

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 08/14/09;
Decision Issued: 08/18/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9144; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9144

Hearing Date: August 14, 2009
Decision Issued: August 18, 2009

PROCEDURAL HISTORY

On March 4, 2009,¹ Grievant was issued a Group II Written Notice of disciplinary action for engaging in a verbal altercation with another employee where Grievant was aggressive and intimidating.

On April 29, 2009, 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 July 27, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 14, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

¹ The date the employee was given the Written Notice appears to have been March 31, 2009.

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:

The Department of Corrections employs Grievant as a Probation and Parole Officer at one of its Facilities. Grievant had been working at the Facility for approximately two years. Grievant had prior active disciplinary action. On April 2, 2008, she received a Group I Written Notice for failure to follow a supervisor's instructions and disruptive behavior regarding her actions in court.

Officer M received flowers from her husband on occasion. When she received them, Grievant would often joke with Officer M about how she hated the flowers. Officer M considered her relationship with Grievant to be a good one.

On February 3, 2009, Grievant was pushing a cart with a box on it. Grievant pushed the box past Officer M and Grievant said words to the effect that Officer M's flowers were of lesser significance than the item Grievant had the box. Officer M assumed Grievant had received a gift much the same way Officer M often received flowers from her husband. Officer M asked Grievant what was inside the box. Grievant said a 42 inch TV. Officer M asked who had sent it to her. Grievant responded "none of your f—king business!" and kept walking down the hallway. This caught Officer M "off guard" since they had often joked about Officer M receiving flowers.

At 5:30 p.m. on February 3, 2009, as Grievant and Officer M and others were leaving the office, Officer M smiled and said to Grievant that she hoped Grievant would be a little nicer the next day. Grievant responded that it was not her fault that Officer M still had issues about what happened earlier in the day. Officer M said that "it was not cool". In a loud and intimidating voice, Grievant said "I am not your husband; I am not your kids; I can do whatever I want and say whatever I want. It does not mean you have to listen." Officer M said, "You don't need to talk to me that way." Grievant loudly repeated her statement that: "I am not your husband; I am not your kids; I can do whatever I want and say whatever I want. It does not mean you have to listen." Grievant said, "You could die today and I would not miss a step." Officer M was shocked at Grievant's comment. Officer M told Grievant, "You need to stop." Grievant said, "No, you could die today and I would be fine." Officer M again told Grievant that she needed to stop. Grievant repeated he statement about not being Officer M's husband, etc. Officer M considered Grievant to be very belligerent and did not know why Grievant was acting that way.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less 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 that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

"[D]isruptive behavior" is a Group I offense.⁵ Grievant was disruptive in her interaction with Officer M because Grievant was angry at Officer M, Grievant yelled at Officer M, Grievant repeated the phrase about not being Officer M's husband thereby being disrespectful to Officer M, and Grievant described Officer M's death as being irrelevant to Grievant. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

The Agency contends Grievant should receive a Group II Written Notice for failure to follow a supervisor's instructions. The Agency did not establish with sufficient particularity the date, location, name of the supervisor, and the specific instruction given by the supervisor to support the issuance of a Group II Written Notice. Thus, the level of disciplinary action must be reduced.

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(X)(A)(5).

Grievant presented evidence of another employee who testified Grievant as not disruptive. That employee, however, did not hear or observe all of the interaction between Grievant and Officer M. Officer M's testimony was credible and addressed the entire altercation between Grievant and Officer M. Grievant did not testify. There is no sworn testimony from Grievant for the Hearing Officer to compare to the sworn testimony of Officer M. Based on the evidence presented, Officer M's version of the events is the most credible.

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..."⁶ 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 for disruptive behavior.

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

⁶ Va. Code § 2.2-3005.

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.⁷

[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

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