

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 01/07/08;
Decision Issued: 01/11/08; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8760; 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: 8760

Hearing Date: January 7, 2008
Decision Issued: January 11, 2008

PROCEDURAL HISTORY

On June 13, 2007, Grievant was issued a Group I Written Notice of disciplinary action for inadequate performance of his job duties and the standard for customer service.¹ On June 13, 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 he requested a hearing. On December 12, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 7, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

¹ The Written Notice originally identified three instances of concern regarding Grievant's work performance. At the hearing, the Agency chose to present evidence regarding only one of those instances and withdrew its allegations against Grievant regarding the other two instances.

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:

Old Dominion University employs Grievant as a Systems Administrator. The chief objective of his position is:

In support of the Center and its research (funded and unfunded), the computer systems engineer is responsible for the supervision, implementation, diagnosis, maintenance, security, back ups, and repair of all aspects of the Center computer network, which consists of UNIX (Solaris, SGI), Linux, Macintosh and Windows operating systems on workstations, servers, multiprocessor clusters, network printers and various networking devices. Integration of software applications. Provide help desk support and training on operating systems and software. Supply maintenance contracts and upgrade equipment as required. Provide necessary budget information to the Center Director.²

² Hearing Officer Exhibit 1.

Dr. H had been asked by the Department Chair to organize the transfer of an instrument from one building to another on campus.³ The instrument was large and weighed approximately 700 pounds. It contained a radioactive Cesium137 source and could only be moved by individuals certified to handle radioactive material.

Grievant was involved in moving many of the items from the building. He was concerned that if the contents of the building were moved by the deadline but the instrument remained in the building, the instrument may be at risk of damage. Grievant was concerned that Dr. H was not timely and efficiently coordinating the move of the instrument. He spoke with the Supervisor about moving the instrument. The Supervisor told Grievant that it was up to Dr. H to coordinate moving the instrument and that he should not assume responsibility for that task.

On April 24, 2007, Grievant sent Dr. H an email telling her that he had started to organize the move. Dr. H replied by email on April 25, 2007 outlining her efforts with respect to the move. She asked Grievant not to get involved with moving the instrument until she had secured a date for moving the instrument.

On April 26, 2007, Grievant and Dr. H attended a social function on campus during work hours. Grievant engaged Dr. H in a conversation about the instrument.⁴ He said he had already moved the instrument from the bench top to a wooden table. Dr. H was concerned that this may have damaged the instrument because the instrument should only have been moved by a professional. She told Grievant again that she was organizing the transfer of the instrument. She asked him not to get involved but rather to leave it to her. Grievant told her he was considering getting some of his Navy friends who worked on nuclear submarines to move the instrument. Dr. H again stated that the instrument was only to be moved by engineers from the instrument's manufacturer. Grievant moved a step closer to Dr. H⁵, he raised his voice⁶, and pointed his finger at Dr. H's face, and said "I have been here for 10 years, this is a state building and I am responsible." Dr. H felt threatened and scared by Grievant's behavior.⁷ She turned and walked away. She complained to the Department Chair about Grievant's behavior. The Agency obtained statements from various witnesses and concluded disciplinary action was appropriate.

CONCLUSIONS OF POLICY

³ The Agency has sold the building containing the instrument and was attempting to vacate the building.

⁴ Grievant had known Dr. H for approximately six years.

⁵ Grievant moved from approximately four feet away from Dr. H to about three feet from her.

⁶ Grievant raised his voice loud enough to attract the attention of another employee standing approximately eight to ten feet away.

⁷ Dr. H testified that Grievant's demeanor was one of a person "telling you off."

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.”⁸ 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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.”

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant’s Employee Work Profile creates an expectation regarding “Customer Relations” as follows:

Provide positive and responsive customer service to our internal and external users that reflects the Center’s mission and values. Maintain effective working relationships with colleagues through courteous, constructive and professional interaction.⁹ ***

Grievant did not comply with the Customer Relations expectation established in his Employee Work Profile during his interaction with Dr. H. He damaged his working relationship with Dr. H because he (1) unnecessarily raised his voice while speaking to Dr. H, (2) stepped towards her even though she could adequately hear him, and (3) pointed his finger towards her face. Grievant knew or should have known that his demeanor would be perceived as hostile by Dr. H. Grievant was not courteous, constructive, and professional towards Dr. H on April 26, 2007. Her behavior of turning and walking away confirms this conclusion. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant contends he was not unprofessional towards Dr. H but rather was being “proactive and direct” in his communication. The evidence, however, showed that Grievant’s behavior exceeded the expectation set forth in his Employee Work Profile. He was counseled in 2006 regarding the importance of customer relations as part of his work duties.

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

⁸ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁹ Hearing Officer Exhibit 1.

Resolution....”¹⁰ 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. In light of this standard, 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 I 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
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

¹⁰ Va. Code § 2.2-3005.

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.¹¹

[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

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.