

Issues: Group II Written Notice (failure to follow instructions), Group I Written Notice (abusive language), Suspension, and Termination (due to accumulation); Hearing Date: 05/23/11; Decision Issued: 07/05/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9531, 9583; Outcome: No Relief – Agency Upheld;  
**Administrative Review: EDR Ruling Request received 07/19/11; EDR Ruling No. 2012-3042 issued 09/23/11; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/19/11; DHRM Ruling issued 09/29/11; Outcome: AHO's decision affirmed.**



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9531 / 9583**

Hearing Date: May 23, 2011  
Decision Issued: July 5, 2011

**PROCEDURAL HISTORY**

On August 27, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow a supervisor's instructions. On January 25, 2011, Grievant was issued a Group I Written Notice for use of abusive language in the workplace. Grievant was removed from employment based upon the accumulation of disciplinary action.

On August 28, 2010, Grievant timely filed a grievance to challenge the Agency's issuance of a Group II Written Notice. On January 25, 2011, Grievant timely filed a grievance to challenge the Agency's issuance of a Group I Written Notice with removal. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On April 18, 2011, the EDR Director issued Ruling No. 2911-2939 consolidating the two grievances for a single hearing. On April 27, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 23, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency's Representative  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Direct Service Associate II at one of its Facilities.

Grievant had prior active disciplinary action. On March 13, 2009, Grievant received a Group I Written Notice for unsatisfactory work performance. On March 13, 2009, Grievant received another Group I Written Notice for unsatisfactory work performance. On March 16, 2010, Grievant received a Group I Written Notice for being tardy. On June 14, 2010, Grievant received a Group I Written Notice for unsatisfactory work performance. On June 14, 2010, Grievant also received a Group II Written Notice for failure to follow instructions.

The Client preferred to eat by himself. One of his behavior plans permitted him to eat his meals alone in the dining room without any individuals or staff in close proximity to him.

On June 18, 2010, Mr. H was working as the Acting Charge Aide. He was responsible for directing the activities of staff and individuals in the absence of a Shift

Supervisor. Mr. H asked Grievant to get the Client for breakfast. Grievant asked the Client to come for breakfast. The Client began walking down the hallway toward the dining room but observed another individual going into the dining room. The Client turned around and went back to the day hall and said he wanted to wait. The Client later came into the dining room. Grievant followed the Client into the dining room and remained there. Mr. H entered the dining room and observed Grievant near the Client. He asked Grievant to leave so that the Client could eat. Grievant replied "I ain't got to go no damn where; I get just as much right to be here as anybody else!" Mr. H said, "No! You need to go right now so [the Client] can eat." Grievant remained in the room. Mr. H. became angry that Grievant was refusing his instructions so he left and called a supervisor, Mr. T.

On January 6, 2011, Grievant was pushing an individual in his wheelchair from one end of a hallway. As Grievant passed near another employee, Ms. R, Grievant looked at Ms. R and said "f—king bitch".

### **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."<sup>1</sup> 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 instruction is a Group II offense. Grievant understood that Mr. H was the Acting Charge Aide who had the supervisory authority to instruct employees regarding their tasks and duties. On June 18, 2010, Mr. H instructed Grievant to leave the dining room so that the Client could eat alone. Grievant heard the instruction and understood that Mr. H expected her to leave the room. She refused to leave the room and told Mr. H that she had just as much right to be there as did anyone else. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instruction. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly the Agency's suspension of Grievant for five workdays must be upheld.

Grievant argued that she did not refuse to comply with Mr. H's instruction. She contends that the matter was a misunderstanding. Upon consideration of the evidence presented, the Hearing Officer finds that Grievant understood the instruction given to her and that she failed to follow that instruction.

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

“Use of obscene or abusive language” is a Group I offense under the Agency’s Standards of Conduct.<sup>2</sup> On January 6, 2011, Grievant referred to Ms. R as a “f—king bitch.” “F—king” is a pejorative term for sexual behavior. “Bitch” is an insult intended to associate a human with a female dog. When the terms are combined, the phrase is both obscene because of the sexual reference and abusive because the insulting and intimidating message. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that she did not refer to Ms. R as a “f—king bitch” and that she had been confused with another employee who actually made the comment. Ms. R knew who Grievant was and heard Grievant say “bitch”. Another employee, Ms. H, did not know Grievant’s name but was able to identify Grievant with reasonable specificity. That employee heard Grievant say “f--king bitch”. There exists sufficient evidence to support the conclusion that Grievant walked past Ms. R and called Ms. R a “f—king bitch.”

An employee may be removed based on the accumulation of four active Group I Written Notices. Prior to the issuance of disciplinary action in this case, Grievant had accumulated at least four active Group I Written Notices. With the issuance of disciplinary action in this case, Grievant has received a sufficient number of Written Notices for the Agency to remove her from employment. Accordingly, Grievant’s removal must be upheld.

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...”<sup>3</sup> 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

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<sup>2</sup> See, Chapter 14, Standards of Conduct and Client Abuse.

