Issue: Group I Written Notice (disruptive behavior); Hearing Date: 02/27/06; Decision Issued: 02/28/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8278; Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8278

Hearing Date: February 27, 2006
Decision Issued: February 28, 2006

PROCEDURAL HISTORY

On August 18, 2005, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior. On September 15, 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 31, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 27, 2006, 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 employed Grievant as a Case Management Counselor at one of its facilities. No evidence of prior disciplinary action against Grievant as introduced during the hearing.

Grievant has an office with a steel door and a window in the door. Grievant's office is approximately six to eight feet from the door to the inmate's dorm. An officer sitting in the control booth can look inside Grievant's office, if the window is not blocked. Several employees had placed papers on the windows to their doors thereby obstructing the view. The Major instructed the Institutional Safety Officer (ISO) to make sure employees did not have papers covering their windows.

On August 17, 2005, the ISO, Lieutenant, and Sergeant entered the building where Grievant's office was located. Grievant had an 8.5" by 11" sheet of paper covering part of the window to her office.[1] The ISO told the Lieutenant that the paper needed to be removed. The Lieutenant opened Grievant's door and told Grievant that the paper needed to be removed. He closed the door. Grievant got up from her desk

[1] Two other counselors had placed sheets of paper in their windows. Although those two counselors were not in their offices at the time of the inspections, they were notified that the paper had to be removed.

and walked to the door. She opened the door and said "Every time I post it outside, the inmates pull it off." She also asked where she could put the piece of paper. The ISO said "That's why bulletin boards are posted by the counselor's office for that purpose." Grievant responded in a loud and angry voice, "I will remove it when you find me a place to put it." Grievant then stepped back inside her office and slammed the steel door. Several inmates heard the door slam. As Grievant walked back to her desk, she said in an aggressive and even louder voice, "If it ain't one god damn thing, it's another!"

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.[2] On August 17, 2005, Grievant was disruptive for several reasons. First, she spoke loudly and angrily to the ISO. Her behavior was not consistent with how other employees communicated and how the Agency expected its employees to communicate. Second, she slammed the door to her office.[3] Several inmates heard the door slam and began a discussion with security personnel about the incident. Third, she expressed contempt for the ISO's instruction by saying "if it's not one god damn thing, it's another."[4] The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.

Grievant contends her behavior was not disruptive. She argues the impact of her behavior is being overstated by the Agency. DOCPM § 5-22.6(D) states that "[a]t times, employees should be respectful, polite, and courteous in their contact with … other employees." Grievant was not respectful, polite, or courteous in her response to the Lieutenant and the ISO. As measured by the policy, the Agency's expectations for Grievant's behavior were not met. No evidence was presented showing that the ISO or Lieutenant had any motive to overstate their concerns about Grievant's behavior.

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[2] DOCPM § 5-10.15(B)(5).

[3] Grievant argues that she did not intend to slam the door. She argued that she was surprised when she heard the door slam so loudly. In order to support issuance of a Group I Written Notice, it is not necessary for the Agency to show that Grievant intended to behave inappropriately. It is only necessary for the Agency to show that Grievant caused the action. The Agency has done so.

[4] Grievant contends she did not use the word "god" in this statement. If the Hearing Officer assumes for the sake of argument that she did not use the term "god", the statement remains a significant expression of contempt for the ISO's legitimate request.

Grievant contends the disciplinary action should be mitigated. *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…."[5] 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.

Grievant contends the Agency is retaliating against her regarding an earlier Equal Employment Opportunity complaint filed by another employee. An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[6] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity.

Grievant's claim of retaliation is not supported by the evidence. At the time he issued the Written Notice, the Warden did not have knowledge of any grievance filed by Grievant. The Warden was aware that another employee had filed an EEO complaint against Grievant. The EEO complaint filed by another employee is not a protected activity in this grievance because the EEO complaint was not filed by Grievant. In other words, Grievant did not engage in a protected activity.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

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[5] *Va. Code § 2.2-3005.*

[6] *See* Va. Code § 2.2-3004(A)(v*)*. Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

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]

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

[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