

Issue: Group I Written Notice (obscene/abusive language); Hearing Date: 08/10/09;  
Decision Issued: 08/14/09; Agency: DOC; AHO: William S. Davidson, Esq.; Case  
No. 9089; 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 No: 9089

Hearing Date: August 10, 2009  
Decision Issued: August 14, 2009

**PROCEDURAL HISTORY**

The Grievant was issued a Group I Written Notice on August 8, 2008 for:

On July 11, 2008, at approximate[ly] 1400 hrs, you (Officer P) placed a telephone call to Ms. B in reference to your School Assistance Time, from Sergeant A's office.

During your conversation with Ms. B, you stated to her "I am sick and tired of you mother others messing with my paperwork." When Ms. B replied that she didn't have your paperwork, you replied, "This is what I am talking about you mother others are always losing my paperwork." This was stated in the presence of Sergeant A. This behavior is unacceptable and will not be tolerated in the Department of Corrections.

You then went to Major C's office, who instructed you not to go to HRO.

You failed to follow instructions as directed by the major.

Around 1415hrs, you entered Ms. B's office slamming the door behind you, and demanded to see your paperwork. Your actions created a hostile work environment. This is also considered intimidation and will not be tolerated by any staff.

Officer P, you will conduct yourself in a professional manner at all times.

Your actions warrant a Written Notice Group I. <sup>1</sup>

Pursuant to the Group I Written Notice, the Grievant received no adverse action other than having the Group I Written Notice placed in her file and it would remain an active Notice until August 8, 2010. <sup>2</sup> On September 2, 2008, the Grievant timely filed a grievance to challenge

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 1, Page 1

the Agency's actions.<sup>3</sup> On May 21, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On August 10, 2009, a hearing was held at the Agency's location. This matter was continued several times by both the Grievant and the Agency, thus resulting in the length of time between the filing of the grievance and this Hearing Officer's Decision. The Grievant was not present at the hearing and participated telephonically.

### **APPEARANCES**

Agency Representative

Advocate for Agency

Grievant

Witnesses

\*\* Grievant participated telephonically

### **ISSUE**

1. Did the Grievant use obscene or abusive language and did any of her actions result in disruptive behavior?

### **AUTHORITY OF HEARING OFFICER**

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as

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<sup>3</sup> Agency Exhibit 1, Tab 2, Page 1

to the appropriate sanction, independent of the Agency's decision.

### **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 Agency provided the Hearing Officer with a notebook containing seven (7) tabbed sections, only six (6) of which contained documents, and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook consisting of fifteen (15) pages of documentary evidence and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Agency, through its witnesses, introduced evidence that the Grievant, while in the presence of one of the Agency employees, placed a call to someone in the HRO. During this phone call, this witness testified that the Grievant's tone was harsh and rude and that on two (2) occasions she referred to the person to whom she was talking as "mother other." This witness testified that the Grievant stated that she was tired of "you mother others messing with [her] paperwork." And the Grievant further stated, "You mother others are always losing [my] paperwork." This witness further testified that it appeared that the Grievant hung up the phone without ending the conversation.

The Agency then called as a witness the employee who was the recipient of the phone call. This employee confirmed the use of the words "mother other" and confirmed that the Grievant hung the phone up without saying goodbye, and that the Grievant's tone was rude and threatening.

This witness testified that, shortly after this phone call was placed and ended, the Grievant came to the HRO and was agitated. After a few moments, however, the Grievant left the office in a much calmer state.

The Agency then introduced evidence to support the second allegation in the Written Notice whereby Major A ordered the Grievant not to talk to the HRO employee and that order was violated. The evidence presented to the Hearing Officer was that that conversation and

violation took place on July 24, 2008. The Written Notice indicates that all offenses took place on July 11, 2008. The Hearing Officer deems that the Grievant was not on Notice as to any offenses other than those which took place on July 11, 2008.

The Grievant testified that she did not refer to the HRO employee as a “mother other” but rather as a “mother superior.” The Grievant testified that it was merely coincidental that the term “mother other” is so similar to the more commonly recognized obscene term.

It is clear to this Hearing Officer that the Grievant was being too smart by half. She fully understood the implication of the use of the words “mother others” and intended that implication to be received by the recipient.

Policy 130.3 Workplace Violence defines workplace violence as follows:

Any...verbal abuse occurring in the workplace by employees...<sup>4</sup>

It is clear that this term, while not the common profane term, was intended as a substitute. That clearly constitutes verbal abuse. The Grievant knew how the words would be received and the Hearing Officer finds that she intended them to be received in exactly that way.

### **MITIGATION**

*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...”<sup>5</sup> 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph and, the Hearing Officer also considered any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that there are no grounds for mitigation in this matter. Inasmuch as the Hearing Officer has found that the Grievant did in fact use obscene and abusive language, and as there was no punishment attached to this Written Notice other than the

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<sup>4</sup> Agency Exhibit 1, Tab 3, Page 1

<sup>5</sup>*Va. Code § 2.2-3005*

existence of the Written Notice itself, there is no mitigation that the Hearing Officer could use other than the elimination of the Written Notice. The Hearing Officer does not accept the invitation to mitigate it to the point that there would be no Written Notice.

### **DECISION**

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof for the Grievant's use of obscene and abusive language and that the Group I Written Notice was validly and properly issued.

### **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 14<sup>th</sup> Street, 12<sup>th</sup> 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.<sup>6</sup> 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.<sup>7</sup>

[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]

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William S. Davidson  
Hearing Officer

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<sup>6</sup>An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>7</sup>Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.