

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 07/12/07;  
Decision Issued: 07/13/07; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 8626; Outcome: No Relief – Agency upheld in full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8626**

Hearing Date: July 12, 2007  
Decision Issued: July 13, 2007

**PROCEDURAL HISTORY**

On March 21, 2007, Grievant was issued a Group II Written Notice of disciplinary action for violating DHRM Policy 1.75, Use of Internet and Electronic Communication Systems. On March 27, 2007, 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 June 14, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 12, 2007, 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 Old Dominion University employees Grievant as an Administrative Specialist II. She has been employed by the Agency for approximately 14 years. No evidence of prior active written disciplinary action against Grievant was introduced during the hearing.

The Practical Nurse works in the same office as does Grievant. Prior to February 28, 2007, Grievant and the Practical Nurse were good friends. They discussed personal, family, and work matters regularly.

The Practical Nurse has asthma that is sometimes triggered by the smell of perfume. All of her coworkers including Grievant were aware of her sensitivity. Her sensitivity worsened over the prior two years. She sought a formal accommodation from the Agency. In February 2007, the Agency began treating her as a person with a disability and afforded her an accommodation of a fragrance-free work environment. On February 13, 2007, the Unit Director sent an email to staff including Grievant requesting the staff be considerate of coworkers by not wearing perfumes or other scents to work because some staff, such as the Practical Nurse, were sensitive to these scents. On December 22, 2007, the Unit Director told staff including Grievant during a

staff meeting that they should “try to wear neutral scents in regards to perfumes and lotions; avoid strong fragrances.”

On approximately February 26, 2007, the Practical Nurse complained to the Unit Director that she could smell perfumes in the workplace. The Unit Director spoke with Grievant’s Supervisor regarding the Practical Nurse’s complaint. On February 28, 2007, the Supervisor met with Grievant and asked Grievant if the Practical Nurse had spoken with Grievant about Grievant’s use of fragrance. Grievant said “no”. The Supervisor said that the Practical Nurse’s complaint would have to be forwarded to Human Resources for review.

Grievant construed her conversation with the Supervisor to mean that the Practical Nurse had accused Grievant of wearing perfume contrary to the Unit Director’s instruction. Grievant was upset that the Practical Nurse had complained to the Agency’s managers instead of speaking directly with Grievant so that Grievant could explain that she was not wearing perfume.

On February 28, 2007, Grievant used the Agency’s computer system to send an email to the Practical Nurse as follows:

[Practical Nurse’s first name] you truly disappoint me! Of all the people in the [unit] you know if you have an issue with me you can express it to me. I know all about your sensitivity, but you seem very inconsiderate of others, all you care about is yourself. I am very sensitive of your problems, but you are only interest[ed] in having your way; you should be ashamed of yourself. The people in this [unit] do not need much to send them to human resources and in walks, [Practical Nurse’s name], one of Satan’s dupes. I suggest you go to these same people about an issue you may have about [name of another employee] and please let me know how YOU are treated. You have allowed them to use you in a way I thought you were [too] intelligent to fall victim to such deceit; I was wrong.<sup>1</sup>

The Practical Nurse read the email when she returned to work. The Practical Nurse was shocked, upset, and in disbelief. She cried upon reading the email. She had difficulty treating a patient that day. The Practical Nurse believed Grievant was attacking her because of her disability. The Practical Nurse is a very religious woman. She was offended and insulted by being referred to as Satan’s dupe. After receiving the email, the Practical Nurse found it difficult to work with Grievant, and that difficulty continues today.

## CONCLUSIONS OF POLICY

---

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

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>2</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).

DHRM Policy 1.75, Use of Internet and Electronic Communication Systems, prohibits employees from using the Agency’s computer system to send emails “transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages ....”

“Failure to ... comply with established written policy” is a Group II offense.<sup>3</sup> Grievant’s email was contrary to DHRM Policy 1.75 because it was intimidating and harassing. The third sentence of the email indicates Grievant knew of the Practical Nurse’s sensitivity and that the Practical Nurse was inconsiderate of others who wished to wear fragrances. The fourth sentence of the email suggests the Practical Nurse should be ashamed of herself because of having her own way regarding her sensitivity to fragrances. When the email is considered as a whole, it was reasonable for the Practical Nurse to feel intimidated and harassed by Grievant for having a sensitivity to fragrances. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant’s actual complaint against the Practical Nurse was one of etiquette. In other words, Grievant was upset that the Practical Nurse complained about Grievant to the Agency’s managers instead of speaking directly with Grievant.<sup>4</sup> That message is lost in Grievant’s email. Grievant’s email grossly exceeded the type of response appropriate to address Grievant’s concerns about the Practical Nurse’s perceived oversight. Grievant could have expressed her concerns in a much less caustic manner and without giving the appearance that Grievant was objecting to the Practical Nurse’s sensitivity to fragrance.

*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

---

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>3</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>4</sup> Grievant believes that the Practical Nurse specifically named Grievant as someone wearing perfume when the Practical Nurse spoke with Agency Managers. No evidence has been presented to suggest this is true. It appears that the Practical Nurse’s complaint to Agency Managers was about staff in general rather than Grievant in particular.

Resolution....”<sup>5</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because she did not intend to offend the Practical Nurse but rather intended to communicate her disappointment that the Practical Nurse did not come to Grievant first before complaining to management. To the extent Grievant’s intent is a mitigating factor, the language she chose to express her message was an aggravating factor eliminating the need to mitigate the disciplinary action. Telling the Practical Nurse that she should be “ashamed of yourself”, “only interested in having your way” and “one of Satan’s dupes” are sufficiently offensive so as to counter any mitigating circumstances. In light of the standard set forth in the *Rules*, 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 II 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

---

<sup>5</sup> Va. Code § 2.2-3005.

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 all of your appeals to the other party and to the EDR Director. 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>6</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.