

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 04/02/04;  
Decision Issued: 04/05/04; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.;  
Case No. 633



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 633**

Hearing Date: April 2, 2004  
Decision Issued: April 5, 2004

**PROCEDURAL HISTORY**

On October 1, 2003, Grievant was issued a Group I Written Notice of disciplinary action for:

*[Grievant] was working her shift as Hospital Receptionist/Switchboard Operator. Her supervisor approached her to reconcile [Grievant's] Leave Slip and Timesheet. [Grievant] became abusive in her manner and accusatory in tone. [Grievant] was loud and used profanity directed toward her supervisor in the Main Lobby of the hospital.*

On October 30, 2003, 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 March 9, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 2, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative

Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

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

## **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. 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 Department of Mental Health Mental Retardation and Substance Abuse Services employs Grievant as an Administrative Office Specialist III at one of its facilities. Grievant reports to the Facility Director's Administrative Assistant. No evidence of prior disciplinary action was introduced at the hearing.

Grievant sometimes works in the reception workstation at the facility. Her workstation is a small carpeted office with a glass window opening into the main lobby. Visitors to the facility enter into the main lobby and then can speak to the receptionist through the glass window. On the wall opposite the glass window is a door opening into another small room containing photocopy machines and supplies. The photocopy room has a door opening into the administrative hallway. Down the administrative hallway are located offices and a woman's restroom. If a person speaks while standing in the main lobby, his or her voice carries easily because of the masonry flooring in the main lobby. If a person speaks standing in the administrative hallway, however, his or her voice is not elevated because the administrative hallway is carpeted.

Facility employees must receive approval from a supervisor before taking leave. If an employee requests leave in advance and the leave is approved, the employee is not penalized. If an employee is scheduled to work, but calls his or her supervisor on that day to say he or she will not be able to work as scheduled, then the employee is

deemed to receive an "occurrence."<sup>1</sup> After accumulating a certain number of occurrences within a several month period, the employee is subject to counseling and possible disciplinary action.

On September 17, 2003, Grievant submitted a leave activity report form to the Administrative Assistant seeking approval to take annual leave on September 18 and 19th 2003. Grievant's request was approved on September 17, 2003 by the Administrative Assistant. Grievant later submitted a "half sheet" timesheet showing the dates and hours worked for the time period from September 10, 2003 through September 24, 2003.<sup>2</sup> Grievant reported on the half sheet that she worked eight hours of sick leave on September 18, 2003. This was contrary to her original request for annual leave on that day.

On September 29, 2003 at approximately 4:40 p.m., Grievant was working as the receptionist. The Administrative Assistant realized grievance's timesheet conflicted. She walked down the administrative hallway into the reception workstation. She explained the discrepancy to Grievant. The Administrative Assistant informed Grievant that she could take annual or sick leave on September 18, 2003 but if Grievant claimed sick leave, Grievant would receive an occurrence because the sick leave was not approved prior to September 18, 2003.<sup>3</sup> Grievant became agitated that she was being questioned. In a loud voice and angry tone, Grievant said "you cover your ass well." Grievant's comments shocked the Administrative Assistant who then said, "I will leave it as it is" and then walked out the door of the reception workstation and out the door of the photocopy room and into the administrative hallway. Grievant then slammed the door to the reception workstation and yelled something else.

The Quality Manager and the Administrative Support Specialist were speaking to each other and standing approximately 35 feet away from Grievant and were half way down the administrative hallway. The Quality Manager was startled when she heard Grievant say in a loud voice "cover your ass well." The Quality Manager looked down the administrative hallway and observed the Administrative Assistant walking away from the reception workstation. The Quality Manager heard Grievant loudly slam the door. The Administrative Support Specialist also heard Grievant speak loudly but did not discern her words.

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<sup>1</sup> An occurrence is defined as "Absence from work without written supervisor approval on a leave slip before the end of the last worked shift." Agency Exhibit 6.

<sup>2</sup> Agency Exhibit 5.

<sup>3</sup> Hospital Instruction No. 83 does not address this specific situation. If Grievant disputed the Administrative Assistant's interpretation of the policy, she could have addressed her concerns by other means than making disruptive comments to her supervisor.

## CONCLUSIONS OF 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).<sup>4</sup> 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.<sup>5</sup> When Grievant yelled at the Administrative Assistant in an unprofessional and disrespectful manner that the Administrative Assistant was just trying to “cover her ass”, Grievant’s actions were disruptive to the workplace.<sup>6</sup> The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.

Grievant contends she did not use profanity and her bearing was not abusive or accusatory. She asserts that the phrase “cover your ass” is frequently used in the workplace such that her use of the phrase was not offensive when measured by the workplace standard. The evidence showed that Grievant is correct that the phrase is frequently used in her workplace. For example, when two nurses are debating whether to document a fact or event, one nurse might use the phrase to inform the other to document the matter to avoid a problem in the future. Even though Grievant’s statements were not obscene or abusive, they were disruptive and remain subject to disciplinary action.

Grievant argues that she did not raise her voice to the Administrative Assistant. She believes that her voice carried because of the masonry floor in the main lobby thereby giving the mistaken impression to others that she was yelling. The Hearing Officer stood where the Quality Manager was standing in the administrative hallway. Grievant’s representative stood in the reception workstation and spoke in a normal tone. The Hearing Officer could hear only limited sound and could not distinguish any of the words spoken by the Representative. The Hearing Officer concludes that for the Quality Manager to hear Grievant say “cover your ass”, Grievant must have been speaking in a markedly elevated tone of voice. Since the Administrative Assistant was standing next to Grievant when she used the phrase, Grievant’s use of an elevated voice was

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<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>5</sup> DHRM Policy 1.60(V)(B)(1)(e).

<sup>6</sup> Grievant’s comments startled the Administrative Assistant and interrupted the conversation between the Quality Manager and the Administrative Support Specialist. Had members of the public been in the main lobby, they also would have heard Grievant’s outburst.

unnecessary. The Administrative Assistant's reaction of being "shocked" was appropriate and reflects Grievant's inappropriate behavior.

Grievant believes the Agency should have counseled her rather than taken disciplinary action. Although the Agency could have chosen to counsel Grievant, it is not obligated to do so.

Grievant contends the disciplinary action should be mitigated because she was ill on September 29, 2003 and that accounted for her outburst. Grievant's arguments are inconsistent. On the one hand, she contends she did not raise her voice or behave inappropriately; on the other hand, she contends her inappropriate outburst can be explained because she was ill and acted inconsistent with her usual temperament. The Hearing Officer cannot mitigate disciplinary action when the argument for mitigation is inherently inconsistent.

Grievant presented evidence to support her position that the Agency failed to comply with the grievance process prior to the matter being assigned to the Hearing Officer. Grievant also presented that matter to the EDR Director who issued a Ruling Number 2004-680 in response. That Ruling did not grant the relief Grievant requested. The Hearing Officer lacks the authority to overturn a Ruling by the EDR Director and will not consider doing so through this hearing decision.

## **DECISION**

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

## **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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor

Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

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.<sup>7</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.