

Issues: Group II Written Notice (failure to follow instructions), Group III Written Notice (workplace harassment), Termination, and Retaliation; Hearing Date: 07/02/09; Decision Issued: 07/06/09; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9078, 9117, 9118; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9078 / 9117 / 9118

Hearing Date: July 2, 2009
Decision Issued: July 6, 2009

PROCEDURAL HISTORY

On January 29, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions. On February 23, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for making racially offensive comments.

Grievant timely filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. Grievant filed a third grievance on February 21, 2009 alleging the Unit Head engaged in intimidating and threatening behavior. On May 13, 2009, the EDR Director issued rulings numbers 2009-2291, 2009-2292, and 2009-2293 consolidating these matters for hearing. On June 9, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 2, 2009, 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 Notices?
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?
5. Whether the Agency retaliated against Grievant?

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 Department of Juvenile Justice employed Grievant as a Probation/Parole Officer/Intake Officer at one of its facilities. Grievant's position was non-exempt under the Fair Labor Standards Act. He had been employed by the Agency for approximately 39 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.¹

Grievant's Supervisor had concerns about Grievant working overtime without authorization. In order to monitor Grievant's overtime, the Supervisor instructed Grievant to submit his timesheet for the prior week each Monday by 10 a.m. She advised Grievant several times of his obligation to submit timesheets every Monday by 10 a.m. On January 8, 2009, the Supervisor instructed Grievant to submit his timesheet

¹ The Agency submitted evidence of an inactive prior written notice. That written notice expired on January 26, 2009, three days before the Agency issued Grievant a Group II Written Notice on January 29, 2009.

on Monday, January 12, 2009 by 10 a.m. Grievant did not submit his timesheet on January 12, 2009. He did not make any attempt to complete or submit a timesheet by the deadline. Grievant chose to ignore the Supervisor's instruction. On January 21, 2009, the Supervisor met with Grievant and reminded him of their conversation to submit the timesheets every Monday. She told them to submit the timesheet by 2 p.m. that day. Grievant submitted the timesheet on January 21, 2009 before 2 p.m.

Grievant and Mr. S had known each other for approximately 50 years. They had been roommates for the past six years. They shared a telephone at their house. Their voices and speech patterns are very similar. Mr. S is familiar with Grievant's complaints about his coworkers. Mr. S desired to "stick up for" his friend, the Grievant.

On February 9, 2009, a local Police Department Dispatcher called Grievant's house and asked to speak with Grievant. Mr. S answered the phone and told the Dispatcher that he was the Grievant. Mr. S described Grievant's Supervisor in racially offensive terms. In particular, he described the Supervisor as a "classic black female from the ghetto" where, "the loudest is the rightist, the biggest is the baddest." The Dispatcher was offended by Mr. S's comments. She believed Grievant had made those comments because the person she was speaking with had identified himself as Grievant and she was familiar with Grievant's voice. The Dispatcher was concerned for the Supervisor's safety and reported the matter to her supervisors.

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."² 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."

Group II Written Notice

Failure to comply with the supervisor's instructions is a Group II offense.³ Grievant was instructed by his supervisor to submit his timesheet on January 12, 2009 by 10 a.m. Grievant understood the instruction but chose to ignore it. He did not submit his timesheet as instructed. No evidence was presented to suggest that Grievant made any attempt to comply with the instruction prior to the deadline. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for fair to follow a supervisor's instruction.

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, DHRM Policy 1.60.

Grievant argued that he lacked sufficient training to complete the timesheet. The evidence showed, however, that the Agency had provided Grievant with the appropriate level of training and that he understood how to complete a timesheet. Grievant had properly completed timesheets on many occasions prior to January 2009.

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.

Group III Written Notice

The Agency has not established that Grievant was the person who spoke with the Dispatcher on February 9, 2009. The conversation between the Dispatcher and Mr. S was recorded by the local Police Department. A copy of that recording was presented as evidence during the hearing. The Hearing Officer repeatedly listened to the recording of the conversation involving the Dispatcher and the person claiming to be Grievant and compared the caller's voice with the voice of Mr. S who testified during the hearing. Their voices are indistinguishable. Their tone, speech cadence, and accent were indistinguishable. Mr. S testified that he was the one who spoke with the Dispatcher. Grievant testified that Mr. S was the one who spoke with the Dispatcher. The Hearing Officer could not find a lack of credibility on the part of Mr. S or Grievant with respect to the issue of who made the offensive comments to the Dispatcher. The Hearing Officer finds that Mr. S made the offensive comments to the Dispatcher and, thus, there is no basis to take disciplinary action against Grievant. There is no reason to believe that Grievant participated in Mr. S's decision to make inappropriate comments to the Dispatcher. The disciplinary action against Grievant must be reversed.

The Agency presented evidence of people who knew Grievant’s voice and who had listened to the recording. They testified that Grievant was the person on the recording. Grievant and Mr. S sound nearly alike when they speak. The Agency has the burden of proof in this grievance. Grievant presented credible evidence to show

⁴ *Va. Code § 2.2-3005.*

that Mr. S made the offensive comments. The Agency has not met its burden of proof for the Group III Written Notice.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁵ (2) suffered a materially adverse action⁶; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁷

Grievant has not established that the Agency retaliated against him. Grievant denied engaging in the protected activity of complaining to a Manager that resulted in the Unit Head accusing Grievant of circumventing the chain of command. Grievant did not suffer any materially adverse action. The Agency did not discipline Grievant because it believed he had circumvented the chain of command. Grievant's request for relief must be denied.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. Grievant's other requests for relief are **denied**.

⁵ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

⁶ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

⁷ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.⁸

⁸ 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