

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 11/12/09; Decision Issued: 11/13/09; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9218; 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: 9218

Hearing Date: November 12, 2009
Decision Issued: November 13, 2009

PROCEDURAL HISTORY

On July 23, 2009, Grievant was issued a Group II Written Notice of disciplinary action with suspension for failure to follow the instructions of a supervisor in a loud and disruptive manner.

On August 21, 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 September 29, 2009, the EDR Director issued EDR Ruling Number 2010-2434, 2010-2435 consolidating this and another grievance. On October 13, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 12, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 Virginia Department of Behavioral Health and Developmental Services employs Grievant as a Food Service Technician I at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Facility's kitchen operates a tray line to prepare meals for its clients. An employee at the front of the line puts silverware on each tray and passes the tray down the line for other employees to put food on the trays. An employee at the end of the line loads trays into a container so that the trays can be delivered to clients located in buildings throughout the Facility's campus. An employee working at the end of the line must engage in more demanding physical labor, such as lifting and loading trays, than an employee at the front of the line.

On July 19, 2009, the Supervisor learned that an employee scheduled to work at the end of the tray line would not be reporting to work. Ms. F had been scheduled to work at the front of the tray line that day. The Supervisor decided to move Ms. F from the front of the tray line to the end of the tray line. The Supervisor moved Grievant to the front of the tray line. The Supervisor did not wish to put Grievant at the end of the tray line because Grievant worked that position the day before. Ms. F suffered an injury to her hand in the past and did not wish to lift heavy objects. Grievant volunteered to switch with Ms. F so that Grievant would work at the end of the line and Ms. F could

return to the front of the tray line. Grievant and Ms. F approached the Supervisor and indicated that they wished to switch positions. The Supervisor said they could not switch positions and that they would do as she had instructed them to do. This angered Grievant and Ms. F. They began loudly complaining to the Supervisor. Grievant and Ms. F continued to talk at the same time. They moved closer to the Supervisor and were "in her space". The Supervisor instructed Grievant to back off and be quiet. Grievant continued to argue loudly. The Supervisor took a step backwards and Grievant moved forward. The Supervisor took another step backwards and Grievant moved forward. The Supervisor told Grievant and Ms. F that if they were not going to backup, they should go home. Grievant said she was not going to go home because the Supervisor would not have enough employees to finish the work. The Supervisor reached around the side of a wall and picked up a telephone. She called the Facility Police dispatcher. A few minutes later, a Police Officer arrived at the building. As he entered the building he could hear Grievant and Ms. F yelling at the Supervisor. When he entered the building he was approximately 200 feet from Grievant and Ms. F.

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."

Failure to follow a supervisor's instructions is a Group II offense.² Grievant was instructed by the Supervisor to move to the front of the tray line. She refused to do so and instead chose to confront the Supervisor and demand that the Supervisor change her decision. The Supervisor instructed Grievant to "back off and be quiet". Grievant disregarded that instruction and continued to yell at the Supervisor. As the Supervisor stepped backwards, Grievant stepped forward toward the Supervisor. The Supervisor instructed Grievant to go home. Grievant told the Supervisor she would not go home because it would leave the Supervisor short-staffed. Only when instructed by the Agency's Police Officer did Grievant leave the Facility. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instruction. Upon the issuance of a Group II Written Notice, an employee may be suspended for up to 10 workdays. In this case, Grievant's suspension for three days must be upheld.

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.

Grievant contends that she was not yelling at the Supervisor but rather was merely expressing her view. This argument is untenable. The Supervisor's testimony was credible. A Police Officer could hear Grievant yelling at and arguing with the Supervisor from approximately 200 feet away. Because of the commotion, other employees stopped what they were doing and watched Grievant yelling at the Supervisor. Regardless of whether Grievant was yelling at the Supervisor, the evidence is clear that she disregarded the Supervisor's instructions.

Grievant argues that her request to the Supervisor was reasonable and should have been granted. Although it appears that leaving Grievant at the back of the tray line would have been a logical choice, that choice belonged to the Supervisor. Once Grievant realized the Supervisor did not intend to change her mind, Grievant should have complied with the instruction.

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 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 II Written Notice of disciplinary action with suspension 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.

³ *Va. Code § 2.2-3005.*

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.