

Issues: Group II Written Notice (Abusive Language), and Termination (due to accumulation); Hearing Date: 11/20/12; Decision Issued: 12/03/12; Agency: DBHDS; AHO: Ternon Galloway Lee, Esq.; Case No. 9958; Outcome: No Relief – Agency Upheld.

# **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 9958**

**Hearing Date: November 20, 2012**

**Decision Issued: December 3, 2012**

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## **SUMMARY OF DECISION**

The Agency had found Grievant violated the standards of conduct by becoming disruptive and displaying unprofessional behavior in the workplace. It issued Grievant a Group II Written Notice with termination for an accumulation of offenses. The Hearing Officer determined that Grievant engaged in the conduct alleged and upholds the Agency's discipline.

## **HISTORY**

On August 27, 2012, the Agency terminated Grievant because it contends Grievant was disruptive and unprofessional in the workplace. On or about September 12, 2012, Grievant timely filed her grievance to challenge the Agency's action. On October 29, 2012, the office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on November 2, 2012, and subsequently a scheduling order was issued.

The Hearing Officer scheduled the hearing for November 20, 2012, the first date available between the parties. Prior to commencing the hearing, the parties were given an opportunity to present matters of concern to the Hearing Officer. None were presented. The Hearing Officer also admitted the Agency's Exhibits 1 through 9, and the Hearing Officer's Exhibits 1 through 7. Grievant was given an opportunity to submit exhibits but declined to do so.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant was represented by her advocate.

## **APPEARANCES**

Advocate for Agency

Witnesses for the Agency (2 witnesses)

Advocate for Grievant

Witnesses for Grievant (3 witnesses, including Grievant)<sup>1</sup>

## **ISSUE**

Was the written notice with termination warranted and appropriate under the circumstances?

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<sup>1</sup> One witness testified on behalf of the Agency and Grievant.

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. Grievant worked as supervisor in the food service department of the Agency. Her responsibility included assuring that the correct number of food trays were prepared and sent to all the residents that resided in the Agency’s cottages/housing units. (Testimonies of Team Leader, Supervisor, and Grievant).
2. On August 10, 2012, sometime between 11:15 a.m. and noon, staff in housing Unit 4C of the Agency discovered that one of the resident’s food trays was missing from the food cart. Grievant’s department was telephoned and informed. Grievant informed the Unit 4C employee who placed the call that she would check on the situation and call back. Grievant did call back regarding the missing tray and spoke to Team Leader. An argument ensued. Subsequently, Grievant continued to inform Team Leader that the tray was sent, and Team Leader responded that the tray had not been received. (Testimonies of Grievant and Team Leader). The argument ended when Grievant called Team Leader a “bitch” and hung up the telephone. (Testimony of Team Leader).
3. Team Leader had never met Grievant in person, but recognized her voice from hearing it several times during the past six years of Team Leader’s employment with the Agency. (Testimony of Team Leader).
4. Soon after the Argument, Team Leader made a complaint that Grievant was rude, unprofessional, and cursed at Team Leader using the word “bitch.” (Testimony of Team Leader; A Exh. 3).
5. Also, shortly after the incident Grievant informed her supervisor (“Supervisor”) of the argument between herself and Team Leader, but did not inform him she had referred to Team Leader as a “bitch.” (Testimony of Supervisor).
6. On August 27, 2012, management issued Grievant a Group II Written Notice with termination for the alleged offence. (A Exh. 2).

The Group Notice described the offense as follows:

Failure to follow the standards of conduct. Despite previous counseling as well as a prior active written notice. [Grievant]

became disruptive and unprofessional in the workplace. On August 10, it was reported that she became argumentative with a team leader regarding a missing tray. [Grievant] used rude and offensive language.

(A Exh. 2).

7. At the time Grievant received the Group II Written Notice she had an active Group II Written Notice for use of abusive language. (A Exh. 6). The prior incident resulting in the Group II Written Notice involved Grievant using obscene language and behaving in an uncivil manner on the job site. As a result of the prior Group II Written Notice, Grievant had been suspended and received anger management counseling. (Testimony of Grievant; A Exh. 7).