<sup>3</sup> Va. Code § 2.2-3005.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

## **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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>4</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Behavioral Health  
and Developmental Services

September 29, 2011

The grievant, through her representative, has requested an administrative review of the hearing officer's decision in Case No. 9531/9583. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer stated the following:

On August 27, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow a supervisor's instructions. On January 25, 2011, Grievant was issued a Group I Written Notice for use of abusive language in the workplace. Grievant was removed from employment based upon the accumulation of disciplinary action.

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In his FINDINGS OF FACT, the hearing officer wrote, in relevant part, the following:

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 Direct Service Associate II at one of its Facilities.

Grievant had prior active disciplinary action. On March 13, 2009, Grievant received a Group I Written Notice for unsatisfactory work performance. On March 13, 2009, Grievant received another Group I Written Notice for unsatisfactory work performance. On March 16, 2010, Grievant received a Group I Written Notice for being tardy. On June 14, 2010, Grievant received a Group I Written Notice for unsatisfactory work performance. On June 14, 2010, Grievant also received a Group II Written Notice for failure to follow instructions.

The Client preferred to eat by himself. One of his behavior plans permitted



him to eat his meals alone in the dining room without any individuals or staff in close proximity to him.

On June 18, 2010, Mr. H was working as the Acting Charge Aide. He was responsible for directing the activities of staff and individuals in the absence of a Shift Supervisor. Mr. H asked Grievant to get the Client for breakfast. Grievant asked the Client to come for breakfast. The Client began walking down the hallway toward the dining room but observed another individual going into the dining room. The Client turned around and went back to the day hall and said he wanted to wait. The Client later came into the dining room. Grievant followed the Client into the dining room and remained there. Mr. H entered the dining room and observed Grievant near the Client. He asked Grievant to leave so that the Client could eat. Grievant replied "I ain't got to go no damn where; I get just as much right to be here as anybody else!" Mr. H said, "No! You need to go right now so [the Client] can eat." Grievant remained in the room. Mr. H. became angry that Grievant was refusing his instructions so he left and called a supervisor, Mr. T.

On January 6, 2011, Grievant was pushing an individual in his wheelchair from one end of a hallway. As Grievant passed near another employee, Ms. R, Grievant looked at Ms. R and said "f-king bitch".

In his CONCLUSIONS OF POLICY, the hearing officer wrote, in part, the following:

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." 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 instruction is a Group II offense. Grievant understood that Mr. H was the Acting Charge Aide who had the supervisory authority to instruct employees regarding their tasks and duties. On June 18, 2010, Mr. H instructed Grievant to leave the dining room so that the Client could eat alone. Grievant heard the instruction and understood that Mr. H expected her to leave the room. She refused to leave the room and told Mr. H that she had just as much right to be there as did anyone else, The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instruction. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly the Agency's suspension of Grievant for five workdays must be upheld.

Grievant argued that she did not refuse to comply with Mr. H's instruction. She contends that the matter was a misunderstanding. Upon consideration of the evidence presented, the Hearing Officer finds that Grievant understood the instruction given to her and that she failed to follow that instruction.

"Use of obscene or abusive language" is a Group I offense under the

Agency's Standards of Conduct. On January 6, 2011, Grievant referred to Ms. R as a "f—king bitch." "F—king" is a pejorative term for sexual behavior. "Bitch" is an insult intended to associate a human with a female dog. When the terms are combined, the phrase is both obscene because of the sexual reference and abusive because of the insulting and intimidating message. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that she did not refer to Ms. R as a "f-king bitch" and that she had been confused with another employee who actually made the comment. Ms. R knew who Grievant was and heard Grievant say "bitch". Another employee, Ms. H, did not know Grievant's name but was able to identify Grievant with reasonable specificity. That employee heard Grievant say "f--king bitch". There exists sufficient evidence to support the conclusion that Grievant walked past Ms. R and called Ms. R a "f-king bitch."

An employee may be removed based on the accumulation of four active Group I Written Notices. Prior to the issuance of disciplinary action in this case, Grievant had accumulated at least four active Group I Written Notices. With the issuance of disciplinary action in this case, Grievant has received a sufficient number of Written Notices for the Agency to remove her from employment. Accordingly, Grievant's removal must be upheld.

*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 ...." 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 nonexclusive 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.

In his DECISION, the hearing officer stated the following:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's removal is **upheld** based upon the accumulation of disciplinary action.

## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In her request to this Department and to the Department of Employment Dispute Resolution for administrative reviews, the grievant raised six issues in her challenge to the hearing officer's decision. Five of the issues were not within the authority of this Agency to address but were addressed by the Department of Employment Dispute Resolution. The singular issue before this Agency, listed as item no. 4 in the appeal document – Grievant was not afforded a referral to the Employee Assistance Program (Policy 1.60) – had no impact on the hearing officer's ruling, especially since Policy 1.60 states, in part, "Referral to the Employee Assistance Program or a comparable program shall not be considered a substitute for any disciplinary action imposed for the commission of an offense." We therefore find no reason to interfere with the application of this decision.

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Ernest G. Spratley  
Assistant Director,  
Office of Equal Employment Services