

Issues: Group I Written Notice (disruptive behavior) and Termination (due to accumulation); Hearing Date: 12/21/10; Decision Issued: 12/22/10; Agency: DBHDS; AHO: Frank G. Aschmann, Esq.; Case No. 9472; 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. 9472

Hearing Date: December 21, 2010
Decision Issued: December 22, 2010

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
Three Grievant Witnesses
Five Agency Witnesses
Agency Presenter
Agency Recorder Operator

ISSUE

Did the Grievant violate Agency policy by being disruptive in the work place on September 14, 2010 such as to warrant the issuance of a Group I Written Notice and termination of employment as disciplinary action by the Agency?

FINDINGS OF FACT

The Agency employed the Grievant as a kitchen aid. On September 14, 2010, the Grievant was working in the dish room. One of the cooks on duty stacked up cooking pans without washing them. The Grievant spoke to the cook and told him it was his job to clean the pans. Words were exchanged and the Grievant went to get her supervisor. The supervisor came and instructed the cook to clean the pans. Shortly thereafter a loud verbal exchange occurred between the cook and the Grievant. The loud voices drew the attention of several employees in the facility. The Grievant's supervisor responded to the noise and directed the cook and the grievant to stop their disruptive behavior. The cook continued to be loud for several minutes longer. During the confrontation between the cook and the Grievant the cook referred to the Grievant as "Aunt Jemima" and the Grievant referred to the cook as "boy." Each took offense at the words of the other. The Grievant is a black female and the cook is a black male. On a prior occasion a different black male employee had referred to the Grievant as "Aunt Jemima." Both the cook and the Grievant were given Group I Written Notices for disruptive behavior in the work place for the incident on September 14, 2010. The Grievant had two active Group II Written Notices in her personnel file when the incident occurred. Human Resources

recommended employment termination. The Grievant's employment was terminated on September 24, 2010. This personnel action is the subject of this hearing.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Agency uses these Standards of Conduct and has cited Section V. B. (e), Group I Offenses, Disruptive Behavior. A Group I offense usually warrants simple issuance of the notice for the first occurrence. However, the Standards of Conduct direct a cumulative effect for more than one written notice. Employment termination is typical for the accumulation of four Group I Written Notices and for two Group II Written Notices. The Agency considered the issue of mitigation in reaching its decision to terminate the employment of the Grievant. The Agency reviewed the circumstances and the work history of the Grievant and found aggravating circumstances not mitigating circumstances. The Grievant's work performance showed a pattern of disruptive behavior and the accumulation of multiple written notices.

The Grievant argues that the incident which occurred on September 14, 2010, was caused primarily by the cook and he made the majority of the noise which disrupted the work place. The cook testified and his version of the event was not particularly credible. It reflected a minimization of his role in the conflict. The Grievant also testified and while her sequence of events was more accurate, as corroborated by other witnesses, like the cook her testimony minimized her role in the conflict. Both, however, admit there was a confrontation and words were had with each other. The cook continued to argue and make noise after the supervisor arrived but this was not the beginning of the disruption, it was the end. Regardless of who

started the conflict or who was the loudest it is clear from the number of people whose attention was drawn to the incident that there was a disturbance to the work place caused by the conflict between the Grievant and the cook. The Grievant's own witness, a co-worker who was present, described the event as, "they were going at it." The noise caused several workers to leave their stations and stop work to see what was going on. The incident thus stopped the orderly progress of work in the facility. Both employees were issued the same level of reprimand for the incident. The Agency has met its burden to show that the Group I Written Notice for disruptive behavior was warranted under the circumstances.

The Grievant raised the issue of discrimination and harassment but failed to produce any evidence which proved she had been subjected to employment discrimination. On two occasions she had been called "Aunt Jemima" by two different co-workers. These incidents did not seem motivated by any discriminatory intent but rather were meant as personal insults. The actions of the employees were not sanctioned by the Agency.

The Group I Written Notice in isolation would not justify employment termination. The Grievant in this matter has two prior active Group II Written Notices in her personnel file. The accumulation of two Group II Written Notices and an additional Group I Written Notice should result in employment termination under the Standards of Conduct. Thus the Agency is justified in its personnel action to terminate the employment of the Grievant.

The service of the Grievant to the state and the fact that the cook contributed to the disturbance are considered but are insufficient mitigating factors to reduce the sanction imposed by the Agency.

DECISION

The disciplinary action of the Agency is affirmed.

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, VA 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) 786-0100.

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 contrary 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.

Frank G. Aschmann
Hearing Officer