

Issue: Group I Written Notice (disruptive behavior and unsatisfactory performance);
Hearing Date: 10/15/12; Decision Issued: 10/16/12; Agency: LVA; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9922; Outcome: No Relief – Agency Upheld;
Administrative Review: EDR Ruling Request received 10/25/12; EDR Ruling No.
2013-3465 issued 11/08/12; Outcome: AHO's decision affirmed; **Administrative**
Review: DHRM Ruling Request received 10/25/12; DHRM letter issued 11/05/12
declining to review.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9922

Hearing Date: October 15, 2012

Decision Issued: October 16, 2012

PROCEDURAL HISTORY

On June 29, 2012, Grievant was issued a Group I Written Notice of disciplinary action for workplace harassment.

On July 10, 2012, 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 September 26, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 Library of Virginia employs Grievant as a Housekeeper, Event Supervisor. He began working full time for the Agency in 2000. Grievant supervises four event staff workers but when the Manager is absent, Grievant supervises the entire housekeeping department. No evidence of prior active disciplinary action was introduced during the hearing.

The Manager had counseled Grievant regarding his interaction with his subordinates on several occasions. For example, on April 7, 2011, the Manager overheard Grievant speaking with Ms. M with a harsh, loud and berating tone. The Manager observed that Ms. M had tears in her eyes because of her interaction with Grievant. The Manager told Grievant that he should treat staff with respect and not be raising his voice to them. On August 10, 2011, three members of the housekeeping staff complained to the Manager that Grievant was speaking harshly and "going off" on them. On February 12, 2012, an employee complained to the Manager that Grievant was following her, criticizing her work, and making her feel uncomfortable. The Manager counseled Grievant against engaging in this behavior.

On May 17, 2012, Grievant was supervising a part time evening housekeeper, Ms. R. Ms. R performed her cleaning duties by moving from one floor to the next. Ms. R cleaned in the evenings after regular business hours and in parts of the building that were quiet and secluded. Sometimes Grievant appeared on the floor before she got to the floor. Other times, Grievant appeared on the floor after Ms. R had moved to the

floor. Grievant did not interact¹ with Ms. R while he was on the floor with her other than saying “uh-huh” several times. Although Ms. R perceived Grievant’s verbal expressions as offensive, several witnesses testified that Grievant regularly said “uh-huh” without any specific reason. Ms. R submitted a written complaint to the Manager because she believed Grievant was harassing her and “nit picking” her with his behavior.

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.”

Disruptive behavior and unsatisfactory work performance are Group I offenses.³ Grievant had been counseled against following employees and informed that he should treat employees with respect. On May 17, 2012, Grievant’s work performance was unsatisfactory because he disregarded the Manager’s counseling and followed Ms. R from floor to floor without a reason to do so. His behavior was disruptive because he upset Ms. R to the point she complained about Grievant to the Manager. The Agency has presented sufficient evidence to support the issuance of a Group I offense.

Grievant argued that he did not engage in any inappropriate behavior. Grievant presented witnesses who testified that he regularly said “uh-huh” without any obvious reason. Grievant’s comments to Ms. R of “uh-huh” do not form a basis for disciplinary action. Grievant did not testify, however, and did not present any witnesses who explained why he went from “floor to floor” on May 17, 2012. The evidence, as presented to the Hearing Officer, is that Ms. R went from floor to floor cleaning and Grievant appeared on those floors on more occasions than was necessary to do his job.

The Agency alleged that Grievant engaged in work place harassment because Ms. R perceived Grievant’s expressions to be “very sexual”. Although the Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior and for unsatisfactory work performance, the Agency has not established workplace harassment under DHRM policy.

¹ Ms. R testified that Grievant did not say anything to her because he knew she would say something back.

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

³ See, Attachment A, DHRM Policy 1.60.

DHRM Policy 2.30 governs Workplace Harassment. This policy states, the “Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual’s race, sex, color, national origin, religion, age, veteran status, political affiliation or disability.” Workplace harassment is defined as:

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.

Although the Written Notice states that Grievant engaged in workplace harassment, it also states, “I could not substantiate any action of sexual harassment on your part” This admission shows that the Agency cannot establish that Grievant engaged in workplace harassment on the basis of sex. Grievant did not take action against Ms. R because of her race, color, national origin, religion, age, veteran status, political affiliation, or disability. Grievant did not engage in workplace harassment as defined by DHRM Policy 2.30.

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-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** on the basis that Grievant’s work performance was unsatisfactory and his behavior was disruptive.

⁴ Va. Code § 2.2-3005.

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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

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

[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

November 5, 2012

[Grievant]

RE: **Grievance of [Grievant] v. Library of Virginia**
Case No. 9922

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 either state human resource management or agency human resource management policy, you may request the Director of the Department of Human Resource Management (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of OEDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

Concerning item number 2 above, in each instance where a request is made to the DHRM for an administrative review related to policy, the party making the request must identify with which human resource management policy, either state or agency, the hearing decision is inconsistent. You have not identified any such policy. Rather, it appears that the issues you raised are related to what occurred during the grievance hearing (you state that had expected to be called to testify as a witness but were not) and were not policy related. Moreover, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. We therefore must decline to honor your request to consider further this appeal.

Sincerely,

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services