Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 04/19/10; Decision Issued: 04/30/10; Agency: W&M; AHO: Carl Wilson Schmidt, Esq.; Case No. 9297; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 05/13/10; Reconsideration Decision issued 06/01/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 05/13/10; EDR Ruling #2010-2656 issued 06/30/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 05/13/10; DHRM Ruling issued 07/20/10; Outcome: AHO's decision affirmed.**

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9297**

Hearing Date: April 19, 2010
Decision Issued: April 30, 2010

## PROCEDURAL HISTORY

On November 16, 2009, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension[1] for violation of policy 1.80 and confrontational, aggressive, rude, unprofessional, and threatening behavior.

On December 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 she requested a hearing. On March 29, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 19, 2010, a hearing was held at the Agency's regional office.

## APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee
Agency Representative
Witnesses

[1] Grievant's suspension was reversed during the Step Process.

## 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 College of William and Mary employs Grievant as a Housekeeper Worker. She began working for the Agency in April 2007. The purpose of her position is to, "maintain the upkeep and cleanliness of campus buildings and to ensure a clean environment is maintained for all faculty, staff, students and visitors."[2] No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On September 23, 2009, Grievant attended a seminar offered by the Agency entitled "Preventing Workplace Violence." The definition of workplace violence was discussed and the consequences of engaging in workplace violence were discussed during the seminar.

On October 29, 2009, Grievant and Ms. H attended a staff meeting held in the Supervisor's office. Approximately seven people attended the meeting. Grievant and Ms. H were sitting side by side on a small couch. Grievant complained about Ms. H.

[2] Agency Exhibit 2.

Ms. H told Grievant she was jealous of Ms. H. Grievant said to Ms. H, "That's why your friend is going around saying you are sucking men's penis on campus." Grievant also said, "you think you cute, but you not cute walking around like you're nine months pregnant." Grievant's intent at the time of her statements to Ms. H was to insult Ms. H and embarrass her in front of the group. As Ms. H was speaking, Grievant raised her arm and hand and placed her hand in front of Ms. H's face, a few inches away. Ms. H told Grievant to take her hand out of Ms. H's face. The Housekeeping Manager asked Grievant to take her hand away from Ms. H's face. Grievant responded by keeping her hand in front of Ms. H's face and moving that hand closer to Ms H's face. Ms. H and Grievant stood up and turned towards each other as part of a heated exchange. The Housekeeping Manager moved between Ms. H and Grievant because she believed Grievant was going to hit Ms. H. The Supervisor also moved between Grievant and Ms. H because he believed a fight would occur. The Housekeeping Manager asked the Supervisor to move Ms. H away from the area. The Supervisor and Ms. H moved away from Grievant and the incident de-escalated.

## 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."[3] 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."

DHRM Policy 1.80 defines workplace violence 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.

Prohibited actions under DHRM Policy 1.80 include:

> Prohibited conduct includes, but is not limited to:
>
> - injuring another person physically;
>
> - engaging in behavior that creates a reasonable fear of injury to another person;

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

- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

Grievant engaged in threatening behavior contrary to DHRM Policy 1.80 because she placed her hand within a few inches of Ms. H's face and moved her hand back and forth as if she were going to hit Ms. H. Grievant engaged in verbal abuse because she criticized Ms. H's weight and suggested Ms. H engaged in sexual behavior with men on campus. The Agency has presented sufficient evidence to show that Grievant acted contrary to DHRM Policy 1.80 governing workplace violence.

Failure to follow policy is a Group II offense.[4] Grievant acted contrary to DHRM Policy 1.80 because she engaged in workplace violence. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy, namely DHRM Policy 1.80 governing workplace violence.

Grievant argued that several of the Agency's witnesses described the events differently and, thus, the Agency's case was unreliable. It is not unusual for several people witnessing the same event to have varying accounts of what happened. The question is whether the variance is so material as to render it too difficult to determine what happened. In this case, the variance of accounts is not significant. For example, one witness testified that Ms. H stood up first. Other witnesses testified that Grievant stood up first. Who stood up first is not material. What is material is that Grievant stood up, was in a position to fight Ms. H, and displayed behavior suggesting she was about to fight Ms. H. All Agency witnesses agreed that Grievant stood up, was in a position to fight Ms. H, and they believed Grievant needed to be separated from Ms. H otherwise a fight would begin.

[4] See Attachment A, DHRM Policy 1.60.

