

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 12/12/05;
Decision Issued: 12/22/05; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8214; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8214

Hearing Date: December 12, 2005
Decision Issued: December 22, 2005

PROCEDURAL HISTORY

On September 26, 2005, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior. On September 29, 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 she requested a hearing. On November 9, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 12, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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 c

Division staff assembled in the conference room for the meeting. The Intern was sitting at the reception area in order to answer telephones. Approximately 20 minutes after the meeting began, Grievant and the Intern entered the conference room.² Grievant had asked the Intern to attend the meeting because Grievant did not know the Division Administrator had asked that the Intern answer the telephones. The Division Administrator interrupted his presentation and asked Grievant who was covering the telephones. Grievant said it was her intention to answer the telephones and she wanted the Intern to attend the staff meeting. The Division Administrator responded that he wanted Grievant to attend the staff meeting and he wanted the Intern to answer the telephones. Grievant asked whether the telephones could be forwarded to another division. The Division Administrator said “yes” but that is not what he wanted to do. He reiterated that he wanted Grievant to attend the staff meeting and for the Intern to answer the telephones. Grievant disagreed with the Division Administrator. She stood at the end of the conference room table and glared at the Division Administrator for approximately 30 seconds. Grievant then left the meeting with the Intern.

Grievant remained away from the conference room for approximately 30 minutes. She then entered the conference room and sat in a seat against the wall instead of at the table where the other staff were sitting. At one point during the meeting, the Division Administrator asked several staff to offer reports about the status of their projects or activities. When it was Grievant’s turn to comment, Grievant said she had nothing to report even though she was involved in projects that might have been of interest to her coworkers. The meeting ended at approximately 2:30 p.m.

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).³ 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.⁴ Grievant’s behavior was disruptive because: (1) glaring at the Division Administrator for approximately 30 seconds showed disrespect and defiance towards a supervisor and made other employees attending the

² Grievant testified she was late to the meeting because of problems with her car.

³ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ DHRM Policy § 1.60(V)(B)(1)(e).

meeting feel uncomfortable, (2) after Grievant left the meeting and remained away for 30 minutes, she did not learn the information communicated during her absence, and (3) she failed to enhance the quality of the meeting by reporting the status of her activities within the division.⁵ The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.

Grievant argues that another employee came late to the meeting yet he was not disciplined. Grievant's argument fails because Grievant was not disciplined for attending the meeting late. In addition, the other employee notified the Division Administrator before the meeting that he would be late and obtained permission from the Division Administrator to be late.⁶

Grievant asserted that the Agency engaged in gender discrimination. No credible evidence was presented suggesting the Agency took disciplinary action against Grievant because of her gender.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."⁷ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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

⁵ Grievant was annoyed with the Division Administrator and chose not to participate in the meeting.

⁶ When the Division Administrator began the meeting, he informed the attendees that the employee would be late.

⁷ *Va. Code § 2.2-3005.*

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.⁸

[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].

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

Carl Wilson Schmidt, Esq.
Hearing Officer