

Issue: Group I Written Notice (obscene or abusive language); Hearing Date: 02/09/06; Decision Issued: 02/13/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8262; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8262

Hearing Date: February 9, 2006
Decision Issued: February 13, 2006

APPEARANCES

Grievant
One witness for Grievant
Health Care Administrator
Advocate for Agency
One witness for Agency

ISSUE

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group I Written Notice for use of obscene or abusive language.¹ The grievance proceeded through the resolution

¹ Agency Exhibit 1. Written Notice, issued July 8, 2005.

steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.² The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for five years as a registered nurse (RN).³ In the course of her duties grievant regularly supervises nursing assistants and certified nursing assistants, including the nursing assistant referred to in the following paragraph.

On April 5, 2005, grievant finished her shift and left the facility at 6:02 p.m. A few minutes later grievant called the facility from her mobile telephone and spoke with a corrections officer in master control. Grievant asked whether another RN had left the facility; the corrections officer said she had not seen her leave yet. Grievant then asked, "Is the whore still out there?" When the corrections officer asked who grievant was referring to, grievant responded with the name of a particular female nursing assistant whom grievant supervises. The corrections officer felt from grievant's tone of voice and the manner in which grievant asked the question, that she was angry.⁴ After the corrections officer told grievant that the nursing assistant was in the parking lot talking with a male corrections officer, grievant said, "The bitch works for Santa Claus; ho-ho-ho."⁵ After that conversation ended, grievant called master control again about 20 minutes later and again inquired whether the nursing assistant was still in the parking lot. When the corrections officer advised her that everyone was gone, grievant said, "I'll go to the bitch[']s house; she don't know me."⁶

The corrections officer reported the incident and it was investigated. When grievant was shown the corrections officer's written report of the incident, grievant did not deny that she had made the statements attributed to her. Instead, grievant maintained that she should not be subject to discipline because she was not on duty at the time and because she had made the telephone call from outside the facility. Grievant has had a good relationship with the corrections officer and did not know of any reason why the corrections officer would not make an accurate report of the incident.

Since May 2004, grievant had been seeing the male corrections officer who was talking with the female nursing assistant in the parking lot.⁷ The female nursing assistant is married. Since at least February 2005, grievant knew that the nursing assistant was trying to date the male corrections officer.⁸ The

² Agency Exhibit 2. Grievance Form A, filed August 5, 2005.

³ Agency Exhibit 4. Employee Work Profile Work Description, effective October 25, 2004.

⁴ The nursing assistant provides indirect corroboration of grievant's anger in her written statement of May 23, 2005 (Agency Exhibit 3) in which she relates what the correction officer told her about the telephone conversation the following day.

⁵ "Ho" is a common, vulgar, street term for whore.

⁶ Agency Exhibit 3. Written statement of corrections officer.

⁷ Agency Exhibit 3. Grievant's written chronology of events from late 2004 through May 2005, June 8, 2005.

⁸ *Ibid.*

nursing assistant believes grievant was angry because she [the nursing assistant] had been spending time with grievant's male companion.⁹

Prior to issuing discipline, the health care administrator consulted with the facility's chief nurse and with human resources.

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:

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 employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁰

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. The Standards of Conduct 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 of Policy No. 1.60 provides that Group I offenses include acts and behavior that are the

⁹ Grievant Exhibit 1. Notarized statement of RN supervisor, February 8, 2006.

¹⁰ § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

least serious.¹¹ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.15 of the DOC *Standards of Conduct* addresses Group I offenses, which are defined identically to the DHRM *Standards of Conduct*.¹² Use of obscene or abusive language is one example of a Group I offense.

