

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 11/10/09;
Decision Issued: 11/12/09; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9203; 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: 9203

Hearing Date: November 10, 2009
Decision Issued: November 12, 2009

PROCEDURAL HISTORY

On July 7, 2009, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow workplace policy and procedures/unprofessional or disruptive behavior, words or gestures that show disrespect for clients, peers and supervisor.

On August 12, 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 October 13, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 10, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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:

The Department of Behavioral Health and Developmental Services employs Grievant as a DSP I at one of its Facilities. She works with the Agency's clients who reside in cottages at the Facility. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Ms. U works with Grievant in a cottage providing services to clients. She is originally from Africa and sometimes has difficulty being understood by others.

On May 18, 2009 at approximately 5:30 p.m. dinner trays were delivered to the cottage. The trays were hot. Although clients should not have been called in to dinner until the trays cooled, Ms. U announced "I did the trays". Grievant heard this and called the clients in for dinner. When Grievant realized the trays were still hot and that the clients should not have been called in to dinner, she became upset. Grievant began speaking loudly and questioned why Ms. U indicated clients could come and eat when in fact Ms. U was not ready. Grievant and Ms. U were located within a few feet of clients. Grievant complained that Ms. U fed Client P every night and did not help out in other work areas. Ms. U told Grievant that everyone who works there calls Grievant a troublemaker. Grievant responded that many staff think that Ms. U is lazy and does not listen regarding how to care for clients. Another employee, Mr. P, observed the conflict and told Grievant to be quiet. Ms. U got up from her seat, called Grievant a troublemaker again and then made a spitting gesture towards Grievant. Grievant said to Ms. U words to the effect that if Africa was so good, she should go back to Africa. Ms. U was offended by Grievant's comment that she should go back to Africa. Mr. P

told Ms. U to go take a walk or ride because Ms. U was in tears and needed to get away.

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 On May 18, 2009, Grievant was disruptive while working in the cottage at the Facility. While standing a few feet away from clients, Grievant engaged in a loud argument with Ms. U. Grievant openly rebuked Ms. U in front of clients. Grievant told Ms. U that she should return to Africa thereby offending Ms. U. The conflict between Grievant and Ms. U resulted in both of them leaving the cottage and leaving Mr. P to care for the clients by himself. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argues that the Agency has not properly trained or managed Ms. U and that this frustrates Grievant because she has to work with an incompetent employee. Grievant argues that Ms. U often speaks negatively about America and of the virtues of Africa and that Grievant was merely suggesting Ms. U could return to Africa if she liked it so much. Grievant's arguments are untenable. Although Grievant's frustration with Ms. U's behavior and comments are understandable, the time and place to express Grievant's frustration was not in front of clients who were preparing to receive their meals.

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....”³ 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

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, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.