Grievant argued that she did not take any aggressive action towards Ms. H and that she had her hand up to block the intrusion into her personal space from Ms. H's arm movement. The evidence presented does not support this assertion. The Agency presented several credible witnesses to support its assertion of how Grievant behaved. One of those witnesses was Ms. H whose testimony was credible. Grievant did not testify and, thus, the Hearing Officer was not able to evaluate Grievant's behavior from Grievant's perspective. When the testimony of all witnesses is considered individually and as a whole, the Agency's contention that Grievant engaged in threatening behavior and verbal abuse is the most logical conclusion.

Grievant argued that the Housing Manager and Supervisor should have taken action sooner to diffuse the confrontation. The evidence does not support this assertion. Even if the Hearing Officer were to assume that the Housing Manager and Supervisor should have responded more quickly, it would not excuse Grievant for failing to govern her own behavior.

*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…."[5] 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.

During the Step Process, Grievant suggested a medical condition may have influenced her behavior on October 29, 2009. No credible evidence was presented to support this assertion. Grievant suggested that the Agency inconsistently disciplined its employees. She asserted that she had been the victim of a conflict with another employee but the Agency took no action against that employee. Insufficient details were presented to support this allegation. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant raised as an issue that her transfer to another work location might inhibit her access to medication that had to be refrigerated. The Agency has taken steps to ensure Grievant has access to her medication and it appeared that Grievant no longer considered this an issue during the hearing.

[5] *Va. Code § 2.2-3005.*

## 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.

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.[6]

[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].

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Carl Wilson Schmidt, Esq.
Hearing Officer

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

# *COMMONWEALTH of VIRGINIA*

## *Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 9297-R**

Reconsideration Decision Issued: June 1, 2010

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant contends the Agency failed to provide a reasonable accommodation to her disability. Grievant raised this argument during the step process but did not present any evidence during the hearing to support her allegation. Grievant appeared to agree with the Agency during the hearing that her concerns had been met. If Grievant did not believe that the Agency had met her concerns, she could have presented evidence to support her allegation. Her failure to do so means there is no evidence upon which the Hearing Officer can determine whether Grievant is a qualified individual with a disability entitled to reasonable accommodation. On appeal, Grievant presented a document showing entries by Ms. H on a social network website. Grievant could have presented

those entries during the hearing but failed to do so. Accordingly, the document is not new evidence.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

## APPEAL RIGHTS

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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
College of William and Mary

July 20, 2010

The grievant, through her representative, has requested an administrative review of the hearing officer's decision in Case No. 9297. The grievant is challenging the decision on the basis that the hearing officer failed to acknowledge and rule on certain violations that served to fuel and support an unhealthy work environment and facilitated the chance of violence continuing in the workplace. For the reasons stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has asked that I respond to this request for an administrative review.

## FACTS

The College of William and Mary employs the grievant as a Housekeeper Worker. In his **Findings of Facts,** the hearing officer states, in part, the following:

> The College of William and Mary employs Grievant as a Housekeeper Worker. She began working for the Agency in April 2007. The purpose of her position is to, "maintain the upkeep and cleanliness of campus buildings and to ensure a clean environment is maintained for all faculty, staff, students and visitors." No evidence of prior active disciplinary action against Grievant was introduced during the hearing.
>
> On September 23, 2009, Grievant attended a seminar offered by the Agency entitled "Preventing Workplace Violence." The definition of workplace violence was discussed and the consequences of engaging in workplace violence were discussed during the seminar.
>
> On October 29, 2009, Grievant and Ms. H attended a staff meeting held in the Supervisor's office. Approximately seven people attended the meeting. Grievant and Ms. H were sitting side by side on a small couch. Grievant complained about Ms. H.
>
> Ms. H told Grievant she was jealous of Ms. H. Grievant said to Ms. H, "That's why your friend is going around saying you are sucking men's penis on campus." Grievant also said, "you think you cute, but you not cute walking around like you're nine months pregnant."

Grievant's intent at the time of her statements to Ms. H was to insult Ms. H and embarrass her in front of the group. As Ms. H was speaking, Grievant raised her arm and hand and placed her hand in front of Ms. H's face, a few inches away. Ms. H told Grievant to take her hand out of Ms. H's face. The Housekeeping Manager asked Grievant to take her hand away from Ms. H's face. Grievant responded by keeping her hand in front of Ms. H's face and moving that hand closer to Ms H's face. Ms. H and Grievant stood up and turned towards each other as part of a heated exchange. The Housekeeping Manager moved between Ms. H and Grievant because she believed Grievant was going to hit Ms. H. The Supervisor also moved between Grievant and Ms. H because he believed a fight would occur. The Housekeeping Manager asked the Supervisor to move Ms. H away from the area. The Supervisor and Ms. H moved away from Grievant and the incident de-escalated.

