

Issues: Group II Written Notice (disruptive behavior and failure to follow instructions) and Suspension; Hearing Date: 06/06/11; Decision Issued: 06/09/11; Agency: UVA; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9595; 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. 9595

Hearing Date: June 6, 2011
Decision Issued: June 9, 2011

PROCEDURAL HISTORY

University of Virginia (“Agency”) issued to the Grievant a Group II Written Notice on February 25, 2011, and reissued on April 14, 2011, for disruptive behavior and failure to follow supervisor’s instructions on January 26, 2011, and February 9, 2011. Agency Exh. 2. The Grievant had one prior active Written Notice, a Group I for a similar offense, disruptive behavior, issued on May 27, 2010. Agency Exh. 3. The discipline for the current Group II Written Notice was suspension for five days.

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 he requested a hearing. On May 18, 2011, the Department of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. A pre-hearing conference was held by telephone on May 23, 2011. The hearing ultimately was scheduled at the first date available between the parties and the hearing officer, Monday, June 6, 2011, on which date the grievance hearing was held, at the Agency’s human resources office.

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

APPEARANCES

Grievant
Representative for Agency
Counsel 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 II Written Notice and rescission of the five-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. Absent mitigating circumstances, a repeat of the same, active Group I offense should result in the issuance of a Group II offense notice. Agency Exh. 7.

The Offense

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 an administrative and office specialist in the information and technology services department. He had a friendly relationship with a female co-worker, M. Through a series of what the Grievant considered on-again-off-again intensification of the relationship, M advised the Grievant that she desired only professional contact with him. This development was hurtful to the Grievant. The Agency stipulated that the Grievant has excellent technical skills and knowledge and is a valuable asset to the Agency. However, the Agency's witnesses testified that the Grievant has a history and pattern of disruptive behavior.

Shortly following M's retreat from non-professional contact with the Grievant, on January 26, 2011, the Grievant switched his work chair for another that functioned better. M noticed that the Grievant was taking the chair she had been using and asked the Grievant to replace it. When the Grievant demurred, M loudly and forcefully, in front of other co-workers, directed the Grievant to return the chair. After a brief verbal exchange with M, the Grievant returned the chair, pushing it down an aisle toward the workstation and to the extent that it hit and bounced off a wall. Co-workers testified that they felt anxious and uneasy about the Grievant's conduct.

Following this incident, on February 9, 2011, the department manager met with the Grievant and counseled him about his disruptive behavior and directed him to return to his workstation and focus on his job responsibilities. The Grievant reacted with visible disdain, expressed by huffing, pacing and temperamental facial expressions to the point that co-workers were concerned and fearful of the distracting behavior, worried that he might lose control and about what the Grievant might do next.

M testified, as did other co-workers and the operations supervisor. The Grievant testified and frankly admitted his regrettable emotional reactions, including anger, to his situation with M, but he denied the alleged intensity and extent of his behavior, asserting that the Agency had overblown his behavior. The operations supervisor testified that M's conduct over the chair on January 26, 2011, was also disruptive behavior.

The co-worker witnesses testifying on the Grievant's behalf did not present evidence materially in conflict with the Agency's witnesses, and some actually confirmed the forceful pushing of the chair on January 26, 2011, and the Grievant's tense and edgy reaction to the counseling meeting on February 9, 2011. One witness, called by the Grievant, expressed that she thought the Grievant was ready to explode on February 9, 2011.

The Agency has written General Expectations from each employee that reminds them, in specific terms, to behave professionally in the workplace. Agency Exh. 4. The Agency issued counseling memorandums to the Grievant in 2007, 2008 and 2009, in addition to the prior Group I Written Notice for disruptive behavior in 2010. Agency Exh. 5.

Based on the evidence presented, I find that the Agency has met its burden of proof that the Grievant engaged in two instances of inappropriate and disruptive conduct as described in the Written Notice, as well as failing to follow supervisor's instructions. I find that the Grievant engaged in the unprofessional and disruptive conduct on January 26, 2011, and February 9, 2011, in violation of the Agency's prior directives, discipline, and counseling. Following his meeting with the department manager on February 9, 2011, instead of returning to his workstation and focusing solely on his work, as directed by the manager, the Grievant exhibited a disruptive reaction.

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 disruptive behavior 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 advances the position that the discipline is too severe and should be mitigated because of M’s conduct toward him. While I find the Agency has met its burden of proof, the hearing officer should consider mitigation. M’s separate disruptive behavior on January 26, 2011, could be considered provocation and, thus, a mitigating factor.

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. Because of the two dates involved, the Agency could have elected to issue two separate Written Notices to the Grievant. The Agency considered mitigating circumstances of the Grievant’s excellent technical skills in tempering its discipline and levying only five days of suspension out of a possible 10 days for a Group II Written Notice. The Agency has exhibited progressive discipline appropriately. Given the two separate instances of misbehavior, on January 26, 2011, and February 9, 2011, the Agency expressed restraint in issuing only one 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, while there was some provocation on January 26, 2011, the Hearing Officer finds no mitigating circumstances exist that compel a reduction of the disciplinary action. Here, when viewing the record of prior counseling and a Group I Written Notice for disruptive behavior, the issuance of a Group II Written Notice with five days 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 five-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.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written in a cursive style.

Cecil H. Creasey, Jr.
Hearing Officer