

Issues: Group I Written Notice (abusive language) and Termination (due to accumulation); Hearing Date: 10/05/12; Decision Issued: 10/20/12; Agency: DARS; AHO: Lorin A. Costanzo, Esq.; Case No. 9932; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA  
WOODROW WILSON REHABILITATION CENTER**

**DECISION OF HEARING OFFICER**

**In the matter of: Grievance Case No. 9932**

**Hearing Date: October 5, 2012  
Decision Issued: October 20, 2012**

**PROCEDURAL HISTORY**

Grievant was issued a Group I Written Notice on August 2, 2012 for Written Notice Offense Codes/Categories "37", "36", and "32" (disruptive behavior, obscene or abusive language, and violation of Policy 1.80 - *Workplace Violence*). The Group I Written Notice further stated Grievant has an active Group III Written Notice and termination was warranted.<sup>1</sup>

Grievant timely grieved the issuance of the Group I Written Notice with termination. The matter was qualified for a hearing and undersigned was appointed hearing officer effective September 17, 2012 by the Office of Employment Dispute Resolution, Department of Human Resources Management. Hearing was held on October 5, 2012 with Grievant in attendance.<sup>2</sup>

Prior to hearing, Grievant requested his designated Advocate testify at the Grievance hearing. By agreement of the parties, Grievant's Advocate testified prior to the parties' opening statements and prior to any other witnesses testifying. By agreement of the parties, the exchanged exhibits were admitted *en masse*. Additionally, by agreement of the parties at hearing, three exhibits (designated as HO-1, HO-2, and HO-3) were admitted.

**APPEARANCES**

Grievant  
Grievant's Advocate (who was also a witness)  
Agency's Advocate  
Agency Party Designee (who was also a witness)  
Witnesses: Housekeeping supervisor  
                  Mechanic  
                  Driver  
                  Grounds supervisor  
                  Environmental Service Manager  
                  HR Director

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<sup>1</sup> A. Ex. D-4.

<sup>2</sup> HO Ex. 3.

## ISSUES

Whether the issuance of a Group I Written Notice with termination was warranted and appropriate under the 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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.<sup>3</sup>

Section 5.8 of the *Grievance Procedure Manual*, provides that the employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.

## FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Agency provides rehabilitation services to clients of various ages who have mental and/or physical disabilities. Agency maintains an "External Training Option" ("ETO") for clients which places clients working with staff on the campus to learn various skills for future employment.<sup>4</sup>

Grievant was employed by Agency as a Repair Tech III.<sup>5</sup> On July 26, 2012, while working with both staff and clients, Grievant was heard saying a profanity and observed throwing his shovel down. He was further observed walking up and down a walkway using profanity. Both staff and clients witnessed his actions and heard his words.<sup>6</sup>

On August 2, 2012 Grievant was issued a Group I Written Notice with termination (Offense date: 7/26/12) for Written Notice Offense Codes/Categories "37" (disruptive behavior), "36" (obscene or abusive language), and "32" (violation of policy 1.80, workplace violence). The Group I Written Notice further indicated, "The employee has an active Group III Notice for similar behavior in the recent past, therefore termination is warranted." The *Nature of Offense and Evidence* provided:

On July 26, 2012, you violated the workplace violence policy and disrupted the workplace when you willfully threw a shovel with reckless abandon and followed this action with excessive abusive and foul language in the presence of [Agency] clients and co-workers. See the attached Due Process letter dated 7/27/12.<sup>7</sup>

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<sup>3</sup> Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

<sup>4</sup> Testimony.

<sup>5</sup> HO Ex. 3.

<sup>6</sup> A. Ex. B, A. Ex. D, and Testimony.

<sup>7</sup> A. Ex. D-4.

On April 6, 2012 Grievant was issued a Group III Written Notice (Offense Date: 3/29/12 and Inactive Date: 4/5/16) for “Damaging State Property or Records” (Written Notice Offense Code/Category “77”). The Group III Written Notice provided for a 3 day suspension. The *Nature of Offense and Evidence* indicated:

On March 29<sup>th</sup>, you willfully and recklessly damaged state property (a weedeater). You were counseled previously on March regarding inappropriate behavior during an incident in [*name of hall*]. Both instances appeared to be a fit of anger.

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints ... . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

### ***Standards of Conduct:***

To establish procedures on the Standards of Conduct and Performance for employees of the Commonwealth and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resources Management has promulgated Policy No. 1.60, *Standards of Conduct*. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct of employees and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. 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 would warrant termination.

Obscene language and disruptive behavior are listed as examples of Group I Offenses in *Attachment A* of Policy 1.60. This policy further provides that the examples of offenses set forth are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. The Standards of Conduct provides:

*Examples of offense, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in*

*the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*<sup>8</sup>

The *Standards of Conduct* provide that one Group III Offense normally should result in termination unless there are mitigating circumstances. *Attachment A* of Policy 1.60 provides that any subsequent Written Notice during the active life of a Group III Written Notice may result in discharge and further provides that Group III Offenses have an active life of four years from the date of its issuance to the employee.<sup>9</sup>

**Workplace Violence:**

Department of Human Resource Management Policy Number 1.80 – *Workplace Violence* (effective date: 5/01/02) prohibits violence in the workplace. “Workplace violence” is defined in Policy Number 1.80 as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, and intimidating presence, and harassment of any nature such as stalking, shouting or swearing.<sup>10</sup>

This Policy provides that employee violating Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

Policy Number 1.80 requires each agency to create and maintain a workplace designed to prevent or deter workplace violence through the development of agency policies and procedures that articulate how this policy will be implemented in their agency.

Agency has promulgated Policy Number 6.06 which has as its objective to establish a procedure that prohibits violence in the workplace and to create and maintain a workplace designed to prevent or deter workplace violence in compliance with the Commonwealth’s Department of Rehabilitative Services Policy Number 30.<sup>11</sup>

Human Resource Service Policy and Procedures, Policy Number 30, titled “Workplace Violence” (effective date June 1, 2004) provides, in pertinent part:

POLICY:

The Department of Rehabilitative Services seeks to provide a work environment free from violence or threats of violence against individuals, groups or employees or threats against agency property. ... This policy requires that all individuals on agency premises or while representing the Agency conduct themselves in a professional manner consistent with good business practices and in absolute conformity with non-violence principles and standards. This policy applies to all DRS employees.

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<sup>8</sup>A. Ex. F.

<sup>9</sup>A. Ex. F. Policy 1.60 and HO-1, *Attachment A*.

<sup>10</sup>HO Ex. 2.

<sup>11</sup>HO Ex. 2.

DRS will not tolerate physical or nonphysical acts of workplace violence. All alleged violations of policy will be immediately reviewed to determine whether further investigation is necessary. Any employee found guilty of workplace violence will be disciplined appropriately under the standards of conduct policy.

DEFINITIONS:

Workplace violence is any physical or nonphysical act that results in threatened or actual harm to a person or threatened or actual damage to property. ....

B. Threatening behavior includes, but is not limited to:

1. Verbal – verbal threats of violence towards persons or property; use of vulgar or profane language towards others; derogatory comments or slurs; verbal intimidation, exaggerated criticism or name-calling.<sup>12</sup>

***Grievant's documents:***

Two documents of Grievant were presented, his written response dated 7/29/12 (A. Ex. D-2) and a document he requested admitted (G. Ex.1).

a. On 7/29/12 Grievant provided a written statement in response to his due process letter indicating he felt certain individuals were trying to provoke him and nothing was done to these people. He admitted that he “tossed down the shovel”. Grievant also sets forth matters as to his prior Group III Written Notice. He expresses concern as to being the only one in trouble. He states, “I even went upstairs with this issue and wanted to know why I was the only one in trouble and was told that was not so, but nobody else in in trouble here but me.” He indicates issues of anger from other persons involved and nothing is done.

Grievant also notes staff asked his then girlfriend, now wife, to try and get him some help. He indicates he received a number to be in contact with people “who could help with my anger”. Grievant states further states, “I am aware that my actions were uncalled for and I do apologize for that. I am working at fixing these issues unfortunately it is a process that needs a little time.”<sup>13</sup>

b. Grievant provided a second typewritten document, admitted as “G. Ex 1”, in which he set forth, in narrative form, his statement of what occurred on 7/26/12 and his concerns about certain matters. He indicates that on 7/26/12 he was assisting the ground shop with a landscape project along with other employees. He states the [clients] were sent to lunch when he began helping empty dirt out of a tractor bucket. Dirt was falling out and hit another employee who responded that Grievant needed to watch what the f--k he was f--ing doing. Grievant indicates the employee threw his shovel down, this upset him, and he tossed down his shovel and tried to walk away to calm down. He contends the other employee continued to run his mouth and that he (i.e. Grievant) began to lose his cool. Grievant states there were existing problems and disagreements affecting matters.

