

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 11/30/05;
Decision Issued: 12/20/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8209; Outcome: Agency upheld in full. **Administrative Review: HO
Reconsideration Request received 01/04/06; HO Reconsideration Decision issued
01/18/06; Outcome: Agency upheld in full.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8209

Hearing Date: November 30, 2005
Decision Issued: December 20, 2005

PROCEDURAL HISTORY

On August 5, 2005, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior. On September 2, 2005, 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 he requested a hearing. On November 2, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 30, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

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?

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 Corrections employs Grievant as an Internal Audit Manager within one of its divisions. The purpose of his position is:

Serves as manager in charge of all operational / financial and special audit activities for the Department of Corrections. This includes, but is not limited to, responsibility for planning and scheduling of operational / financial audits; direction and supervision of staff performing audits, as well as personally performing audits.¹

A measure of Grievant's core responsibilities includes:

Communications. Effective in maintaining good working relationships through effective communications with peers, the Inspector General and subordinates; avoids problems related to poor communication, maintains good working relationships with other departmental groups; submits required reports in a timely manner; reports are clear, accurate and complete. Keeps the Inspector General advised of significant issues and provides prompt information on the status of audits.²

¹ Agency Exhibit 4.

² Agency Exhibit 4.

The Agency has evaluated Grievant's work performance as an extraordinary contributor for several years. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Lieutenant NT works for the Department of Corrections. His daily activities include extensive use of his personal computer to access the internet. On July 6, 2005, Lieutenant NT's computer stopped working. He could no longer connect to the internet and perform his duties. Many steps were taken by several people to attempt to restore Lieutenant NT's computer. Grievant participated in attempting to fix Lieutenant NT's computer. At the end of the day, his computer was fully functioning with the exception of his access to the internet.

On July 7, 2005, Lieutenant NT arrived at the parking lot of his office and exited his vehicle. He greeted Ms. KC who was also arriving to work. Ms. KC asked Lieutenant NT how he was doing. Lieutenant NT responded that he was well except that his computer had not been working the prior day and that although most of its functions had been restored, he could not access the internet. Ms. KC offered to take a look at Lieutenant NT's computer. Lieutenant NT agreed and they both entered their office building. Ms. KC worked for the Virginia Information Technologies Agency and, along with other VITA employees, provided services to DOC staff.³

While walking to Lieutenant NT's office, Lieutenant NT and Ms. KC passed Grievant's office. Grievant observed them and stepped into the hallway as they passed. Grievant asked Ms. KC where she was going. Ms. KC responded that she was going to take a look at Lieutenant NT's computer. Grievant did not like Ms. KC's response because the Agency had an informal agreement with VITA that whenever VITA employees were to perform work on one of the Agency's computer's, Grievant was supposed to be notified in advance. No one had notified Grievant that Ms. KC would be working on Lieutenant NT's computer and this concerned him.

Grievant expressed his concerns to Ms. KC about her working on Lieutenant NT's computer without following the customary protocol. Grievant was angry. He did not yell but his voice was raised and he sounded angry. He did not use profanity. He was shaking. His face was flushed and had an angry look.

At the conclusion of Grievant's and Ms. KC's conversation, Ms. KC told Lieutenant NT "I can't look at your computer. I can't help you." She later complained to a supervisor.

The manner in which Grievant communicated his objection to Ms. KC's behavior upset Lieutenant NT. Lieutenant NT felt he had to leave the conflict because he felt it

³ Ms. KC did not report to Grievant.

had gotten out of hand. Mr. RS believed Grievant was not behaving in a professional manner.

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.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. 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.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

“[D]isruptive behavior” is a Group I offense.⁴ Grievant’s behavior was disruptive because (1) he was angry, (2) he communicated that anger through his physical demeanor, (3) Lieutenant NT, Ms. KC, and Mr. RS felt Grievant’s anger, and (4) Lieutenant NT, Ms. KC, and Mr. RS were distracted from their normal work duties by having to consider and respond to Grievant’s behavior. In addition, Ms. KC did not report to Grievant. He should have followed the chain of command in order to criticize Ms. KC’s actions rather than confronting her directly. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice for disruptive behavior.⁵

Grievant contends he was not disruptive but expressing a legitimate concern about the Agency’s operations.⁶ It is sometimes difficult for individuals to realize how others perceive them. This is one of those instances. Although Grievant believed he was under control because he did not yell or curse, his other body language communicated his anger to three people. Although Ms. KC did not testify and she was described as a sensitive person, Lieutenant NT and Mr. RS testified and there is no reason for the Hearing Officer to believe their perceptions of Grievant’s behavior were unreliable. Indeed, Lieutenant NT testified that his customary work duties involve dealing with angry inmates and that he has a good foundation to measure degrees of anger in others.

⁴ DOCPM § 5-10.15(B)(5).

⁵ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*. Although Grievant’s work performance was extraordinary, an employee’s work performance is not listed as a basis for mitigation in the *Rules*.

⁶ Neither party disputes that Grievant should have been notified prior work being done on Lieutenant NT’s computer. Although this was not done, it does not excuse the manner in which Grievant communicated his objection to the absence of his prior notification.

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 **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.
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 14th St., 12th 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 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. 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.⁷

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ 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: 8209-R

Reconsideration Decision Issued: January 18, 2006

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.

Grievant argues that to “imply that someone was angry because they looked angry or had a frown on their face is subjective in nature and does not mean the person was angry.” The evidence in this case is overwhelming that Grievant was angry because he had not been informed prior to work being performed on Lieutenant NT’s computer. Whether or not he actually felt anger, as he defines anger, however, does not change the outcome of this case. Grievant was disciplined for his behavior and his behavior was an intense expression of anger and frustration that was experienced by others.

Grievant argues that the video disc of the area at the time of his interaction with other staff shows he displayed no physical demeanor through his body language or posture. The quality of the video disc, however, was poor. The cameras did not focus on Grievant’s face. Grievant’s disruptive behavior resulted from his words, voice, and facial expressions. The Hearing Officer gave little weight to the video disc.

Grievant argues the witness testimony was different from the initial accounts given to the Inspector General. The Hearing Officer assesses the credibility of witnesses at the time of their testimony. A prior statement is a factor to consider when determining whether a witness is credible. It is not unusual for different witnesses to perceive the same events with some variation. It is also not unusual for a witness’s recollection to vary as time passes. The Agency’s witnesses were credible during the hearing. Any variation in their testimony from prior statements was not significant. This

is especially true, since some prior accounts suggested Grievant was even more disruptive than expressed by the witnesses during the hearing.

Grievant argues that the Hearing Officer assumed what Lieutenant NT and Ms. KC stated happened in the hallway was true. The Hearing Officer relied on the credible account of Lieutenant NT. Ms. KC did not testify and was described as “very sensitive” by the Network Manager. The Hearing Officer also relied on the credible account of Mr. RS. Both men observed Grievant’s disruptive behavior.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant simply restates the arguments and evidence presented at the hearing. For this reason, Grievant’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 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 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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer