

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 05/02/11;
Decision Issued: 05/03/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.;
Case No. 9558; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9558

Hearing Date: May 2, 2011
Decision Issued: May 3, 2011

PROCEDURAL HISTORY

On February 4, 2011, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance.

On February 9, 2011, 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 April 12, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 2, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Department of Behavioral Health and Developmental Services employs Grievant as a Food Service Tech I at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Food for patients at the Facility is delivered to them in trays. After meals are completed, the trays are placed in carts on rollers standing between five and six feet tall. When a cart is filled with trays it weighs over 300 pounds. The carts are placed in trucks and transported to an area where the dishes can be removed from the trays and washed.

On January 17, 2011 at approximately 9 a.m., Ms. D was standing in front of a long table with a sink built into the table. She was pre-soaking dishes that had been brought to her in trays stacked in carts. She was looking face down towards the water in the sink. The water had soap and bleach in it. Mr. M was standing to her side. Grievant was standing on the other side of the table approximately 8 feet in front of Ms. D. Grievant was standing with her back to a wall and next to a cart. Grievant pushed the cart full of empty trays towards Ms. D. The cart hit the side of the table with enough force to cause water to splash out of the sink. Several drops of water landed on Ms. D's clothing and some water splashed into her right eye. Some water splashed on Mr. M's hand. The soap and bleach in the water irritated Ms. D's eye. She struggled to walk to another sink where she began flushing her eye with tap water until her eye cleared. Ms. D contacted her supervisor and reported 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.”¹ 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.”

“[U]nsatisfactory work performance” is a Group I offense.² Grievant pushed a heavy cart full of trays several feet into a table containing a sink with water mixed with soap and bleach. Grievant pushed the cart with sufficient force that caused the water in the sink to splash into Ms. D’s eye. It was not necessary for Grievant to push the cart and hit the table. It was not necessary for Grievant to push the cart with sufficient force to cause the water inside the sink to splash. As a result of Grievant’s behavior, soap and bleach was splashed into Ms. D’s eye which caused her irritation and could have caused her more significant injury. The Agency has established that Grievant’s work performance was unsatisfactory thereby justifying the issuance of a Group I Written Notice.

Grievant argued that the incident did not occur as the Agency claimed. In particular, she argued that Mr. M was not standing next to Ms. D when the water splashed. She argued that Mr. M was not in the room at the time but rather Mr. C was standing next to Ms. D. Ms. D and Mr. M testified that Mr. M was standing next to Ms. D and that Mr. C was not in the room at that time. Their testimony was credible. Mr. C testified that he was not in the room at the time of the incident. His testimony was also credible. No credible evidence was presented to show that Mr. C was in the room at the time water splashed in Ms. D’s eye.

Grievant argued that the Agency’s employees were involved in a “frame up”. She argued that she was being falsely accused of splashing water into Ms. D’s eye. Grievant’s argument fails. The testimony of Ms. D and Mr. M was credible. There exists sufficient credible evidence to support the Agency’s assertion that Grievant pushed a heavy cart full of trays with excessive force thereby causing that cart to hit the table and sink and causing water to splash into Ms. D’s eye.

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....”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

³ *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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.