In this document Grievant presents matters including another employee ran over a hand blower and was not written up, cussing and loss of temper by other employees, adding time on time sheet,

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<sup>12</sup> A. Ex. E.

<sup>13</sup> A. Ex. D-2.

contending he was set up to fail, improper smoking observed, and staff being allowed to spit smokeless tobacco on shop floor.

**7/26/12 incident:**

An incident occurred on 7/26/12 which gave rise to Agency concerns and resulted in Grievant being issued a Group I Written Notice. Grievant was working on Agency grounds with other employees and clients. The employees and clients were planting shrubbery and dirt was being shoveled from a tractor bucket. Grievant's actions and words on 7/26/12 led to him being issued a Group I Written Notice for disruptive behavior, obscene or abusive language, and violation of Policy 1.80. In his written statement (Ex. G. 1) Grievant indicates that he was upset and did "toss down" his shovel. He further indicates that he tried to walk away to calm down contending he was provoked by what another employee said and did. Neither of his written statements address any words he was alleged to have said.

Differences exist between matters related in Grievant's written statements and related by the testimony of witnesses. One of Grievant's documents was prepared to respond to allegations being investigated and the other was prepared for use in the grievance hearing as an exhibit. Grievant does not address cursing or use of profanity on his part in either document but does present he was provoked. Witnesses testified to Grievant's cursing/profanity. Very little of the matters contended in Grievant's documents were supported by testimony or other evidence. Eyewitnesses presented testimony as to matters they observed under oath and subject to cross-examination.

Witnesses testified to their observations of Grievant using profanity/obscene language and hitting his shovel and throwing his shovel down. Testimony also indicated he was walking up and down a walkway using profanity/obscene language. Eyewitness testimony confirmed Grievant's actions and use of profanity/obscene language were done in the presence of both clients and staff.

Grievant was observed shoveling dirt in a very fast manner from the tractor bucket. It appeared that some dirt got on another employee. This other employee testified he, "felt dirt hit me in my back and heard the "F" word *{Note: expletives were set forth in testimony but are abbreviated herein}* and the shovel hit the bench behind him. He also testified he heard another employee say saying to stop acting like a four year old. This employee also testified Grievant got mad earlier because he told Grievant they weren't working Saturday.

Grievant was observed hitting the ground with his shovel and say "F--- this". One witness testified to Grievant's shovel bouncing in the stone and off the wall. Grievant was observed pacing on walkway with his hands under this arm pits saying profanities. Grievant was heard also saying, "F--- everybody".

There is insufficient evidence to find Grievant was either provoked or was in any way justified in his actions and/or words. The evidence indicates that on 7/26/12, while a work, Grievant did used obscene and/or abusive language and exhibited disruptive behaviors on the job. Furthermore, his actions and words were a violation of Policy 1.80.

**Prior incidents:**

Witnesses testified to prior instances of Grievant being angry/upset at work and to his throwing and/or breaking things. Witness expressed concerns for clients and for staff in situations where Grievant gets upset/angry. Witness also expressed concerns as the effect Grievant's actions were having on work and on other employees.<sup>14</sup> The active Group III Written Notice specifically noted, "You were counseled previously on March regarding inappropriate behavior during an incident in [hall]. Both instances appeared to be a fit of anger."

The evidence indicates that there have been past issues and incidents at work involving Grievant becoming upset and/or angry and there have been past incidents of throwing and/or breaking. Management has verbally counseled Grievant on a number of occasions about his anger and outbursts.

***Unfair/different treatment:***

In his two written statements (discussed above) Grievant contends he was treated unfairly/differently than other employees. He contends inconsistent discipline, and that employees engaged in inappropriate behaviors including anger issues and cussing. He asserts time sheet issues, smoking issues, and spitting issues.

While Grievant may have asserted a number of matters in these two documents there is insufficient evidence/no evidence presented to support these assertions. Grievant has not presented sufficient evidence to find other employees being inconsistently disciplined in the same or similar situation or that he was unfairly or differently treated than other employees.

For an allegation of unfair or misapplication of policy to be sustained it generally must be shown that management violated a mandatory provision of policy or that the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. The evidence presented does not uphold a finding of unfair or unequal treatment.

