

Issues: Group II Written Notice with termination (due to accumulation) (failure to follow instructions and aggressive behavior); Hearing Date: 10/05/07; Decision Issued: 10/12/07; Agency: VDOT; AHO: William S. Davidson, Esq.; Case No. 8715; 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 No: 8715

Hearing Date: October 5, 2007  
Decision Issued: October 12, 2007

**PROCEDURAL HISTORY**

On July 11, 2007, the Grievant was issued a Group II Written Notice for failure to follow supervisor's instructions and showing a pattern of aggressive and inappropriate behavior. Inasmuch as the Grievant had an existing Group II Written Notice on his record, and because the Agency found no mitigating circumstances, the Grievant's employment was terminated based on the accumulation of two (2) Group II Written Notices.

On July 21, 2007, the Grievant filed a grievance to challenge the Agency's action. The outcome of the Second Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 13, 2007, EDR assigned this appeal to the Hearing Officer. On October 5, 2007, the hearing was held at the Agency's location.

At the hearing, the Agency proffered as Agency Exhibit 1, a notebook with six (6) tabs. That notebook was received into evidence in its entirety as Agency Exhibit 1. The Grievant adopted as Grievant's Exhibit 1, all of the documents contained behind Tab 6 of Agency Exhibit 1. The Grievant objected to the Group I Notice that was located at Tab 4, Page 4 of Agency Exhibit 1. That objection was sustained and the Hearing Officer disregarded the Group I Written Notice.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Representative  
Agency Party  
Witnesses

**ISSUE**

1. Did the Grievant fail to follow Supervisor's instructions and did he show a pattern of aggressive and inappropriate behavior?

2. Were there mitigating circumstances justifying 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 Grievant has been a mechanic for the Agency for several years. His employment was terminated on July 11, 2007.

On February 17, 2006, the Grievant was issued a Group II Written Notice for disruptive and intimidating behavior and failing to comply with his Supervisor’s instructions. This resulted in a suspension for four (4) days.<sup>1</sup> Simultaneous with the issuance of that Group II Written Notice, the Grievant was referred to the Agency’s Safety and Health Office for help in anger management.<sup>2</sup>

On July 3, 2007, with proper authority, the Grievant went to the Mancon parts area to request parts that he needed to continue performing his work. When he arrived at the Mancon area, he was told by the representative there that it would take approximately thirty (30) minutes to fill his order as there were two (2) orders in front of him. Witnesses for the Grievant said that this statement was made belligerently and aggressively and witnesses for the Agency said that it was not and that it was made in a normal tone of voice.

The Grievant, who had a stopwatch built into his watch, turned the stopwatch on and either knelt or squatted in the parts area. Witnesses for the Grievant indicated that he was calm and perfectly polite. Witnesses for the Agency indicated to the contrary. The Mancon representative testified that, at some point, he suggested to the Grievant that, “he wished the Grievant’s Superior was there to see him squatting on the floor.” The Mancon representative testified that he said this in a normal tone of voice but acknowledged that it was intended to cause the Grievant to consider if he was acting properly by squatting on the floor. The Grievant’s witnesses indicated that this was said in a belligerent tone of voice.

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<sup>1</sup> Agency Exhibit 1, Tab 4

<sup>2</sup> Grievant Exhibit 1, Tab 4, Page 3

The Grievant's witnesses indicated that the Mancon representative questioned whether or not the Grievant had proper identification. The Mancon representative denied making such a statement.

All witnesses indicated that there was no physical altercation or raised voice used by the Grievant in the parts area. Subsequently, after approximately seventeen (17) minutes, the order was filled and the Grievant returned to his work area.

Upon arriving at his work area, the Grievant and a co-worker entered into a conversation that was of sufficient volume that the Grievant's immediate Supervisor heard the conversation and came out of his office to inquire as to exactly what was transpiring. There was conflicting testimony as to whether the Supervisor heard this conversation as the Grievant and a co-worker passed his office on the way to the work area or whether or not it was heard for the first time while they were in the work area. The Hearing Officer heard testimony from at least two (2) witnesses that indicated that the work area might be forty (40) to sixty (60) feet from the Supervisor's office, from another witness testimony that it might be a hundred (100) feet, and from yet another witness that it might be as much as two hundred (200) feet.

In any event, the Supervisor approached the Grievant and the Grievant was extraordinarily loud and thrust his arm into the vicinity of the Supervisor's face and said, "Look at this, it was twenty minutes to get the part." There is a conflict as to whether the Grievant was merely showing the Supervisor his stopwatch or whether it was an aggressive and potentially intimidating display toward the Supervisor.

The Supervisor testified that he was threatened and he was intimidated and he left the scene immediately and called his Supervisor. They both confronted the Grievant on July 6, 2007 and told him that he should prepare a written statement over that weekend setting forth any justification that he had for his action and any mitigating circumstances that he might have, as they were considering this as a potential disciplinary matter. Subsequently, the Grievant did not prepare a written statement and advised his Supervisor that he did not write well. On July 11, 2007, the Grievant was issued the Group II Written Notice and was terminated.

The Hearing Officer heard from several witnesses that the Grievant was loud enough on the shop floor to be disruptive. One witness indicated that this happened one, two or three times a week. Also, the written statements introduced by the Agency supported this conclusion.<sup>3</sup>

There was substantial conflict in the evidence that the Hearing Officer heard and the Hearing Officer had to make determinations based on the totality of what each witness said and their demeanor in their testimony. Based on this, the Hearing Officer finds that the Grievant was sufficiently loud and out of control and that it was reasonable for the Supervisor to feel that the Grievant's behavior was aggressive and intimidating. The Hearing Officer finds that the Grievant had a prior Group II Written Notice for nearly identical behavior and had been counseled and sent to an anger management program for this very issue.

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<sup>3</sup> Agency Exhibit 1, Tab 5

## CONCLUSIONS OF POLICY

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. The dual goals reflect a valid governmental interest in and responsibility to its employees in the workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides in 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 that have access to the procedure under Section 2.2-3001.

DHRM Policy and Procedure 1.60 is the Standards of Conduct for employees. A second active Group II Written Notice normally results in discharge.<sup>4</sup>

## MITIGATION

*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>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.

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<sup>4</sup> Grievant Exhibit 1, Tab 3

<sup>5</sup> Va. Code § 2.2-3005

The Hearing Officer finds no basis for mitigation in this matter. The Grievant was disciplined properly. In addition, the Grievant had a prior Group II Written Notice for substantially similar conduct. For this, the Grievant had been sent to an anger management program by the Agency and had been counseled numerous times.

### **DECISION**

For reasons stated herein, the Agency's issuance to the Grievant of a second Group II Written Notice and termination of Grievant is **upheld**.<sup>6</sup>

### **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> Street, 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 Street, Suite 400  
Richmond, VA 23219

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<sup>6</sup> Because the disciplinary action is upheld, there is no basis to change the Grievant's eligibility for rehire.

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 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>7</sup> 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>8</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]

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William S. Davidson  
Hearing Officer

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<sup>7</sup>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).

<sup>8</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.