In his **Conclusions of Policy**, the hearing officer stated the following:

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." 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."

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Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and

- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

Grievant engaged in threatening behavior contrary to DHRM Policy 1.80 because she placed her hand within a few inches of Ms. H's face and moved her hand back and forth as if she were going to hit Ms. H. Grievant engaged in verbal abuse because she criticized Ms. H's weight and suggested Ms. H engaged in sexual behavior with men on campus. The Agency has presented sufficient evidence to show that Grievant acted contrary to DHRM Policy 1.80 governing workplace violence.

Failure to follow policy is a Group II offense. Grievant acted contrary to DHRM Policy 1.80 because she engaged in workplace violence. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow policy, namely DHRM Policy 1.80 governing workplace violence.

Grievant argued that several of the Agency's witnesses described the events differently and, thus, the Agency's case was unreliable. It is not unusual for several people witnessing the same event to have varying accounts of what happened. The question is whether the variance is so material as to render it too difficult to determine what happened. In this case, the variance of accounts is not significant. For example, one witness testified that Ms. H stood up first. Other witnesses testified that Grievant stood up first. Who stood up first is not material. What is material is that Grievant stood up, was in a position to fight Ms. H, and displayed behavior suggesting she was about to fight Ms. H. All Agency witnesses agreed that Grievant stood up, was in a position to fight Ms. H, and they believed Grievant needed to be separated from Ms. H otherwise a fight would begin.

Grievant argued that she did not take any aggressive action towards Ms. H and that she had her hand up to block the intrusion into her personal space from Ms. H's arm movement. The evidence presented does not support this assertion. The Agency presented several credible witnesses to support its assertion of how Grievant behaved. One of those witnesses was Ms. H whose testimony was credible. Grievant did not testify and, thus, the Hearing Officer was not able to evaluate Grievant's behavior from Grievant's perspective. When the testimony of all witnesses is considered individually and as a whole, the Agency's contention that Grievant engaged in threatening behavior and verbal abuse is the most logical conclusion.

Grievant argued that the Housing Manager and Supervisor should have taken action sooner to diffuse the confrontation. The evidence does not support this assertion. Even if the Hearing Officer were to assume that the Housing Manager and Supervisor should have responded more quickly, it would not excuse Grievant for failing to govern her own behavior.

## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond reasonableness, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The relevant policy regarding disciplinary action, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness. Attachment A, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, the provisions of DHRM Policy No. 1.80, Workplace Violence, are applicable here.

In its request for reconsideration and administrative review, the grievant does not identify any particular human resource management policy with which the hearing officer's original decision is inconsistent. Rather, the grievant states, in part,

> The failure of the hearing officer to acknowledge and rule on these violations has fueled and supported not only an unhealthy work environment, but facilitates the chance of violence continuing at the workplace. By disciplining one worker and allowing a peer to continue to abuse state time is discrimination."

This Department has determined that this represents an evidentiary issue for which this Department has no authority to intervene.

In her appeal, the grievant also stated the following:

> "The grievant is a diabetic that requires the ability to consume food at specific intervals during her shift to maintain a stabilized blood sugar level. She has been transferred to a building she is prohibited to eat in and the facilities alternative accommodations include the grievant walking three blocks to eat a snack if hypoglycemic. Additionally, a peer was trained to assist her in emergency situations

of hypoglycemia in her original building. This is no longer available due to the transfer that is a direct response of the facility.

According to the hearing decision, the issue of accommodating the grievant's disability was addressed during the hearing. Specifically, the decision stated, "The Agency has taken steps to ensure Grievant has access to medication and it appeared that Grievant no longer considered this an issue during the hearing." This Department has determined that this represents an evidentiary issue for which this Department has no authority to intervene.

The grievant also suggested that her behavior was influenced by her diabetic condition. According to the provisions of the Americans with Disabilities Act Amendments Act, employers can hold employees to the same performance standards, including standards of conduct, as employees without disabilities. Thus, the DHRM has no basis to interfere with the application of this hearing decision.

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Ernest G. Spratley