

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 03/09/10;
Decision Issued: 03/12/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9276; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9276

Hearing Date: March 9, 2010
Decision Issued: March 12, 2010

PROCEDURAL HISTORY

On September 30, 2009, Grievant was issued a Group I Written Notice of disciplinary action for making an obscene comment and disrupting the work unit.

On October 15, 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 he requested a hearing. On January 22, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 9, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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:

The Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant and Ms. R did not like working with one another. They had engaged in verbal conflicts on several occasions over a several month period. Ms. R believed a rumor that Grievant had considered paying someone to "kick her ass".

On September 21, 2009, Ms. R was unsure of which truck to operate as her work crew was to travel to a work site for the day. She used her radio to call the Team Leader to ask which truck he thought she should use. Grievant overheard the radio conversation and interrupted that conversation by using his radio to call the Team Leader as well. Grievant expressed his opinion regarding which staff should be operating the two trucks and indicated that it made sense to him for Ms. R to drive a particular truck. Grievant's comments angered Ms. R. Ms. R walked to Grievant's location and "got in his face". Ms. R was angry. She told Grievant that she did not report to him and would not take orders from him. She told Grievant and she would only take direction from the Team Leader. Ms. R said that she would "whip his mother f--king punk ass." Grievant told her to "mind your own f--king business. F--k you!" Ms. R responded "f—k you!"

Ms. R was given a Group I Written Notice for her behavior. Agency Managers felt that Ms. R's behavior was on the "high end" of the Group I offense and that Grievant's was on the "low end" of the Group I offense.

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."

"Use of obscene language" is a Group I offense.² Webster's New Universal Unabridged Dictionary defines "obscene" to include "offensive to morality or decency; indecent; depraved; *obscene language*." "[D]isruptive behavior" is a Group I offense. Grievant's statement "f—k you!" was the use of an obscene phrase as an insult to Ms. R. Ms. R was ready for a physical confrontation. Grievant's phrase constituted "fighting words". His demonstrated demeanor and words directed at Ms. R could have initiated a physical conflict with Ms. R. Grievant's behavior was disruptive to the Agency's operations and justifies the Agency's issuance of a Group I Written Notice.

Grievant denies using obscene words and insulting Ms. R. Ms. R testified during the hearing and her testimony was credible. Grievant did not testify.³ There is no basis for the Hearing Officer to assess the credibility of Grievant's denial. Accordingly, the Agency has presented sufficient evidence to support its assertion that Grievant made inappropriate comments to Ms. R.

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...."⁴ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any

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 Grievant argued that Mr. Ro overheard his conversation with Ms. R and could have testified that Grievant did not make any offensive comments to Ms. R. Mr. Ro was unavailable on the date of the hearing because he was out of work on short-term disability. The Hearing Officer will not draw an adverse inference against the Agency because the Agency attempted to have Mr. Ro testify by contacting Mr. Ro and asking that he appear at the hearing to testify. It appears that Mr. Ro chose not to participate in the grievance hearing. Under the Grievance Procedure Mr. Ro has that right.

⁴ *Va. Code § 2.2-3005.*

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.

Ms. R initiated the conflict. Her actions were contrary to DHRM Policy 1.80, Workplace Violence. The Agency could have issued her at least a Group II Written Notice. Instead, the Agency issued her a Group I Written Notice because Agency managers believed that Ms. R's behavior was on the "high side" of a Group I offense. The Agency's decision to give Ms. R lesser discipline than would otherwise be appropriate is not a mitigating circumstance in this case. The Agency's judgment appears to be based upon its interpretation of Ms. R's behavior and not based on a desire to discipline Grievant more harshly than the circumstances would warrant. There does not appear to be a desire by Agency managers to single out Grievant for disciplinary action. In light of the standard set forth in the Rules, 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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.