

Issue: Group I Written Notice (argumentative behavior); Hearing Date: 12/19/08;
Decision Issued: 12/22/08; Agency: GMU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8997; 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: 8997

Hearing Date: December 19, 2008
Decision Issued: December 22, 2008

PROCEDURAL HISTORY

On July 31, 2008, Grievant was issued a Group I Written Notice of disciplinary action for argumentative behavior.

On August 28, 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 November 21, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 19, 2008, 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:

George Mason University employs Grievant as a Plumber. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On September 26, 2007, Grievant received a performance evaluation stating, in part:

[Grievant] has started to become argumentative in certain situations and he needs to just start following directions from his supervisors without unnecessary comment.

Grievant's Supervisor had counseled him on at least 25 occasions over an unspecified period of time about his argumentative behavior.

On June 18, 2008, Grievant was assigned to replace a water heater at the University President's residence. He experienced difficulty with the soldering of pipes. The pipes were cut in a ragged manner and crushed in places. Only a small amount of solder stuck to the surface of the pipe with no evidence of solder being drawn into the joint. Grievant did not finish the installation by the end of his shift and another employee completed the task.

On June 19, 2008, Grievant's Supervisor spoke with Grievant about his inability to adequately replace the water heater. After the Supervisor expressed his concern about Grievant's work performance on the prior day, the Supervisor told Grievant that

he would have to attend training to improve his soldering skills. Grievant became loud and argumentative. He told the Supervisor he would not attend any such training. Grievant believed he was proficient in soldering and refused to attend training.

The Manager overheard the conversation between Grievant and the Supervisor. The Manager approached Grievant and began discussing the need for soldering. The Manager said to Grievant that they would have to teach each other how to solder. Grievant responded that he had 17 years of experience and "you are not going to tell me how to solder". The Manager said "Are you refusing to take the training?" Grievant responded "yes." In order not to single out the Grievant, the Agency held soldering training a few days later for all of its employees in the unit. Grievant participated in that training.

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."

Disruptive behavior is a Group I offense.² Grievant's behavior was disruptive because he was loud and argumentative. Grievant upset and frustrated the Supervisor and Manager thereby distracting them from their other duties in order to address Grievant's behavior. Employees are expected to follow instructions of their supervisors if those instructions are legal and ethical. An employee is not entitled to ignore a supervisor's instruction simply because the employee disagrees with that instruction. Grievant's expression of refusal to comply with the Supervisor's instruction to obtain training demonstrated insubordination towards the Supervisor. Insubordination can be a Group II offense³ under the Standards of Conduct, however, the Agency treated Grievant's insubordination as a part of a Group I offense. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant contends that if the Agency's supervisors had better communicated with him, the conflict would not have arisen. Grievant's argument fails. There is no credible evidence to show that Agency employees communicated with Grievant in a manner that

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 to DHRM Policy 1.60.

³ Insubordination can be a Group II offense because it is similar to the Group II offense of failure to follow a supervisor's instructions.

would have caused or excused Grievant's outburst. Grievant's reaction to the Supervisor's instruction was not appropriate.

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...."⁴ 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

⁴ Va. Code § 2.2-3005.

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.