

Issue: Group II Written Notice with suspension (workplace harassment); Hearing Date: 09/06/07; Decision Issued: 09/07/07; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 8668; 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: 8668**

Hearing Date: September 6, 2007  
Decision Issued: September 7, 2007

**PROCEDURAL HISTORY**

On May 7, 2007, Grievant was issued a Group II Written Notice of disciplinary action with a four work day suspension for workplace harassment. On June 6, 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 July 30, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 6, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

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 Correctional Education employs Grievant as a Teacher at one of its facilities. She began working for the Agency on June 25, 1998. She has one prior active Group I Written notice issued in September 2005 for excessive tardiness.

The Librarian worked at the facility with Grievant. She has been living in the United States for 20 years. She came from Taiwan and is Chinese.

A telephone is located in the library at the facility and is locked in a desk drawer throughout the day to prevent Wards from using the telephone. Staff are permitted to use the telephone during work breaks. The Librarian usually unlocks the drawer and removes the phone prior to scheduled staff breaks.

On March 5, 2007, the Librarian had not removed the phone from the drawer prior to the beginning of the staff lunch break. Grievant and another employee were discussing what they wanted for lunch. They wanted to use the telephone to call for lunch and then pick it up. Grievant turned to the Librarian and asked for the phone. The Librarian said, "The drawer is not locked, help yourself." Grievant became upset and angrily stated, "[the Librarian's last name], I am tired of your attitude with me. You are not going to get smart with me like that. You need to take your attitude and go back to Asia." The Librarian was stunned and speechless because of Grievant's statement.

Grievant's comment caused the Librarian to become upset. She interpreted Grievant's comment to be a racial slur against her. The Librarian felt Grievant had been disrespectful towards her and that Grievant was not in a position to tell anyone where to go. The Librarian believed Grievant was discriminating against her because of her race. The Librarian went to the restroom and cried. The Librarian walked to the Principal's office and asked if she could go home. The Principal observed that the Librarian was upset and about to cry. Because of the Librarian's demeanor, the Principal permitted the Librarian to leave work early.

## 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>1</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).

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, natural origin, age, sex, religion, disability, marital status or pregnancy."<sup>2</sup> DHRM Policy 2.30 defines workplace harassment as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Grievant's comment to the Librarian was unwelcome. Grievant's comment showed hostility towards the Librarian. It was directed at the Librarian because of the Librarian's Asian descent. Grievant's comment interfered with the Librarian's work performance because the Librarian was so upset that she could not finish her workday. The Librarian's opinion of Grievant also changed. Grievant unreasonably interfered with the Librarian's work performance because of Grievant's harassing comment. The

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>2</sup> DHRM Policy 2.30.

Librarian's reaction to Grievant's offensive comment was reasonable under the circumstances. To suggest that a resident of Virginia should return to a continent where she does not live, is offensive and inappropriate. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice. A suspension of up to 10 workdays is appropriate upon the issuance of a Group II Written Notice. Grievant received a four workday suspension and that suspension must be upheld.<sup>3</sup>

*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...."<sup>4</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. She argues that she did not intend to offend the Librarian. Grievant contends she is not a racist. She argues that the Librarian treated white employees differently than African American employees. She argues that the disciplinary action is too harsh. These arguments fail. It is not necessary for the Agency to show that Grievant intended to offend the Librarian. Grievant's comment was intentional; her comment was not inadvertent. She knew or should have known that suggesting the Librarian take her attitude back to Asia would be offensive to the Librarian. The Agency did not allege that Grievant is a racist. The Agency alleged Grievant made a racial comment and the Agency has established that Grievant made a racial comment to the Librarian. If the Hearing Officer were to assume for the sake of argument that the Librarian treated employees differently based on their race, this would not justify Grievant's inappropriate comment towards the Librarian. Grievant's remedy would have been to report her concerns to Agency managers. The disciplinary action against Grievant is not too harsh. Failure to follow established written policy is normally a Group II offense. The Agency's action is consistent with the authority given to it by DHRM Policy 1.60, Standards of Conduct.

Grievant also argued that the remedy sought by the Librarian was a meeting with Grievant, not disciplinary action against Grievant. This argument fails. Decisions regarding what level of disciplinary action to take against an employee who has

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<sup>3</sup> It is not necessary for the Hearing Officer to address whether Grievant also created a hostile work environment because the Agency otherwise has presented sufficient evidence to show workplace harassment as defined by DHRM Policy 2.30.

<sup>4</sup> *Va. Code § 2.2-3005.*

engaged in inappropriate behavior are made by Agency managers and not by an employee who may have been affected by the inappropriate behavior. 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 with suspension 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 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>5</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>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.