

Issue: Group I Written Notice (Disruptive Behavior); Hearing Date: 02/04/09;
Decision Issued: 05/26/09; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9008; 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: 9008

Hearing Date: February 4, 2009
Decision Issued: May 26, 2009

PROCEDURAL HISTORY

On August 29, 2008, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior.

On September 11, 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 she requested a hearing. On January 5, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 4, 2009, 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:

On October 15, 2007, the Landscape Supervisor sent Grievant a memorandum stating:

On October 9, 2007, you interrupted me while I was speaking to your co-workers and displayed insubordinate, disruptive behavior when you directed loud aggressive language towards me while facing me from a few feet away. This conduct is unacceptable and will not be tolerated again.

You have previously been counseled regarding your loud, aggressive, insubordinate and disruptive behavior towards me while outside [Location] on October 4, 2007. On October 8, 2007, you attended a team wide meeting in which everyone was counseled to treat each person with respect.

Another instance of disruptive behavior, including the use of loud aggressive language, or the showing of disrespect to co-workers, supervisors, support staff or other University employees during work hours will result in immediate termination.

As a reminder, management retains the ability to terminate you with or without probable cause at any time during your probationary period, pursuant to University policy.

You will not interrupt me while I am speaking to others. You will speak to me, your co-workers, other supervisors and all University employees in a professional, courteous manner during work hours. You will follow my directions; if you have an issue or question about my directions, you will speak to me in a modulated, civil tone of voice. If you find yourself being drawn into an argument with your co-workers, you will remove yourself from the situation and discuss your concerns with me in a professional and appropriate manner.¹

The Temporary Employee began working for the Agency in the summer of 2008.

Grievant frequently complained to Agency managers that others on her crew would get into a work truck and advance to the next worksite without taking her with them. This left her stranded. Agency managers investigated Grievant's complaints and concluded that on some occasions crewmembers had inappropriately abandon Grievant but on other occasions they had advanced to the next worksite because Grievant was slow and was taking lengthy breaks.

On July 22, 2008, Grievant approached the Temporary Employee while he was watering plants at the West complex. Grievant was frustrated and angry. She had been working with a crew of employees mowing grass. Grievant asked the Temporary Employee where the crew was and said that one of the crew members had left her. The Temporary Employee told Grievant he did not know where the crew was and Grievant walked away. Grievant came back to the Temporary Employee's location and a few minutes later. She was even more upset than before. She started "ranting" about how her crew had deliberately left her. She went on to explain that the people she was working with are "racist sons of bitches" and that is why they left her. The Temporary Employee knew the employees Grievant was complaining about and he was skeptical of her allegation. The Temporary Employee asked Grievant how the employees were racist. Grievant quickly replied, "You tell me!" The Temporary Employee told Grievant he did not know what to say. Grievant told him that the employees had said racial slurs about her in the past. The Temporary Employee asked how past remarks had anything to do with her being separated from the group. He said he was just trying to understand the situation. Grievant responded that the Temporary Employee "don't have to understand the f--king situation". Grievant told him to stop questioning her. He responded that she did not have to come and talk to him about the situation if she wasn't willing to explain it to him. Grievant walked away. A few minutes later Grievant returned to the Temporary Employee's location and shouted "Have you ever walked around these grounds in the hot f--king sun for half hour like I'm doing right now?" The Temporary Employee responded by telling her that he had done so. Grievant responded by saying "When?! Because every time I see your pansy temp-ass you're in an air-conditioned truck!" The Temporary Employee asked Grievant what was her problem with him. Grievant said that the Temporary Employee, "keep f—king questioning and sh-t." Grievant walked away angry leaving the Temporary Employee

¹ Agency Exhibit 3.

feeling uncomfortable. The Temporary Employee complained to the Agency and submitted a detailed written account of the incident. He informed Agency managers that he did not wish to work for the Agency anymore because of Grievant's behavior and attitude. He submitted his resignation effective July 25, 2008.

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."² 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."

Disruptive behavior is a Group I offense.³ Grievant's behavior was disruptive to the Temporary Employee. She displayed anger towards him. Grievant was frustrated that she had again been abandoned by her crew and she took out her frustration on the Temporary Employee. She demeaned the value of the Temporary Employee's work by suggesting that every time she saw him he was in an air-conditioned truck. Grievant inappropriately described the Temporary Employee as a "pansy temp-ass". Grievant's behavior was so upsetting to the Temporary Employee that it was a factor in his resignation from the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Noticed for disruptive behavior.

Grievant denies the allegations. She points out that the Temporary Employee refused to testify at the hearing. She argues his account should not be trusted. This argument is untenable. The Agency made every attempt to have the Temporary Employee testify but he refused. The Temporary Employee's written statement is lengthy, detailed, and made shortly after the incident. Grievant testified she did not recall the encounter. Based on the evidence presented, the Temporary Employee's written statement is the most accurate evidence of what occurred on July 22, 2008.

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

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ See Attachment A to the Standards of Conduct.

⁴ *Va. Code § 2.2-3005.*

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
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.