

Issues: Group III Written Notice (disruptive behavior & workplace violence),
Suspension, Transfer and Pay Reduction; Hearing Date: 10/29/09; Decision Issued:
11/10/09; Agency: VDH; AHO: Jane E. Schroeder, Esq.; Case No. 9215;
Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Case Number 9215

Hearing Date: October 29, 2009
Decision Issued: November 10, 2009

PROCEDURAL HISTORY

Grievant was issued a Group III Written Notice for a violation of State Personnel Policy 1.80 for workplace violence and disruptive behavior.¹ The Grievant filed a timely grievance from the Group III Written Notice.² Following failure of the parties to resolve the grievance at the third step resolution step, the agency head qualified the grievance for a hearing.³ On October 7, 2009, the hearing officer was appointed for this case.

One telephonic pre-hearing conference was held on October 13, 2009 to set the hearing date and address pre-hearing issues. The hearing was held on October 29, 2009. It began at 9:00 a.m and concluded at 1:44 p.m. The Hearing Officer granted the Agency's request (without objection) for attendance at the hearing by the Agency's EEO/Employee Relations Manager.

EXHIBITS

The following Exhibits were accepted into evidence:

Agency's Exhibits:

- Agency # 1. Employee Grievance Procedure Form A + 3 Grievant attachments
7/8/09 Memo from Supervisor's Administrative Assistant
7/15/09 First Step Response
8/10/09 Second Step Response
9/04/09 Third Step Response
- Agency # 2 5/4/09 Probationary Progress Review
5/26/09 6-month Probationary Progress Review
Undated letter from Administrator to Grievant

¹Agency Exhibit #2: Written Notice

²Agency Exhibit #1: Employee Grievance Procedure Form A

³Agency Exhibit #3: 9/18/09 Letter from Agency to DEDR

6/02/09 Grievant's Response to Proposed Disciplinary Action
6/10/09 Memo from Administrator to Grievant
Written Notice, issued date: 6/10/09
6/25/09 Memo from Administrator to Grievant
7/28/09 3 Letters from Co-Workers to Whom It May Concern
10/14/08 Grievant's Performance Review
9/8/09 Letter to Agency Administrator from Grievant
8/26/06 Grievant's Performance Review
10/6/06 Email from Grievant to Agency Administrator

Agency # 3. Employee Grievance Procedure Form B
9/18/09 Letter from Agency to DEDR
9/25/09 Memo DEDR, to Parties to the Grievance
10/2/09 Letter to Hearing Officer from DEDR
10/8/09 Letter to Hearing Officer from Agency Administrator

Agency #4 Policies and Procedures Manual: Policy 1.80: Workplace Violence
Policies and Procedures Manual: Policy 1.60: Standards of Conduct

Grievant's Exhibits: (unnumbered.)

9/18/09 Letter from Agency to DEDR
9/25/09 Memo from DEDR, to Parties to the Grievance
10/2/09 Letter from DEDR to Hearing Officer
5/4/09 Probationary Progress Review for Grievant
5/26/09 Letter from Grievant's Supervisor to Grievant
Undated letter from Administrator to Grievant starting, "This letter is to notify you that you are being placed on on pre-disciplinary leave with pay. . ."
6/2/09 Grievant's "Response to Proposed Disciplinary Action"
Written Notice, issued date: 6/10/09
6/25/09 Memo from Administrator to Grievant
7/8/09 Memo from Supervisor's Administrative Assistant
7/8/09 Employee Grievance Procedure, Form A
7/8/09 "Grievant's Attachment I to Grievance Form A"
7/8/09 "Grievant's Attachment II to Grievance Form A"
7/8/09 "Grievant's Attachment III to Grievance Form A"
7/15/09 Memo from Administrator to Grievant
7/31/09 Emails between Grievant and Administrator's Supervisor
8/10/09 Letter from Administrator's Supervisor to Grievant
9/4/09 Third Step Response to Grievance
9/8/09 Letter from Grievant to Administrator's Supervisor
9/18/09 Employee Grievance Procedure, Form B
7/28/09 3 Letters from Co-Workers to Whom It May Concern
9/22/08 Performance Rating of Grievant
10/6/06 Performance Rating of Grievant
10/6/06 E-mail from Grievant to Administrator's Supervisor

1/09 4 E-mails between Administrator and Grievant
5/20/09 Verification of Treatment of Grievant by a medical doctor
5/28/09 Hospital Work Release Form and Discharge Instructions
Pages 9-12 from Performance Evaluation Handbook for Supervisors
Policy 1.80: Workplace Violence (from Policies and Procedures Manual)

APPEARANCES

Grievant
Agency Representative

Witnesses for the Agency:

Grievant's Supervisor
Agency Administrator
Agency Administrator's Supervisor
Agency Social Worker
Grievant's Co-Worker "A"

Witnesses for the Grievant:

Grievant's Co-Worker "B"
Grievant's Co-Worker "C"
Grievant's Co-Worker "D"
Grievant's Co-Worker "E"
Grievant

ISSUE

The Agency alleges that on May 27, 2009, during a meeting with her Supervisor and Administrator, the Grievant exhibited unprofessional conduct and violent behavior including screaming, pointing her finger at the Administrator and the Supervisor, slamming the table in the meeting room, throwing herself to the floor and kicking, verbal intimidation, making derogatory statements and making threats to the Supervisor. The disciplinary action taken was a 10-day suspension without pay, a change in position of employment within the agency, and a 6% disciplinary pay reduction.

