

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 09/20/10; Decision Issued: 09/24/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9392; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9392

Hearing Date: September 20, 2010
Decision Issued: September 24, 2010

PROCEDURAL HISTORY

On April 12, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On May 10, 2010, 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 August 24, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 20, 2010, a hearing was held at the Agency's 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 District Location & Design Engineer at one of its Facilities. The purpose of Grievant's position is to:

manage the District Location & Design program to provide right of way and construction roadway plans in an accurate, precise manner. Supervise, trained other team members, maintain high skills in new design technology and construction methodology and provide extraordinary customer service.¹

One of Grievant's Measures for Core Responsibilities in his Employee Work Profile is, "[d]emonstrates leadership in executing the Civil Rights Program." No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On Friday, December 19, 2008, approximately 15 employees gathered at the Agency's facility for an informal Christmas celebration luncheon. The gathering was not an official Agency function. Grievant did not attend. Ms. L² and Ms. R attended the luncheon. Ms. R was a Muslim originally from Iraq.

¹ Agency Exhibit 3.

² Ms. L was a subordinate within Grievant's chain of command.

Ms. D brought meatballs to share with the group. Ms. R asked Ms. D what were the ingredients in the meatballs. Ms. L overheard Ms. R's comments and said, "Why not eat meatballs? Because you worship cows?" Someone said "that's Hindu". Ms. L asked "What is she anyway?", referring to Ms. R. Someone else said "Muslim". Ms. L said "You guys are terrorists." Ms. D said to Ms. L "You can't say that to people." Ms. L replied "She doesn't have feelings anyway." Ms. R heard Ms. L's comment and understood that they were directed at her. Ms. R's expression was one of surprise possibly shock. Ms. D described Ms. R's expression as being "taken aback."

Ms. P was approximately five feet away from Ms. L when she made her offensive comments. On Monday, December 22, 2008, Ms. P approached Grievant and told him what Ms. L said on Friday. Ms. P told Grievant that she thought Ms. L should apologize to Ms. R. Grievant told Ms. P he had heard other employees talking about Ms. L's comments.

On December 22, 2008, Grievant approached Ms. D and asked if anything happened on Friday. Ms. D initially said "no" but then realized that Grievant might be asking about Ms. L's comments. Ms. D asked Grievant if he was referring to Ms. L's comments made on Friday. Grievant responded "yes". Ms. L said that she had heard the comments. Grievant said "okay".

Grievant did not approach Ms. L to counsel her or take any action to further investigate the incident.

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."

"Unsatisfactory work performance" is a Group I offense.⁴ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

In 2008, workplace harassment was defined under DHRM Policy 2.30 as:

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

⁴ See, Attachment A, DHRM Policy 1.60.

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Ms. L's comments regarding Ms. R showed hostility and aversion towards Ms. R because of her religion and/or national origin. Whether Ms. L comments were sufficient to create a hostile work environment for Ms. R was a matter worthy of investigation. It would have been appropriate for Grievant to make an inquiry of Ms. L regarding her comments or initiate an investigation by human resources or civil rights staff. Instead, Grievant did nothing. Even if Ms. L's actions did not rise to the level of creating a hostile work environment, her comments were so offensive that a reasonably prudent manager would have addressed those comments to ensure that Ms. L understood that they were offensive and that such behavior should not be repeated. By failing to take any action, Grievant left the Agency at risk that Ms. L might repeat her behavior. Grievant's work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the Agency's investigation included inconsistencies and inaccuracies. If the Hearing Officer disregards the Agency's investigation in total and merely relies on the testimony presented during the hearing, there remains sufficient evidence to support the Agency's decision to take disciplinary action against Grievant.

Grievant presented testimony of the District Hydraulic Engineer who testified that he heard Ms. L's comment and told her "That's not right, you can't say that." Grievant argued that the matter was addressed at a "low level" by a supervisor and, thus, Grievant did not have to act with respect to Ms. L. Grievant's argument fails. The District Hydraulic Engineer was not within Ms. L's chain of command. He did not have the authority to sanction her or instruct her to refrain from future inappropriate behavior.

Grievant argued that the luncheon was not an officially sanctioned event of the Agency and, thus, he was not responsible for addressing Ms. L's comments. Whether the luncheon was officially sanctioned is not material. Ms. L made her comments in the Agency's offices to other Agency employees. Grievant had the authority to reprimand Ms. L.

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

⁵ Va. Code § 2.2-3005.

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 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.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].

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.