

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 06/24/11; Decision Issued: 06/27/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9612; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9612

Hearing Date: June 24, 2011

Decision Issued: June 27, 2011

PROCEDURAL HISTORY

On March 15, 2011, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instruction.

On April 5, 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 he requested a hearing. On May 23, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 24, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Interpreter/Representative
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 employed Grievant as a Food Service Technician I at one of its Facilities. He had been employed by the Agency for approximately 20 years prior to his removal effective March 15, 2011.

Grievant had prior active disciplinary action. On September 30, 2008, Grievant received a Group III Written Notice with a five workday suspension for "verbally threatening a female co-worker with bodily harm."¹

On several occasions, the Supervisor informed Grievant that he should refrain from angry outbursts and using offensive language. The Supervisor instructed Grievant not to use foul language in the workplace.

On August 18, 2010, Grievant and an interpreter met with the Supervisor and the Director of Support Services. The Supervisor reminded Grievant that Grievant had an active Group III Written Notice and explained that any other performance issues or problems with his expressions of anger could result in the termination of his employment. When asked why he sometimes gets loud in the kitchen, Grievant responded that he was not aware that he did that. He said he did not mean to get loud.

On November 17, 2010, the Chief Operating Officer² gave Grievant a Written Counseling Notice stating:

¹ Agency Exhibit 9.

On November 4, 2010, a discussion took place between you and [Mr. P]. During that discussion, [Mr. P] claims that you were loud, and that you implied you were “going to get him” by saying that you know people in [location]. In short, you and [Mr. P] were arguing and picking at each other during work hours, which constitutes inappropriate behavior for our workplace.

In the future, you are advised and expected to comply with the following instructions:

- You shall avoid confrontations with co-workers.
- If a confrontation begins, you will walk away and notify your supervisor immediately.
- If the supervisor is not available, you will notify the Department director immediately.
- You will not initiate any discussions or elevate your tone of voice too loud and inappropriate levels while at work. If you need to resolve communication problems, a problem with work assignments, or items to be prepared, or any other work-related clarifications and a co-worker with whom you are assigned is “difficult” to communicate with, you are instructed to contact a supervisor and seek their assistance in resolving assignments, duties, tasks, or equipment issues as they arise.

If you engage in any of the following behaviors, you may subject yourself to further discipline up to and including suspension or termination:

- Loud or abusive language (remain calm, talking normal tones and respectfully so as to assure others remain calm and respectful to you).
- Cursing.
- Threats (either threatening language or physical behaviors)
- Banging pots, pans or equipment so as to vent your frustrations (there are better ways to deal with frustrations than damage to state property).

Ms. B’s temperament is quiet and reserved. She interacts with other employees but it not as gregarious as are her coworkers such as Mr. E and Ms. C.

In the late afternoon of March 8, 2011, Grievant, Ms. B, Mr. E, and Ms. C were working in the kitchen preparing trays to serve to patients at the Facility. Grievant was located behind a tray line with two hot carts on either side of him. Mr. E was within a

² Grievant was within the chain of command of the Chief Operating Officer.

few feet of Grievant and facing him. Ms. C was in the room and standing within a few feet of Grievant.

On March 8, 2011, Ms. B entered the kitchen, approached Grievant, and asked him if he was going to make mashed potatoes to serve to patients. Grievant shouted, "No". He picked up a metal serving utensil and slammed it down onto the hot cart very loudly. Ms. B told Grievant, "It's on the paper" referring to the sheet showing what food was to be served for that meal. Ms. B observed Grievant's face appear "kind of mean and distorted" and then Grievant said that Ms. B "could take that piece of paper and shove it up your ass." Ms. B was scared and left the area.

After the altercation with Grievant, Ms. B attempted to disregard the conflict so that she and the other employees could complete their work. After her shift, she left work crying. She was upset that night and was unable to work the following day. When she was later asked why she was absent on March 9, 2011, Ms. B revealed that she was so upset by Grievant's behavior that she could not come to work. Ms. B's husband called the Supervisor and complained about Grievant's behavior towards Ms. B.

Mr. E overheard the interaction between Grievant and Ms. B. He perceived Grievant's comments "as a joke because I heard him say something similar to that before even as he was completing the task." Mr. E responded to Grievant's comment, "you shouldn't talk to my [Ms. B's first name] like that." Ms. C overheard Grievant's comments and believed he was joking.

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."³ 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."

Failure to follow a supervisor's instructions is a Group II offense.⁴ It is clear that Grievant banged a utensil and used the phrase "up your ass". The Supervisor instructed Grievant not to use foul language in the workplace. The Chief Operating Officer counseled Grievant not to use abusive language and not to bang equipment to vent his frustration. On March 8, 2011, Grievant banged a cooking utensil on a metal hot cart and used abusive language in response to Ms. B's question to him. The Agency has presented sufficient evidence to support the issuance of a Group II Written

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See Attachment A, DHRM Policy 1.60.

Notice of disciplinary action for failure to follow a supervisor's instruction. Given that Grievant has an active Group III Written Notice, the Agency's issuance of a Group II Written Notice supports Grievant's removal based on the accumulation of disciplinary action.

Mr. E and Ms. C heard Grievant's comments and believed that Grievant was joking in his response to Ms. B. If the Hearing Officer construes Grievant's comments to have been made in a joking manner, the outcome of this case remains unchanged. Even if Grievant intended that his comments not be taken seriously, Grievant banged a cooking utensil loudly and used foul language. Grievant failed to follow the instructions given to him by his supervisors.

Grievant argued that the Agency's action towards him resulted from Ms. B's husband threatening the Supervisor and the Agency's fear that if it did not take action against Grievant, Ms. B's husband would create problems for the Agency. No credible evidence was presented to support this assertion. The Supervisor initiated action against Grievant because of his concerns about Grievant's behavior and not because he feared how Ms. B's husband might react to inaction by the Agency.

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..."⁵ 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. 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 II Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

APPEAL RIGHTS

⁵ *Va. Code § 2.2-3005.*

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.⁶

[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].

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer