

Issues: Group I Written Notice (disruptive behavior) and Termination (due to accumulation); Hearing Date: 07/05/11; Decision Issued: 07/06/11; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9619; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9619**

Hearing Date: July 5, 2011

Decision Issued: July 6, 2011

**PROCEDURAL HISTORY**

On April 14, 2011, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior. Grievant was removed from employment effective April 15, 2011 based upon the accumulation of disciplinary action.

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 June 1, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 5, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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:

Old Dominion University employed Grievant as a Housekeeper. He began working for the Agency in March 2008. Grievant had prior active disciplinary action. On October 19, 2010, Grievant received a Group III Written Notice for sleeping during work hours.

A fast food Restaurant is located within one of the Agency's buildings. If the Restaurant has food remaining after the Restaurant closes in the evening, Restaurant employees will sometimes give Agency employees the leftover food. On April 6, 2011, a Restaurant employee, Ms. M, was cleaning up the front area of the Restaurant where customers pay for their orders. Ms. M observed Grievant approach a counter and reach over an approximately 1 foot partition and grab a sandwich. Ms. M believed that Grievant was stealing the sandwich because she had not told him he could take one.<sup>1</sup> She told him that he did not have to "sneak and take one" and that he could just ask for a sandwich. Grievant turned around towards Ms. M and put his finger to his lips and made a "shhh" noise to tell Ms. M to keep quiet. He then grabbed her upper arm and rubbed her arm down to her elbow and turned to walk away. Ms. M felt extremely uncomfortable when Grievant touched her. As Grievant was walking away, Ms. M said to him loudly that he should please never touch her like that again. With his back turned to Ms. M, Grievant waved his hands in the air gesturing for Ms. M to leave him alone or to "just forget about it." Ms. M saw some of Grievant's coworkers near

---

<sup>1</sup> Grievant claimed that another employee had signaled to him that he could take a sandwich and that Ms. M did not see the other employee communicate with Grievant.

Grievant and asked them for Grievant's name and where the supervisor's office was located. After being told Grievant's name, she immediately reported the matter to Grievant's Supervisor.

## 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>2</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."

Disruptive behavior is a Group I offense.<sup>3</sup> Grievant's behavior was disruptive for several reasons. First, he took a sandwich from the Restaurant without authorization. Second, he touched Ms. M's arm and rubbed it. He did not have her permission to touch her. She did not know Grievant and did not have any reason to suspect that he would try to touch her. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

Grievant denied that the events occurred as claimed by the Agency. The Agency presented several witnesses who testified that they observed all or a portion of Grievant's interaction with Ms. M. The Agency's witnesses supported the Agency's claim that Grievant engaged in disruptive behavior. Grievant did not present any evidence showing that his interaction with Ms. M was materially different from the interaction claimed by the Agency.

Grievant had prior active disciplinary action consisting of a Group III Written Notice. With the disciplinary action giving rise to this grievance, Grievant has received sufficient disciplinary action to support the Agency's removal based on the accumulation of disciplinary action. 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>4</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

---

<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

<sup>4</sup> Va. Code § 2.2-3005.

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**. 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>5</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.