

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 11/19/09;
Decision Issued: 11/20/09; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9223; 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: 9223

Hearing Date: November 19, 2009
Decision Issued: November 20, 2009

PROCEDURAL HISTORY

On August 14, 2009, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On August 20, 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 November 3, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 19, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 University of Virginia employs Grievant as a Lab and Research Specialist I. She supervises several staff. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Agency managers had received complaints from Grievant's subordinates regarding how she interacted with them. On May 4, 2009, the Director, Grievant's supervisor, gave Grievant a Performance Improvement Plan stating, in part:

Keep your verbal interactions with your staff on a professional level. As a supervisor you must function in a manner that provides clear direction, motivation and problem solving for your employees to make certain that all of the work gets done. The manner in which you convey and clarify this information for your employees is almost as important as the work itself. So always keep an even professional tone to your voice, never yell or be overly condescending and never call your employees derogatory names. You need to get them to function as a team, including yourself and fostering that they help each other to get the day's missions accomplished. Your employees need to feel they can come to you for guidance, and you should provide that coaching in a professional manner.

The Agency maintains Time in Motion Data Cards for employees to record the amount of time they worked on various projects throughout the day. Grievant had instructed employees to write the number 4 in the last block of the timecard.

Mr. H reported to Grievant. He submitted a timecard to Grievant that had a number other than 4 written in the last block of the timecard. Mr. H made the error because he was confused by a prior instruction regarding how to complete the timecard.

On July 23, 2009 at approximately 3:30 p.m., Grievant was in her office seated at a desk reviewing timecards. She noticed that Mr. H had incorrectly completed his timecard. She summoned Mr. H to come to her office as Mr. H was leaving for the day. While Mr. H was standing within arm's length of Grievant, Grievant spoke in a loud and demanding voice. Grievant pointed out Mr. H's errors in completing the time card. Grievant said "No one knows how to f--king do this right!" "Nobody knows how to do these f--king cards!" "You f--king know better!" Grievant's demeanor expressed that she was angry with Mr. H. Mr. H listened silently to Grievant. Grievant's comments upset him. Mr. H wanted to leave immediately to avoid further contact with Grievant. He responded "okay" and turned and walked out of Grievant's office. The Animal Caretaker was standing outside of Grievant's office during the confrontation. She observed Mr. H with his head down and shaking as he left Grievant's office.

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 On May 4, 2009, the Director instructed Grievant to speak to her subordinates in a professional tone and not to yell at them. On July 23, 2009, Grievant did not speak to Mr. H in a professional tone. She yelled at Mr. H with an accusatory tone and in a confrontational and abrasive manner. The Agency mitigated the disciplinary action to a Group I Written Notice. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant denies that she yelled at Mr. H. The Agency has presented sufficient evidence to support its claim that Grievant acted in an unprofessional manner towards Mr. H. This conclusion is supported for several reasons. First, Mr. H's testimony was credible. Mr. H did not report Grievant's behavior to the Agency. He explained that he did not wish to have anything else to do with Grievant while he waited for a transfer.

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.

Although Mr. H initially told the Agency's investigator that Grievant did not curse, he did so because he wished to minimize the situation and "be done with it." Second, the Animal Caretaker's testimony was credible. The Animal Caretaker did not work with Grievant. She had not had any prior conflicts with Grievant, although Grievant alleges that the Animal Caretaker was angry with Grievant because Grievant changed the work schedule of Mr. P which had the effect of altering the Animal Caretaker's carpool arrangements. This assertion has not been established by the evidence. It appears to be speculation. Third, Grievant testified that she was frustrated with her staff's routine failure to comply with her instructions and directives. Grievant's frustration with Mr. H's failure to comply with her instruction supports the conclusion that Grievant was angry at Mr. H and yelled at him.

Grievant contends that Mr. P dislikes her and is disrespectful to her even though she supervises him. Grievant asserts that Mr. P has conspired with other staff to falsely accuse her of poor management. The evidence is insufficient to support this allegation. Mr. P did not testify at the hearing. Mr. P was not involved in the disciplinary action. There is no evidence that Mr. P spoke with Mr. H or the Animal Caretaker to influence their actions.

Grievant contends that her subordinates are routinely disrespectful to her and did not comply with her instructions. She complains that the Agency has not permitted her to take the appropriate management steps to correct their behavior. If the Hearing Officer assumes for the sake of argument the Grievant's allegations are true, these allegations do not affect the outcome of this case. The issue before the Hearing Officer is not whether the Agency is providing adequate support to Grievant. The issue in dispute is the nature of Grievant's interaction with Mr. H. on July 23, 2009.

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

³ *Va. Code § 2.2-3005.*

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

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

[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