Issue: Whether the Group III Written Notice to the Grievant on May 27, 2009, should be upheld or rescinded. If the Written Notice is upheld, whether the disciplinary action taken was appropriate.

The relief sought by the grievant is the reduction or removal of the Group III Offenses and full refund of her lost wages. She does not seek restoration to her previous position of employment within the agency.

FINDINGS OF FACT

The Grievant has been an employee of the agency for 16 years. During this time, she satisfactory performance reviews and no disciplinary actions. Co-workers, including a doctor, a nurse, and other support staff describe the Grievant as helpful, courteous, hard working, and

reliable, with no instances of violent behavior. In September 2008, a new Supervisor was hired. The Grievant assisted the Supervisor in learning the procedures at the agency. Both the Grievant and the Supervisor said that they initially had a good working relationship. The Grievant was in fact promoted to a lead position.

By January 2009, both expressed concerns to the Administrator about the actions of the other. The Grievant had concern about the Supervisor making a hostile work environment. The Supervisor had concerns that the Grievant was yelling at co-workers. On January 29, 2009, the Administrator had a meeting with the Grievant and the Supervisor to discuss the issues between them. The Grievant was upset with the Supervisor and started yelling during the meeting. Subsequently, the Administrator met a couple more times with the Grievant and the Supervisor, but the situation remained tense. In May, the Administrator directed the Supervisor to schedule another three way meeting, this time to give the Grievant a written interim progress review. That meeting was held on May 27, 2009.

At the May 27th meeting, the Administrator gave the Grievant a copy of the Probationary Progress Review which had been prepared by the Supervisor.⁴ In the review, the Supervisor said that the Grievant showed a lack of respect of co-workers, did not speak to co-workers in a professional manner, and threw papers at a staff member. As the Grievant read the review, she became increasingly upset. The Grievant said that the review was all lies, she yelled at the Supervisor and the Administrator, pointed her finger in their faces, and punched the wall. She said that the Supervisor had worked her like a slave. She told the Supervisor that the Supervisor would be punished by God for her lies, that she would suffer and her children would suffer because of her lies. The Supervisor felt threatened by this behavior.⁵

The Grievant left the meeting and talked to Co-worker "D", complaining that the Administrator and Supervisor were telling lies about her. The Grievant then returned to the meeting, and got upset one again. She again was screaming at the Supervisor, and threw herself on the floor, crying and shouting. Eventually, the social worker at the agency came in to talk with the Grievant. The social worker testified that the Grievant was upset and crying, speaking in a raised voice. Co-worker "A" who heard the moaning and crying opened the door to the meeting room twice to see if everything was all right. She saw the Grievant laying out flat on the floor in great distress. She went to get Co-worker "B" who came to assist the Grievant. Co-worker "B" testified that she heard the Grievant tell the Supervisor that "I can't take no more," and that God would punish the Supervisor and her children for her lies. Co-worker "B" then took the Grievant home.

The Grievant denied that her behavior at the meeting was inappropriate, but says that she was reacting to the many lies. She admitted that she said that God would punish the Supervisor for her lies, but she did not consider this a threat.⁶

APPLICABLE LAW AND OPINION

⁴Agency Exhibit 2:5/4/09 and 5/26/09 Probationary Progress Review

⁵Testimony of Supervisor

⁶Testimony of Grievant

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

Policy 1.60: Standards of Conduct provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section B.2.c. provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence would normally warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.

Policy Number 1.80: Workplace Violence

Workplace violence is defined as any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, harassment of any nature such as stalking, shouting or swearing.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section "Framework for Determining Whether Discipline was Warranted and Appropriate" states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with the law (e.g. free of unlawful discrimination) and policy (e.g. properly characterized as a Group I, II, or III offense) and finally, (iv) 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.

In reviewing agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations. Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice; (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with the law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness. . . .⁷

Using the framework suggested, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

In this case, the Grievant did engage in the disruptive behavior in a meeting on May 27, 2009. I find that the preponderance of the evidence shows that the Grievant screamed at the Supervisor and Administrator, pointed her finger in their faces, threw herself to the floor, and made threatening and verbally intimidating statements to her Supervisor.

(ii) Whether the behavior constituted misconduct

Workplace violence as defined above includes any threatening behavior or verbal abuse occurring in the workplace by employees or third parties, and listed in the definition are the behaviors (inter alia) of threats and harassment of any nature such as shouting. The behavior of the Grievant at the meeting clearly meets this definition of workplace violence and as such constitutes misconduct.

(iii) Whether the agency's discipline was consistent with the law and policy

The Grievant was given an Written Notice of a Group III Offense. This level of discipline is appropriate in this case due to the serious violation of the workplace violence policy and the disruption of the workplace. This Hearing Officer finds that the agency's discipline is consistent with law and policy.

⁷DEDR Rules for Conducting Grievance Hearings, VI.B., Effective Date 8/30/2004.

(iv) 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

The misconduct was of such a serious nature that the Grievant's employment could have been terminated. Instead, the agency considered the Grievant's 16 years of state service before determining the disciplinary action. This disciplinary action taken was a suspension without pay for ten days, a change in her in position of employment within the agency, and imposition of a 6% disciplinary pay reduction. This Hearing officer finds that the agency properly considered mitigating circumstances in this case, based on the Grievant's otherwise satisfactory work performance.

DECISION

The Group III Written Notice issued on June 10, 2009 is hereby UPHELD. The disciplinary action taken by the agency was appropriate.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing office to revise the decision to conform it to written policy. Requests should be made to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the

date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided, and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Jane E. Schroeder, Esq.
Hearing Officer