

Issue: Group II Written Notice (threatening/coercing behavior); Hearing Date: 12/04/08; Decision Issued: 12/05/08; Agency: ODU: AHO: Carl Wilson Schmidt, Esq.; Case No. 8961; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8961

Hearing Date: December 4, 2008
Decision Issued: December 5, 2008

PROCEDURAL HISTORY

On June 16, 2008, Grievant was issued a Group II Written Notice of disciplinary action for threatening or coercive behavior. On July 2, 2008, 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 October 15, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 4, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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:

Old Dominion University employs Grievant as a Computer Administrator. Grievant had prior active disciplinary action. On June 13, 2007, Grievant received a Group I Written Notice for unsatisfactory performance of his job duties and the standard for customer service.

The Graduate Student rented a car from a rental company. He and another employee intended to drive to another location as part of their work duties. The rental company delivered the vehicle to the Facility at 8:50 a.m. The Graduate Student had not yet arrived at the Facility. In order to provide a favor to the Graduate Student, Grievant accepted the vehicle on the Graduate Student's behalf.

At approximately 9:10 a.m., the Graduate Student arrived at the Facility and attempted to locate the rental car. He was informed that Grievant had accepted the vehicle. The Graduate Student walked to the first floor lobby of the Facility and observed the Grievant. The Graduate Student noticed that Grievant's face was flushed and he appeared angry. The Graduate Student concluded that Grievant was angry at the Graduate Student for being late. The Graduate Student formed this opinion based on his prior interactions with Grievant in which Grievant displayed anger.

The Graduate Student walked towards Grievant, stopped, and stood approximately two feet from Grievant. The Graduate Student spoke first. He said, "I am not going to listen to you." Grievant tried to speak to the Graduate Student about the car rental. The Graduate Student "cut off" Grievant and said, "I am not going to listen to

you." Grievant became angry at the Graduate Student because of his comments. Grievant yelled "f--k you!", threw the keys he was holding in one hand upward and to the side, threw the paper he was holding in the other hand upward and to the side, turned and began walking towards the elevator and away from the Graduate Student. As Grievant was walking away from the Graduate Student, he continued to argue with the Graduate Student and said "f--k you" a second time. As he approached the elevator approximately 50 feet away from the initial confrontation, Grievant yelled "f--k you" a third time.

During the hearing, the Graduate Student testified initially that he was not threatened by Grievant's behavior because of the location of the conflict, namely their workplace. Later he testified he may have had some brief concern about physical harm when Grievant threw the keys and the paper in the air.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"Threatening others" is a Group III offense.² Webster's New Riverside Dictionary defines "threat" as: "1. An expression of the intent to inflict harm. 2. A possible source of danger: menace." One could argue that because Grievant said "f--k you" to the Graduate Student while standing within 2 feet of him, Grievant threatened the Graduate Student. The words "f--k you" are "fighting words" which may be reasonably construed as presenting a threat. In this instance, however, Grievant said "f--k you" at the same time he was turning away from the Graduate Student and walking away from the Graduate Student. Applying an objective standard, Grievant's action of turning and walking away from the Graduate Student revealed his intent to avoid a physical confrontation with the Graduate Student. Accordingly, the evidence is insufficient to conclude that Grievant threatened the Graduate Student.

"[D]isruptive behavior" is a Group I offense.³ Grievant's behavior was disruptive because he cursed at another person and threw keys and paper into the air. Grievant's behavior was upsetting to the Graduate Student and other employees who observed the

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

² See Attachment A, DHRM Policy 1.60.

³ See Attachment A, DHRM Policy 1.60.

incident. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

Grievant argued that the building in which the altercation occurred was not owned by the Commonwealth and, thus, the Agency lacked jurisdiction to discipline him. This argument fails because Grievant was acting in his capacity as an employee of the Agency and being compensated for his work by the Agency.

The Agency may issue a Group II Written Notice if the employee has an active Group I Written Notice for the same offense in his personnel file. In this case, Grievant received a Group I Written Notice on June 13, 2007. Although Grievant's behavior on that date is similar to his behavior on May 29, 2008, the offenses are not the "same offense". The charge against Grievant on June 13, 2007 was for unsatisfactory performance of his job duties and the standard for customer service. The charge against Grievant on May 29, 2008 was for threatening or coercive behavior.⁴ The evidence is insufficient to elevate Grievant's behavior from a Group I offense to a Group II offense.

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 *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 further 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 **reduced** to a Group I Written Notice.

⁴ In the Supervisor's "due process memo", the Supervisor notified Grievant of his intent to issue a Group II Written Notice for failure to comply with the Code of Ethics, the Standards of Conduct and the expectation stated in his position description. The memo further states that Grievant violated the standard for service in his position description namely, "[m]aintain effective working relationships with colleagues through courteous, constructive and professional interaction." The Written Notice, however, charges Grievant with threatening or coercive behavior, an offense that can be a Group III offense.

⁵ *Va. Code § 2.2-3005.*

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
600 East Main St. STE 301
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.⁶

⁶ 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

Carl Wilson Schmidt, Esq.
Hearing Officer