

Issue: Group II Written Notice with Suspension (disruptive behavior and workplace harassment); Hearing Date: 09/16/11; Decision Issued: 09/19/11; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 9669; Outcome: No Relief – Agency Upheld; **Judicial Review: Appealed to Charlottesville Circuit Court; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9669

Hearing Date: September 16, 2011
Decision Issued: September 19, 2011

PROCEDURAL HISTORY

On May 19, 2011, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for disruptive behavior and violation of Workplace Harassment Policy 2.30.

On June 13, 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 August 10, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 16, 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:

The University of Virginia employs Grievant as a Mason Plaster. He has been employed by the Agency for approximately ten years. Grievant has prior active disciplinary action consisting of a Group I Written Notice issued on June 30, 2010 for disruptive behavior. Except with respect to the facts giving rise to this grievance, Grievant's work performance was otherwise satisfactory to the Agency.

Grievant reported to Mr. B, an African American. Grievant believed that Mr. B sometimes sent emails that were confusing and inconsistent with the rules of grammar.¹

On April 25, 2011, supervisors called a meeting to discuss inappropriate writing on a blackboard in one of the work areas. Approximately seven employees were at the meeting. During the meeting, Grievant commented that "HR should take some money and send their superintendent, [Mr. B] to learn how to put two sentences together so a white man could understand it." Mr. S heard Grievant's comment and was offended because he believed Grievant was denigrating Mr. B because of his race. Mr. S told Mr. W he would report Grievant to a manager. Other employees in the room also heard Grievant's comments and found it offensive.

On April 27, 2011, Grievant and several employees were meeting and discussing Agency operations. One person commented about a meeting with a senior manager.

¹ Grievant submitted several emails drafted by Mr. B that were poorly drafted and confusing.

Grievant said that things would not get better as long as “HNIC were in control”. Mr. A, an African American, over heard Grievant’s comment and understood Grievant to be referring to the phrase “Head Ni—er In Charge”. Mr. A considered Grievant to be a friend but noticed that when Grievant was recounting events, he often unnecessarily included descriptions of the races of people involved in the events. Mr. A asked Grievant what he meant by his comment. Grievant walked to another area of the building. Mr. A followed Grievant. Mr. W also heard Grievant’s comment and understood “HNIC” to mean “Head Ni—er In Charge.” Mr. W understood Grievant to be referring to Mr. B. Mr. W followed Grievant and Mr. A because he was concerned that there might be a confrontation or fight between Grievant and Mr. A. Mr. A again asked Grievant what he meant by his comment. Mr. A understood Grievant to say that he was referring to “Head Knucklehead in Charge.” Mr. A explained to Grievant that if he continued to use terms like HNIC, others would perceive him as racist and possibility he might get fired. They shook hands and Mr. A considered the matter resolved between the two men.

Mr. W reported the matter to a supervisor. When Grievant met with the Deputy Director of Operations, Grievant stated that he intended the letters HNIC to be refer to “Head Nuts In Charge.”

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.”² 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.”

DHRM Policy 2.30 governs Workplace Harassment. The policy of the Commonwealth is to provide its employees with a workplace free from harassment. Workplace harassment includes:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant violated DHRM Policy 2.30 because he engaged in verbal conduct that denigrated Mr. B based on Mr. B's race. Grievant's comments had the effect of creating an offensive work environment for other employees. By saying that HR should provide training to Mr. B so that he could put two sentences together so that a white man could understand it, Grievant injected a contrast between his race and Mr. B's race into a comment about Mr. B's failure to use proper grammar. Several employees perceived Grievant's comment as an offensive comment about Mr. B based on his race. By using the letters "HNIC", Grievant referred to the phrase, "Head Ni—er In Charge". "Ni—er" is a word commonly used to demean and insult African Americans. Several employees heard Grievant's reference to HNIC and were offended because they understood Grievant to be using the word "Ni—er". Based on an objective and subjective standard, the Agency has presented sufficient evidence to show that Grievant engaged in workplace harassment contrary to DHRM Policy 2.30.

Failure to follow policy is a Group II offense.³ Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's five workday suspension must be upheld.

Grievant argued that when he referred to himself as a white man, he was merely making a statement of fact and did not intend to make a comment about Mr. B's race. The difficulty with Grievant's argument is that including a description of his race into his statement about Mr. B's poor grammar was unnecessary if he only wanted to comment on Mr. B's writing ability. By including reference to his race, he created a contrast between his race and Mr. B's race which suggested whites may have difficulty communicating with African Americans.

Grievant argued that he meant the term HNIC to stand for Head Nuts In Charge and did not intend it to be racially offensive. The Agency presented evidence of several employees who were familiar with the term HNIC and understood it to mean "Head Ni—er In Charge." Grievant's argument fails. Aside from Grievant's assertion, Grievant presented no evidence of witnesses who understood the term to refer to Head Nuts In Charge.

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...."⁴ 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-

³ See, Attachment A, DHRM Policy 1.60

⁴ Va. Code § 2.2-3005.

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.

Grievant argued that the Agency inconsistently applied disciplinary action. He argued other employees had referred to race but were not disciplined. He offered an exhibit of an email sent by an Italian American employee. The email expressed pride about his Italian American heritage. Grievant's argument fails. To show the inconsistent application of disciplinary action, Grievant must show similarly situated employees were treated differently by managers who were aware of the behavior. Grievant has not presented such evidence. An Italian American referring to his own heritage is significantly different from an employee of one race making derogatory comments about persons of another race. In light of the standard set forth in the Rules, 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 with suspension 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.⁵

[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

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

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

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)	
Grievant,)	
)	Case No. 2011-350
THE RECTOR AND VISITORS)	
OF THE UNIVERSITY OF VIRGINIA,)	
)	
Respondent.)	

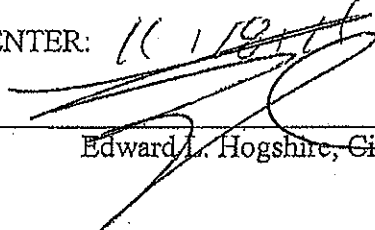
ORDER

This matter came before the Court on Grievant's appeal pursuant to Va. Code § 2.2-3006(B) of the decision of the hearing officer on September 19, 2011, in Case Number 9669 and was argued by counsel for Respondent and by Grievant *pro se*.

Having reviewed the record submitted by Respondent to this Court on October 27, 2011, and carefully considered the arguments on behalf of the parties, this Court is of the opinion, and does hereby hold, that Grievant submitted no evidence that the decision on appeal was "contradictory to law," and that said decision must therefore be affirmed.

It is therefore hereby ORDERED that the decision of the hearing officer on September 19, 2011, in Case Number 9669 is affirmed, and that this appeal is dismissed with prejudice and removed from the docket of this Court. Grievant's objections are noted. Grievant has waived signature to this Order.

ENTER: *11/19/11*



Edward L. Hogshire, Circuit Judge

I ask for this:

R. C. Kast

Richard C. Kast, Counsel for Respondent

A COPY TESTE:
 PAUL C. GARRETT, CLERK
Paul C. Garrett CLERK