

Issue: Group II Written Notice (workplace violence); Hearing Date: 02/01/10;  
Decision Issued: 02/08/10; Agency: CNU; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9251; Outcome: Partial Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9251**

Hearing Date: February 1, 2010  
Decision Issued: February 8, 2010

**PROCEDURAL HISTORY**

On September 18, 2009, Grievant was issued a Group II Written Notice of disciplinary action for workplace violence.

On October 16, 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 January 11, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 1, 2010, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
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:

Christopher Newport University employed<sup>1</sup> Grievant as an Administrative and Program Specialist. The purpose of her position was:

Responsible for performing Accounts Payable functions, processing all University disbursements in accordance with State and University policies, and entering data into the Financial Accounting System.<sup>2</sup>

Grievant has been employed by the Agency for approximately three and a half years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 23, 2009, in the afternoon, Ms. S retrieved some paperwork from the Accounts Payable file that Grievant had put in order that week. The file was used by several staff. Grievant checked the file and noticed that it was not in the same order as she had originally organized the file. Grievant started talking in a loud and agitated voice in the middle of the office. Grievant told Ms. S that "she messed it up like she messed everything up." Ms. S apologized and said she didn't know that was in a special order. Grievant replied "shut up, shut your big fat mouth." Ms. S located the

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<sup>1</sup> The Agency issued Grievant a Group III Written Notice after this grievance arose and removed her from employment. The Group III Written Notice is not part of this grievance.

<sup>2</sup> Agency Exhibit 2.

Comptroller and the Assistant Comptroller and asked them to provide assistance. The Comptroller approached Grievant and tried to calm Grievant down. Grievant remained agitated. The Comptroller decided to address the issue after other staff in the office had left for the day. The Comptroller asked Grievant and Ms. S to remain. After the other staff had left for the day, the Comptroller and the Assistant Comptroller met with Grievant and Ms. S. Ms. S said that Grievant could tell her how the file needed to be filed, and she would file them that way. Grievant became very agitated and did not calm down. Grievant called Ms. S a "racist", "a liar", and "two-faced". Ms. S was not afraid of Grievant at the time Grievant insulted Ms. S.

## 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."<sup>3</sup> 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.<sup>4</sup> Grievant was disruptive on July 23, 2009 because Grievant told Ms. S to "shut up, shut your big fat mouth." Grievant was also disruptive because she continued to be agitated and loud even after the Comptroller repeatedly asked Grievant to be calm. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency contends Grievant engaged in workplace violence. DHRM policy 1.80 prohibits "Workplace Violence" which 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, and harassment of any nature such as stalking, shouting or swearing.

Grievant did not make any threats, manifest an intimidating presence, or harass her coworkers by stalking or swearing. There is some evidence that Grievant raised her voice. The degree to which Grievant raised her voice is insufficient to support a Group II offense. It appears that Grievant may have raised her voice intermittently as opposed to a prolonged period of time. It appears that Grievant may have raised her voice to

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<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> See, Attachment A to DHRM Policy 1.60.

emphasize her point as opposed to raising her voice in order to intimidate her coworkers. The Agency presented evidence that some of Grievant's coworkers felt threatened by Grievant's behavior. The evidence suggests those employees felt threatened by what Grievant might do next instead of what Grievant actually did. In other words, the coworkers felt threatened by the unknown rather than what they had observed happen.

The Agency contends that Grievant engaged in verbal abuse by calling Ms. S a "racist" and a "liar". The context of this conversation is significant. Grievant made her statements in response to the Comptroller's questioning about why Grievant was upset. Employees are expected to be free to discuss their concerns with their supervisors. In this case, Grievant was expressing her concern to a supervisor even though Ms. S could hear the comment. In hindsight, it might have been a better management practice for the Comptroller to have discussed her concerns with Grievant without enabling Ms. S to hear the discussion. The fact remains, however, that Grievant's comments were made under circumstances where Grievant was free to express her concerns to her supervisor.<sup>5</sup>

*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...."<sup>6</sup> 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.

Grievant contends the disciplinary action should be mitigated. The degree to which taking medication or the withdrawal of medication is mitigating depends on the degree to which the medication or withdrawal of the medication controls the employee's behavior. For example, there is a difference, in terms of a basis for mitigation, between medication that may increase drowsiness and medication that has the primary and immediate effect of inducing sleep. The behavior of an employee disciplined for sleeping in the workplace may be explained by a medication creating drowsiness but may be excused by a medication inducing sleep. Only in the latter instance would mitigating circumstances exist.

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<sup>5</sup> See, EDR Ruling 2008-1964, 2008-1970.

<sup>6</sup> *Va. Code § 2.2-3005.*

Grievant presented evidence that she suffers from generalized anxiety, PTSD, and major depression with symptoms being triggered and exacerbated by stress. In this case, Grievant presented evidence that her drug therapy ended on April 7, 2009 which exacerbated her symptoms. She was taking Benzodiazepine but began reducing the amount of the drug taken over time in accordance with her doctor's instructions. There are many symptoms of Benzodiazepine withdrawal syndrome including anxiety, possible terror and panic attacks, agitation and restlessness, hypochondriasis, impaired concentration, nightmares, insomnia, muscular spasms, cramps, or fasciculations, etc.

Grievant argues that her withdrawal from Benzodiazepine caused her outburst. Although it is possible that Grievant's withdrawal may have made her more agitated and affected her mood, there is insufficient evidence to show that the withdrawal caused her outburst such that she lacked the ability to control her behavior. In other words, Grievant's withdrawal may help explain her behavior, but it does not excuse that behavior. Like all employees, Grievant was responsible for her behavior on July 23, 2009. She has not presented sufficient evidence to show that the drug withdrawal so severely affected her on July 23, 2009, that she was with minimal or no fault for her outburst.

Grievant argues she should be granted a reasonable accommodation regarding her disability. If the Hearing Officer assumes for the sake of argument that Grievant is a qualified individual with a disability under the Americans with Disabilities Act, reversing disciplinary action is not a required accommodation. Employers are permitted to discipline employees who may otherwise be qualified individuals with disabilities.

In light of the standard set forth in the Rules, 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.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>7</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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