Grievant acknowledges that she made two telephone calls to the facility and spoke with the corrections officer on the date and at the approximate times cited in the Findings of Fact. However, grievant denies making the three statements in which she referred to the nursing assistant as a whore, a ho, and a bitch. Despite grievant's denial, it is concluded for four reasons that she did make the statements attributed to her. First, the corrections officer wrote a detailed statement about the incident several days after the incident; she credibly affirmed the accuracy of the statement while under oath during the hearing. Second, grievant stated that she and the corrections officer have a good relationship and that there is no reason that the corrections officer would fabricate her statement.

Third, when the health care administrator initially confronted grievant about the incident, grievant did not deny making the defamatory statements. Although grievant testified during this hearing that she had denied the statements, the health care administrator testified credibly that grievant had not done so. Grievant has not shown that the health care administrator had any reason not to be truthful in her recollection of that meeting. Finally, grievant's chronology of events reflects that for some time, she had been upset that the nursing assistant was competing for the attention of the male correction officer whom grievant had been seeing. This is circumstantial evidence demonstrating that, more likely than not, grievant was angry during the April 5, 2005 telephone conversation. Accordingly, the agency has shown by a preponderance of evidence that grievant did make the defamatory statements attributed to her.

Although grievant now denies making the statements, she has not disputed that the language used in the statements was obscene and/or abusive. In this case the words "whore," "ho," and "bitch" are obscene because they are "regarded as taboo in polite usage."¹³ The words are also abusive because they defame the reputation of the nursing assistant. Although the agency did not cite grievant in the Written Notice for engaging in disruptive behavior, agency testimony established that her actions were, in fact, disruptive. Because grievant had made defamatory statements about a subordinate in an obviously angry manner, the corrections officer had to report the incident. This resulted in further investigation, and the nursing assistant learning about the statements. Thus, grievant's remarks did result in disruption of the normal business of the agency.

¹¹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Agency Exhibit 5. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹³ *Merriam-Webster's Collegiate Dictionary*, Tenth Edition.

The use of such language in these circumstances constitutes an offense that warrants corrective action.

Having concluded that grievant committed the offense cited by the agency, and that such an offense warrants corrective action, two questions remain. First, was the offense punishable under the *Standards of Conduct*, and second, what is the appropriate level of discipline?

As to the first question, grievant argues that the offense is not punishable under the *Standards of Conduct* because she made the telephone calls while off duty and from outside the facility. The *Standards of Conduct* policy serves to “limit corrective action to employee conduct occurring only when an employee is at work or when otherwise representing the Commonwealth in an official or work-related capacity...”¹⁴ If grievant had committed this offense while physically at work, there would be no question but that it would warrant corrective action. Conversely, if grievant had made these statements to a peer who was also off duty and not at the facility, the statements would not fall within the purview of the policy. However, in this case, grievant made the statements to a corrections officer who was both on duty, and at the facility. Although grievant was physically outside the facility, her telephone call to master control *inside* the facility effectively constituted being “at work” for purposes of applying Policy 1.60. The on-duty corrections officer could reasonably interpret grievant’s inquiry about the whereabouts of one of grievant’s subordinates as being potentially work-related.

While grievant may have had reason to be upset about an apparently developing relationship between her male friend and another female, such personal matters should always be kept out of the workplace. By using vulgar and obscene language to inquire about a subordinate’s whereabouts with an on-duty corrections officer, grievant allowed her personal animosity to spill into the workplace. This type of behavior is unacceptable from a supervisory employee.

With regard to the level of discipline, the *Standards of Conduct* cite obscene or abusive language as one example of a Group I offense. The preponderance of evidence establishes that grievant did use obscene and abusive language. Therefore, the agency correctly applied the *Standards* by issuing a Group I Written Notice.

DECISION

The decision of the agency is affirmed.

The Group I Written Notice issued on July 8, 2005 is hereby **AFFIRMED**.

¹⁴ Agency Exhibit 5. Section 5-10.7.B.3, Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

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. Address your request to:

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

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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.¹⁵ You must file a notice of appeal with the clerk of the circuit court in the

¹⁵ 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).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁶

[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

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.