

Issue: Group I Written Notice (use of obscene language and disruptive behavior); Hearing Date: 10/31/05; Decision Issued: 11/01/05; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8190



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8190

Hearing Date: October 31, 2005
Decision Issued: November 1, 2005

APPEARANCES

Grievant
Representative for Agency
Three witnesses for Agency

ISSUES

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia 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 grievance from a Group I Written Notice for use of obscene language and disruptive behavior.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.² The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") has employed grievant for five years as a direct service associate.

¹ Exhibit 11. Group I Written Notice, issued July 21, 2005.

² Exhibit 12. *Grievance Form A*, filed August 16, 2005.

On June 21, 2005, grievant went into the day hall where a male coworker was already present. The coworker began to “play around” and grievant told him to stop because “I’m mad enough at you already.”³ Grievant then walked into a staff break room (next to the day hall) and the coworker followed asking what she meant by the comment. Grievant said that she had to work the preceding day because the coworker did not report for work. The coworker said he just couldn’t get to work. Grievant started to leave the break room and told him, “If I had known that I would have come and picked [your] ass up.”⁴ Grievant walked back to the day hall and the coworker followed her saying “Well, you don’t have to be a bitch about it.”

As grievant made her statement, the acting charge aide was coming out of the bathroom (located directly across the hall from the break room)⁵ and heard grievant’s statement. At least one client was in the bathroom with the charge aide and other clients were in the day hall when the altercation occurred. The acting charge aide was sufficiently concerned about the verbal altercation that she spoke individually with both grievant and the coworker to make sure the dispute had ended. She also attempted to call two supervisors to report the incident.⁶

After due process notification,⁷ both grievant and the coworker were given Group I Written Notices for use of obscene language and disruptive behavior.⁸

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:

³ Exhibit 4. Grievant’s witness statement, June 27, 2005.

⁴ *Ibid.*

⁵ Exhibit 2. Floor plan of area. Day hall is 239, break room is 209 and bathroom is 241.

⁶ Exhibit 3. Acting charge aide’s witness statement, June 27, 2005.

⁷ Exhibit 6. Letter from Center Director to grievant, July 14, 2005.

⁸ Exhibit 10. Written Notice issued to coworker, July 18, 2005.

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. In all other actions the grievant must present her evidence first and prove her claim by a preponderance of the evidence.⁹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated *Standards of Conduct* Policy No. 1.60 effective September 16, 1993. The *Standards* 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.1 of Policy No. 1.60 provides that Group I offenses include acts and behavior that the least severe.¹⁰ Use of obscene language and disruptive behavior are two examples of Group I offenses.

It is undisputed that grievant and a coworker had a verbal altercation during which both used inappropriate language. Although grievant quibbles about the meaning of the word “ass,” the sentence in which she used it demonstrates that she used it in an abusive manner. Moreover, grievant was admittedly angry at the coworker when she made the statement, further corroborating that it was an abusive statement. The use of obscene or abusive language is a Group I offense.

The acting charge aide who overheard the altercation intervened and spoke with both grievant and the coworker, and then reported the incident to supervision. Because the acting charge aide had to take such actions, she was interrupted from performing her routine duties. Such an interruption constitutes a disruption to normal work activities. Disruptive behavior is also a Group I offense.

Grievant acknowledges what she said but argues that no clients heard her. The evidence regarding this issue is disputed. The coworker states that

⁹ § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

¹⁰ Exhibit 8. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

clients were in the area; the acting charge aide was tending to a client in the bathroom. Grievant acknowledges that at least one client was in the bathroom and that there were clients in the day hall. She testified that she had not yet opened the break room door when she made the offensive statement to her coworker. However, grievant's written statement is not consistent with her testimony because she wrote that she made her offensive statement "as I was opening the door."¹¹ Moreover, the acting charge aide heard grievant's statement. Grievant did not challenge the acting charge aide's credibility and did not offer any motive for the acting charge aide to testify falsely. Accordingly, the preponderance of evidence is that grievant made her statement with the door to the hallway at least partially open and that clients coming from the bathroom or in the adjoining day hall could have heard her.

Grievant also argues that the level of discipline was too harsh for the offense. It is correct that an offense such as occurred in this case *could* have been addressed by counseling as an alternative to disciplinary action. However, because the offense occurred in a client living area, the agency determined that disciplinary action was warranted. When an offense can be dealt with either by counseling or by a Group I disciplinary action, the hearing officer gives some deference to the agency's determination. In this case, regardless of whether clients heard grievant, it is undisputed that grievant's actions constituted disruptive behavior because a supervisor found it necessary to intervene. The agency's decision to issue a disciplinary action rather than just counsel grievant is certainly within the limits of reasonableness.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for use of obscene language and disruptive behavior is hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 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.

¹¹ Exhibit 4. Grievant's witness statement, June 27, 2005.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 15 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 15-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.¹² 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.¹³

[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

¹² An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.