***Disability and/or Accommodation:***

Grievant appears to be contending that anger issues and his being, at one time, a client at Agency were indicative of a disability and were mitigating circumstances. Grievant stated in his written statement of 7/29/12 that he had gone to several people for help and did receive a telephone number to be in contact with people who could help him with his anger. However, in response to clarification questions presented by Agency, he indicated none of the people he referenced as going to for help were either certified counselors or medical professionals. He further indicated that he was not presently under the supervised care of a medical professional.<sup>15</sup>

The Americans with Disabilities Act ("ADA") prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability. A *qualified individual* is defined as a person with a disability, who, with or without "reasonable accommodation can perform the essential functions of the job. An individual is "disabled" if she a.) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual; b.) has a record of such an impairment; or c.) has been regarded as having such an impairment.<sup>16</sup>

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<sup>14</sup> A. Ex. A, A. Ex. B, and A. Ex. C.

<sup>15</sup> A. Ex. D-2 and A. Ex. D-3.

<sup>16</sup> 42 U.S.C. § 12102(2).

Without addressing whether Grievant was disabled or a “qualified individual with a disability”, there is no evidence that Grievant requested of Agency any accommodation or indicated any accommodation was needed. Grievant has the responsibility to inform Agency that an accommodation is needed to perform essential job functions. Furthermore, in Jones v. Am. Postal Workers Union, 192 F.3d 417, 429 (4<sup>th</sup> Cir. 1999) the Court held:

The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee’s misconduct, even if the misconduct is related to a disability.

There is insufficient evidence to establish that violation the ADA or that any rights under the ADA were violated by the issuance of the Group I Written Notices with termination.

***Due Process:***

The *Standards of Conduct* provide that prior to any disciplinary action employees must be given oral or written notification of the offense, an explanation of the evidence in support of the charge and a reasonable opportunity to respond. The *Standards of Conduct* further provides that, as to a reasonable opportunity to respond after receiving notification normally, a 24-hour period is sufficient. However, a reasonable opportunity to respond should not be solely based on the quantity of time provided but also the nature of the offense, which may or may not require time to refute it or mitigate charges.

Agency provided Grievant with a due process letter dated July 27, 2012 which described the 7/26/12 incident leading to Agency’s concern and investigation for possible disciplinary action. This letter set forth allegations Grievant had used obscene language, smacked the shovel down in the gravel on the truck bed one or two times, threw the shovel down, and continued walking up and down a main walkway using profane language. The letter notes that this, combined with the fact that he had received a Group III Offense could result in a termination.

In the 7/27/12 letter Grievant was afforded until 3:00 PM on July 30, 2012 to respond to management and provide any information he wanted considered before Agency made a determination of what, if any, disciplinary action would be pursued. Additionally, Grievant was asked to meet with management on August 1, 2012 to discuss what, if any, disciplinary action would be taken.<sup>17</sup> By letter dated 7/29/12 Grievant did provide a written response and set forth matters he desired considered by Agency.<sup>18</sup>

The evidence indicates that, prior to any disciplinary action Grievance received a written notification of the offense and an explanation of Agency’s evidence in support of the charge. Furthermore, the evidence indicates that, prior to any disciplinary action that Grievant was afforded a reasonable opportunity to respond and present mitigating factors or denial of the charge prior to the disciplinary action.

***Mitigation:***

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 the

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<sup>17</sup> A. Ex. D-1.

<sup>18</sup> A. Ex. D-2.

rules established by the department of employment dispute resolution..."<sup>19</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". 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."

Grievant has an active Group III Written Notice that was issued on April 6, 2012. Even though Policy 1.60 provides that the normal Disciplinary action for a first Group III Offense is termination, Grievant was not terminated at that time. Grievant was issued a Group I Written Notice for his actions on 7/26/12. Due to his having an active Group III when the Group I was issued he was terminated. Policy 1.60 provides that any subsequent Written Notice during the active life of a Group III Written Notice may result in discharge.

The Hearing Officer does not find that the agency's discipline exceeds the limits of reasonableness.

### **CONCLUSION**

For the reasons stated above, based upon consideration of all the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency's discipline does not exceed the limits of reasonableness.

### **DECISION**

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group I Written Notice with termination was warranted and appropriate under the circumstances and the Agency's issuance of a Group I Written Notice with termination is **UPHELD**.

### **APPEAL RIGHTS**

As the *Grievance Procedure Manual (effective date: July 1, 2012)* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

#### **A. Administrative Review:**

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<sup>19</sup> Va. Code § 3005.

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

**1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the DHRM Director.** This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

**2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR.** This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is [edr@dhrm.virginia.gov](mailto:edr@dhrm.virginia.gov)).

**B. Final Hearing Decisions:**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if Ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**C. Judicial Review of Final Hearing Decision:**

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/Lorin A. Costanzo

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Lorin A. Costanzo, Hearing Officer