. She then answered a telephone call. After the call, she again asked what the key was for and grievant repeated that he had told her. The assistant refused to accept the key. Grievant put the key and a note on the assistant's desk, and left her office.⁴

When grievant left, he went downstairs to speak with the receptionist. The administrative assistant believed that grievant had left the building and went downstairs to give the key to the receptionist. When she came into the receptionist's office, she found grievant talking with the receptionist. The assistant began complaining about grievant's curt conversation upstairs. She also accused him of throwing the key at her. Grievant denied throwing the key and then began arguing with the assistant telling her that it was her job to simply take the key and do as she was asked. The assistant started to leave but grievant followed her to the door arguing loudly with her. The assistant returned to the front of the receptionist's desk where grievant confronted her face to face, standing no more than one foot away. At one point, he gestured with his hands about 6 - 12 inches away from the assistant's face.

The assistant became scared and asked the receptionist to call campus police. The receptionist dialed the police department and they answered. At this point the assistant decided that it would be quicker to ask the executive director to come out of his meeting. The call to the police department was terminated. The receptionist summoned the executive director who came into the room, and the confrontation ended.

¹ Exhibit 5. Written Notice, issued July 17, 2002.

² Exhibit 2. Revised Written Notice, September 6, 2002.

³ Exhibit 4. Grievance Form A, filed July 23, 2002.

⁴ The assistant states that grievant threw the key and note on her desk; grievant avers that he placed the key and note on the desk.

Grievant has not had any previous encounters with this administrative assistant. The executive director later verbally counseled the assistant because she had the opportunity to walk away from the argument before it escalated but did not do so.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60

⁵ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

provides that Group II offenses includes acts and behavior which are more severe in nature than Group I and are such that an accumulation of two Group II offenses normally should warrant removal. Section V.B.1 defines Group I offenses as least severe; disruptive behavior is an example of a Group I offense.⁶

The Group II Written Notice, in its description of the offense, noted that grievant had entered the administrative assistant's "comfort zone." Grievant took issue with the use of this term because no specific definition was used. Even though the agency rescinded this written notice and substituted a revised written notice without this term, a brief discussion is warranted. The term "comfort zone" is used interchangeably with the term "personal space." Both terms refer to the immediate area around an individual that, if entered by another, causes one to feel uncomfortable. In 1963, researcher Edward T. Hall first coined and defined the term "personal space" as 18 inches to four feet for most Americans.⁷ He further defined as "intimate space" distances from zero to 18 inches. By grievant's own admission, he was well within the assistant's personal space as well as her intimate space when he argued and gestured with his hands.

Grievant acknowledges that he was standing within one foot of the assistant, and that, "When I'm talking, I wouldn't know what I did with my hands." The agency has shown that grievant was within the assistant's intimate and personal space. Moreover, the testimony of two witnesses establishes that grievant was gesturing with his hands within one foot of her face. When one considers that grievant is male and the assistant is female, and that grievant is bigger than the assistant, it is entirely reasonable that the assistant felt threatened by grievant when he was loudly arguing and gesturing only inches from her face. The undisputed evidence establishes that the assistant requested that the police be called and then that the executive director be summoned from an adjoining room because she was fearful. Under these circumstances, the grievant's actions constituted disruptive behavior.

Grievant admitted that he was upset during the confrontation. He contends that he was only trying to defend his integrity when the assistant accused him of throwing the key on her desk. If grievant had limited his interaction to a calm rebuttal of the assistant's accusation, discipline would not have been warranted. However, by walking directly up to the assistant and standing within one foot of her, grievant clearly violated her comfort zone or personal space. When he compounded this by arguing loudly and gesturing with his hands inches from her face, the totality of his behavior became threatening to the assistant. Therefore, the agency has shown, by a preponderance of the evidence, that grievant's behavior was disruptive. Pursuant to the Standards of Conduct such behavior is a Group I offense.

⁶ Exhibit 6. Section V.B.1.e, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁷ See Griffin, Em. (2000) *A First Look at Communication Theory* (4th Ed.) New York: McGraw-Hill.

Grievant argues that the assistant was not disciplined. However, the assistant was verbally counseled for her part in the incident. Since her behavior was not threatening, it was not nearly as serious as grievant's offense.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued to the grievant on July 17, 2002 for disruptive behavior is hereby UPHeld. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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.⁸

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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]

David J. Latham, Esq.
Hearing Officer