

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 02/16/06;  
Decision Issued: 02/17/06; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 8261; Outcome: Agency upheld in full; **Administrative Review: HO  
Reconsideration Request received 03/06/06; Reconsideration Decision issued  
04/04/06; Outcome: Original decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8261**

Hearing Date: February 16, 2006  
Decision Issued: February 17, 2006

**PROCEDURAL HISTORY**

On September 8, 2005, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior. On September 24, 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 January 17, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 16, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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 University of Virginia employs Grievant as a dishwasher at one of its dining facilities. On December 5, 2003, Grievant received a Group II Written Notice for leaving the workplace without permission.<sup>1</sup> On April 2, 2004, Grievant received a Group I Written Notice for being involved in a verbal altercation with a co-worker.<sup>2</sup>

On September 7, 2005, Grievant was working near a garbage disposal. The disposal did not have a top. On several occasions in the past, items had fallen into the disposal without anyone knowing this had happened. When the disposal was activated, the items ejected from the disposal potentially causing injury.<sup>3</sup> Grievant knew of this risk. Another employee, Ms. B, approached Grievant and accidentally knocked an item into the disposal. Grievant asked Ms. B if she was going to pick up the item. Ms. B continued to walk away so Grievant made a harsh comment that Ms. B overheard. Grievant and Ms. B began arguing loudly.

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> Agency Exhibit 4.

<sup>3</sup> Grievant presented evidence of utensils mangled by the disposal thereby showing as realistic her concerns about whether items may have fallen into the disposal.

Grievant decided to report the conflict with Ms. B to Grievant's Supervisor. Grievant walked to the Supervisor's office and entered the doorway. The Supervisor's office is located next to an area where customers and employees can observe and overhear loud discussions taking place inside the Supervisor's office. Grievant began talking to the Supervisor who was seated behind her desk and working on her computer. The Supervisor's back was turned to Grievant. While Grievant was talking, the Supervisor was trying to finish what she was working on. Ms. B entered the Supervisor's office. As the Supervisor turned around to speak with Grievant, Grievant and Ms. B had resumed their argument. Grievant was yelling at Ms. B and Ms. B was yelling at Grievant. The Supervisor instructed Grievant and Ms. B to calm down. Grievant and Ms. B disregarded the Supervisor's instruction. The Supervisor instructed Grievant and Ms. B to calm down several more times. They disregarded the Supervisor's instruction.<sup>4</sup> The Supervisor closed her office door and again demanded Grievant and Ms. B calm down. The Supervisor then separated Grievant and Ms. B and told them to leave her office and that she would speak with each of them individually. Grievant and Ms. B left the Supervisor's office. Each later returned and spoke with the Supervisor and the Manager.

### 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>5</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>6</sup> Grievant's behavior was disruptive because she yelled at another employee thereby furthering a conflict. She yelled at the other employee at a location where customers could overhear the argument and possibly form a negative opinion of Grievant as an employee working at the dining facility. She continued to yell after repeatedly being instructed to calm down by her Supervisor. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.

Grievant contends mitigating circumstances exist because the Agency has inconsistently disciplined its employees. She presented evidence of Ms. D who said

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<sup>4</sup> Ms. B also received a Group I Written Notice.

<sup>5</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>6</sup> DHRM Policy § 1.60(V)(B)(1)(e).

she and another employee had a heated argument in a public area of the Facility. The Manager spoke with each employee separately and the matter was resolved without the issuance of disciplinary action. The evidence showed that the conflict involving Ms. D differed from Grievant's conflict. Ms. D and the other employee met with the Supervisor in the Supervisor's office and calmly discussed the dispute. In Grievant's case, Grievant and Ms. B refused to comply with repeated requests by the Supervisor to calm down. Thus, the conflict involving Ms. D does not show an inconsistent application of disciplinary action.

Grievant contends some employees are treated differently because of their race. She presented evidence regarding one employee who got into a dispute with a co-worker in a public area of the Facility, yet the employee did not receive any disciplinary action.<sup>7</sup> The employee was of a race other than Grievant's race. Grievant's Supervisor was not involved in that dispute. The Supervisor had only been employed by the Agency for a few months so she asked the Manager to resolve the matter.<sup>8</sup> The Manager did not testify. It is difficult to determine what factors he considered when declining to take disciplinary action against the employee. Grievant had received disciplinary action in April 2004 for a verbal altercation with another employee. It is unknown whether the other employee had any prior disciplinary action or counseling for conflicts with coworkers. Accordingly, the evidence is insufficient for the Hearing Officer to determine whether the Agency has inconsistently disciplined employees.

Grievant argues that if the Supervisor had immediately told Ms. B to leave the office, none of the argument would have occurred. Grievant asserts she reached the Supervisor's office first and should have been permitted to make her complaint without interruption. Ms. B testified that she was also headed to the Supervisor's office to make a complaint but Grievant merely got there first. The evidence showed that the Supervisor was busy finishing up what she was working on when Grievant entered her office. She did not realize Ms. B had entered the office and did not have time to instruct Ms. B to leave. Grievant and Ms. B began arguing before the Supervisor could have taken any action to remove Ms. B. Even if the Hearing Officer assumes for the sake of argument that the Supervisor should have immediately instructed Ms. B to leave the office, this does not excuse Grievant's disregard of the Supervisor's instruction to calm down.

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<sup>7</sup> Grievant also argued that a 70-year-old woman of one race did not have to engage in certain duties such as lifting trash while an employee of another race and of similar age was required to lift trash. The Agency presented testimony showing that the employee who is not required to lift trash had a doctor's note saying she should not lift trash. Thus, the Agency's different treatment of these two employees was not motivated by racial considerations.

<sup>8</sup> The Supervisor testified that on September 28, 2005, she had three employees in her office who engaged in a heated discussion and refuse to calm down. She issued two of those employees Group I Written Notices. The third employee received a Group III Written Notice and was removed from employment for threatening another employee. All three employees were of a race different from Grievant's.

## 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 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 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.<sup>9</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> 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: 8261-R**

Reconsideration Decision Issued: April 4, 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 restates the arguments she made during the hearing. She adds concerns unrelated to the grievance. She seeks to include in evidence a bent fork that she could not find on the date of the hearing. The fork adds nothing new to the grievance. Grievant offers an investigation report dated March 3, 2004 regarding an equal employment opportunity investigation. Grievant could have presented the report during the hearing, and, thus, it is not new evidence.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. 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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer