

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 10/12/10;
Decision Issued: 10/13/10; Agency: DOLI; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9410; Outcome: No Relief – Agency Upheld; Administrative Review: EDR
Ruling Request received 10/28/10; Outcome pending; Administrative Review: DHRM
Ruling Request received 10/28/10; Outcome pending.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9410

Hearing Date: October 12, 2010
Decision Issued: October 13, 2010

PROCEDURAL HISTORY

On April 27, 2010, Grievant was issued a Group I Written Notice of disciplinary action for her behavior on April 5, 2010 during a meeting with her supervisor and another employee.

On May 20, 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 she requested a hearing. On September 14, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 12, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
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 Department of Labor and Industry employs Grievant as a Program Support Technician. The purpose of her position is:

Promptly, accurately, and consistently process inspection reports received from inspection companies, generate invoices, and report the inactive status of objects/equipment. Maintain existing files and/or establish new files for the objects maintained by the [division.]¹

Grievant received an overall rating of "Major Contributor" on her 2009 annual performance evaluation. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On April 5, 2010, Grievant was talking to another employee at the bottom of stairs in the Agency's office building. Ms. W was carrying a box down the stairs and wanted to pass Grievant. Ms. W said "excuse me" and attempted to pass Grievant. Grievant attempted to move but did not move in accordance with Ms. W's expectations and Ms. W became angry. Ms. W said, "simple, stupid, ignorant dumb-ass, and God don't like ugly, ignore her." Grievant heard Ms. W's comment and was offended. She spoke with another employee regarding what to do. That employee suggested

¹ Agency Exhibit 4.

speaking with the Supervisor. Grievant spoke with the Supervisor and told her of Ms. W's comment. Ms. W sought the advice of her supervisor who suggested the Supervisor meet with both Grievant and Ms. W to resolve the matter.

The Supervisor met with Grievant and Ms. W. The Supervisor stood at the corner of the table in the room. Grievant was seated at the table to the Supervisor's left and was against the wall of the room. Behind Grievant and to her right was the office door. Ms. W sat at the table to the Supervisor's right. The Supervisor began the meeting by saying there appeared to be conflict and she wanted to get it out in the open. The Supervisor asked Grievant to repeat the statement Ms. W made to Grievant. Grievant repeated the statement and the Supervisor asked Ms. W if she made those remarks. Ms. W admitted to making the statement. The Supervisor said, "oh my goodness [Ms. W], that is not acceptable." The Supervisor then told Ms. W she should apologize to Grievant. Ms. W refused to do so. Ms. W responded by questioning how Grievant knew the comments were about Grievant. Ms. W then explained how Grievant failed to move as she passed through the walkway and that it was not the first time Grievant had acted indifferent towards Ms. W. Ms. W then described some of the prior incidents as she perceived them. Grievant began to express her feelings about what Ms. W said but Ms. W kept interrupting Grievant. The Supervisor asked Ms. W to calm down but Ms. W kept getting louder. Ms. W stood up and started walking towards the Supervisor to either go out the door or approach Grievant. Ms. W was pointing her finger at Grievant and saying Grievant was a trouble maker who brought drama with her everywhere she went. The Supervisor asked Ms. W to calm down and said people can change and that Ms. W needed to let go of the past. Ms. W said people can change but Grievant had not changed. Grievant was offended by Ms. W's remarks and stood up to defend herself by disputing the comments. Ms. W calmed down and sat down briefly. Ms. W then stood up again and said she "this was petty drama" and that she could not stand drama. The Supervisor placed herself in front of Ms. W because Ms. W was loud and again pointing her finger at Grievant. Grievant said that Ms. W was a liar and was immature. Ms. W responded by pounding her fist on the table and yelled at Grievant that she had three children and was a very mature person. Ms. W stood up and again walked towards the Supervisor and the Supervisor attempted to get in Ms. W's way. Grievant was talking to Ms. W and pointing her finger at Ms. W. Ms. W yelled that she wanted to take her two hours of leave right then and left the room. The Supervisor observed that Grievant was upset and apologized to Grievant for Ms. W's behavior. The Supervisor then left the room.

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."² Group II offenses "include acts of misconduct of a more serious

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.³ Grievant engaged in disruptive behavior by calling Ms. W a liar and immature, pointing her finger at Ms. W, and standing up to make her point. Referring to Ms. W as a liar and as immature had the effect of angering Ms. W. Pointing her finger at Ms. W was disrespectful to Ms. W. Standing up to make her point served to heighten the risk of a physical confrontation.⁴ Grievant’s actions served to exacerbate the conflict. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.⁵

Grievant argued that Ms. W was the aggressor and escalated the conflict. It is clear that Ms. W’s engaged in inappropriate behavior and was actively participating in the conflict. Ms. W was the aggressor with respect to several aspects of the conflict. Ms. W received disciplinary action. Ms. W’s behavior helps to explain why Grievant behaved as she did, but the behavior of Ms. W did not excuse Grievant’s response. Ms. W’s behavior was provocative, but was not so provocative as to render Grievant unable to collect her thoughts and respond in a calm professional manner without name calling and without an aggressive physical demeanor.

Grievant argued that when the Supervisor observed inappropriate behavior by Ms. W, the Supervisor should have exercised the appropriate judgment to adjourn the meeting. In hindsight, it is clear that the Supervisor made several poor supervisory decisions. For example, conducting a fact finding meeting with both employees present (instead of meeting with Ms. W separately and asking her if she made the offensive statements earlier in the day) was not an optimal method of resolving the dispute. When Ms. W became disruptive initially, the Supervisor could have adjourned the meeting. The Agency has discretion as to how to resolve disputes among its employees. In this case, the Agency did not exercise that discretion unreasonably.

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....”⁶ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

³ See, Attachment A, DHRM Policy 1.60.

⁴ Standing during a heated confrontation can sometimes serve to initiate further movement that leads to physical confrontation.

⁵ Grievant’s request to have her concerns addressed by the Supervisor was a protected activity under Virginia Code § 2.2-3000 which provides “[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management.” How she expressed her concerns (namely, by disruptive behavior) was not protected activity.

⁶ 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.⁷

[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

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