

Issue: Group II Written Notice with Suspension (abusive language, disruptive behavior);
Hearing Date: 12/08/10; Decision Issued: 12/10/10; Agency: UVA; AHO: Cecil H.
Creasey, Jr., Esq.; Case No. 9450; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9450

Hearing Date: December 8, 2010
Decision Issued: December 10, 2010

PROCEDURAL HISTORY

University of Virginia (“Agency”) issued to the Grievant a Group II Written Notice on September 14, 2010, for failure to follow instructions, obscene or abusive language, and disruptive behavior. Agency Exh. 2. The Grievant had one prior active Written Notice, a Group I for similar behavior, issued on August 14, 2009. Agency Exh. 3. The discipline for the current Group II Written Notice was suspension for one day.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On November 8, 2010, the Department of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. A pre-hearing conference was held by telephone on November 8, 2010. The hearing ultimately was scheduled at the first date available between the parties and the hearing officer, Wednesday, December 8, 2010, on which date the grievance hearing was held, at the Agency’s human resources office.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and they will be referred to as Agency’s Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative/Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group I Written Notice and rescission of the one-day suspension.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee’s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth’s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency’s Standards of Conduct, Policy 1.60, defines Group II offenses to include acts of misconduct of a more serious nature that significantly impact agency operations, such as failure to follow supervisor’s instructions. Group I offenses generally include offenses that have a relatively minor impact on agency business operations, such as obscene language and disruptive behavior. Agency Exh. 4.

The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a lab and research specialist with many years of experience and service, including supervision in the past. Her job entails caring for laboratory research animals in the Agency's vivariums, and includes no supervisory role. All witnesses agreed that the Grievant has excellent technical skills and knowledge and is a valuable asset to the Agency. The Agency's witnesses testified that the Grievant has a history and pattern of disruptive behavior with co-workers.

The Grievant's supervisor testified that on the morning of August 1, 2010, she overheard a loud, heated exchange between the Grievant and a co-worker and investigated. The supervisor learned that the Grievant had confronted co-worker "A," a lab technician, about gerbil feed and a wet cage to point out and correct the co-worker's performance. The Grievant is not currently a supervisor. Co-worker A, whose first language is not English, testified that the Grievant was very angry with him and used words he did not understand. He testified that the Grievant expressed anger toward him. In reporting to the supervisor, co-worker A testified that he did not wish the Grievant trouble over the incident; he only wanted her to stop yelling at him. Co-worker dictated a corroborating incident statement to the supervisor who typed the statement. Co-worker A read and signed the statement. Agency Exh. 2.

Following this exchange, Grievant's supervisor counseled the Grievant about the proper, professional behavior expected in the workplace, and reminded the Grievant of her similar past incidents. The department director had issued a memorandum to the Grievant on May 20, 2010. In that memo, the Agency counseled the Grievant regarding negative verbal interactions with co-workers. The concluding instruction of the memo is:

In the future I expect your verbal interactions with the research staff and your co-workers to be professional, congenial and foster a collaborative relationship so that they feel comfortable working with you and around you. Failure of you to do so may lead to disciplinary action.

Agency Exh. 2. In 2009, the Agency issued the Grievant a performance improvement plan that included a directive regarding condescending communication and to "keep your verbal interactions with your staff on a professional level." Agency Exh. 3.

Following the counseling by her supervisor on August 1, 2010, the Grievant left her supervisor's office and had another encounter with another co-worker "B." Co-worker B was preparing to use some clean animal cages that had been the Grievant's supplies for her work, and the Grievant angrily reprimanded co-worker B. The supervisor overheard this exchange, too, and sought the department director's advice on what action to take regarding the Grievant. Co-worker B typed and signed a corroborating statement of the incident. Agency Exh. 2.

The department director testified that he consulted the Agency's human resources department and instructed the supervisor to issue a Group II Written notice for the unprofessional conduct with two co-workers on August 1, 2010, based on the rationale that even if Group I could be appropriate a Group II was warranted because of the repeat offenses.

All Agency witnesses, including the department director, supervisor, and assistant supervisor, testified that the Grievant was very skilled and knowledgeable in her job.

The Grievant's witness, a co-worker "P" testified that that she never experienced the negative or hostile behavior from the Grievant. However, another witness called by the Grievant, the assistant supervisor, testified to the Grievant's knowledge, but also testified that he no longer asks the Grievant for assistance because her behavior toward him is disrespectful.

The Grievant testified on her own behalf, and she denied all the allegations of improper conduct and behavior. The Grievant testified to deficiencies in her co-workers and supervisors, and that her conduct and behavior was directed to correcting mistakes. The Grievant testified that the prior Group I Written Notice was based on lies, as is the current Group II Written Notice. The Grievant sincerely appears to take her job seriously and expresses a desire for others to meet her expectations. While being fervent about one's job is an admirable quality, it must be tempered with professional behavior. Here, the Grievant has been counseled and disciplined for prior behavior, all of which the Grievant disagrees with. The prior behavior, however, is only relevant if the current offense is found to have occurred.

Based on the evidence presented, I find that the Agency has met its burden of proof that the Grievant engaged in two loud, heated confrontations with two separate co-workers on August 1, 2010. All the Agency witnesses would have to be conspiring in order to find the Grievant's denials tenable. One of the Grievant's witness, the assistant supervisor, corroborated the Grievant's history of disrespectful behavior. I find that the Grievant engaged in the unprofessional confrontations with co-workers on August 1, 2010, in violation of the Agency's prior directives, discipline, and counseling.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating

circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action.”

The offense of rude or abusive language directed to co-workers could justify a Group I or Group II Written Notice. The Standards of Conduct permit a Group I offense to be disciplined as a Group II offense for repeated violations of the same offense. The Agency, thus, has met its burden of proving the Group II Written notice because the instant offense is similar to the prior, active Group I offense.

The Agency had the discretion to elect less severe discipline. 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....” Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution.”

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.

The Grievant does not advance the position that the discipline is too severe and should be mitigated. Her contention is that all aspects of the offense presented by the Agency are untruthful. The Grievant asserts that her voice pitch is intrinsically lower than a normal woman’s, and that her verbal communications are misinterpreted. She contends the disciplinary action should be reversed as completely baseless. However, the weight of the evidence shows that voice pitch is not the issue. While I find the Agency has met its burden of proof, the hearing officer should consider mitigation.

Although the Agency could have done so, it did not levy up to 10 days suspension as allowed by the Standards of Conduct for a Group II Written Notice. The Agency considered mitigating circumstances of the Grievant’s excellent technical skills in tempering its discipline and levying only one day of suspension out of a possible 10 days for a Group II Written Notice.

In light of the standard set forth above in the *Rules*, the hearing officer is not a “super-personnel officer.” Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. Accordingly, the Hearing Officer finds no mitigating circumstances exist that compel a reduction of the disciplinary action. Here, when viewing the prior Group I

Written Notice, the issuance of a Group II Written Notice with one day of suspension falls within the bounds of reasonableness and no further mitigation is permitted.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the Group II Written Notice of disciplinary action with one-day suspension is **upheld**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.



Cecil H. Creasey, Jr.
Hearing Officer