8. April 17, 2012 minutes of a meeting with Grievant, her supervisor and at least one of Grievant's subordinates indicated that Grievant had received at least one complaint from a subordinate that she did not know how to speak appropriately to people. (A Exh. 5, p. 2). A memorandum of a meeting held on May 4, 2012, with Grievant, her supervisor, and a subordinate of Grievant states that on at least one occasion the escalation of an incident was attributed to, according to Grievant's supervisor, the way Grievant responded to her subordinate. (A Exh. 5, p. , p. 6).

8. Several of Grievant's coworkers believed she would retaliate if they voiced complaints. (A Exh. 5).

9. Grievant's immediate supervisor described Grievant as one of his best supervisors with good intent, but often with bad methods. (Testimony of Supervisor).

### **DETERMINATIONS 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. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

*Va. Code § 2.2-3000 (A)* sets forth the Commonwealth's grievance procedure and provides, in pertinent 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>2</sup>

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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.

On August 27, 2012, management issued Grievant a Group II Written Notice with termination for the reason previously noted here. Accordingly, the Hearing Officer examines the evidence to determine if the Agency has met its burden.

#### **I. Analysis of Issue before the Hearing Officer**

##### **Issue: Whether the discipline was warranted and appropriate under the circumstances?**

##### **A. Did the employee engage in the behavior described in the Group II Written Notice and did that behavior constitute misconduct?**

The Agency contends Grievant committed a Group II Offense because she used rude and offensive language on August 10, 2012.

An examination of the testimony and evidence reveals that Team Leader stated that she and Grievant argued over a missing food tray. Grievant ultimately referred to Team Leader as a “bitch” and hung up the telephone. Grievant agrees that she and Team Leader argued and she became so upset that she hung up the telephone. Grievant denies ever using the word “bitch.”

The Hearing Officer had an opportunity to observe the witnesses and their demeanors. Having done so and considered the evidence, the Hearing Officer finds Team Leader more credible than Grievant regarding the issues before her. First, the Hearing Officer notes that Team Leader took immediate action once the argument ended by lodging a complaint. Team Leader’s written assertion of what occurred references Grievant cursing and it not being the first time Grievant has done so. Second, the evidence does not establish any history of prior dissension specifically between Grievant and Team Leader to motivate Team Leader to falsely accuse Grievant of calling Team

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<sup>2</sup> Grievance Procedural Manual § 5.8

Leader a bitch. Third, although Grievant denies using the word “bitch,” her own testimony acknowledges that an incident occurred. Fourth, Team Leader steadfastly testified during direct and cross examination that Grievant used obscene language.

The Hearing Officer is cognizant of evidence offered by Grievant to support her assertion. The Hearing Officer notes that Grievant’s witness presented for this purpose testified that she did overhear some of the telephone conversation between Grievant and Team Leader. In this witness’s words she could tell they were going “back and forth.” While this witness did not acknowledge hearing Grievant curse during the conversation, the witness did testify that she was 10 feet away from Grievant and she was concentrating on doing her job, not the telephone conversation. Bearing this in mind, the Hearing Officer is unable to find that this witness can substantiate Grievant’s claim that Grievant did not use obscene language.

As noted above, the Hearing Officer had an opportunity to observe the witnesses and their demeanors. Having considered this and the evidence, she finds Team Leader more credible. Thus, the Agency has met its burden and shown Grievant used abusive language and this behavior was misconduct.

**B. Was the discipline consistent with policy and law?**

The Standards of Conduct provides that Group II offenses include acts of misconduct that are more than minor in nature or repeat offenses. Also, under the Standards of Conduct, a second active Group II Notice normally results in termination. *See* Standards of Conduct, at p. 9. (A Exh. 8).

The evidence shows that previously on June 21, 2011, Grievant received a Group II Written Notice for abusive language. Grievant was suspended and attended anger management counseling. This Group Notice was active at the time Grievant was issued a second Group II Written Notice on August 27, 2012, for rude and offensive language, an offense that was similar or identical to the offense for which she was disciplined for on June 21, 2011. Moreover, upon the issuance of the Group II Notice on August 27, 2012, Grievant had accumulated two active Group II Written Notices.

Thus, the Hearing Officer finds that the Agency’s issuance of the Group II Written Notice for an offense of a repeat nature with termination was consistent with policy.

**II. Mitigation.**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”<sup>3</sup> EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should

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<sup>3</sup> Va. Code § 2.2-3005 and (c)(6)

give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>4</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>5</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the behavior alleged, it was misconduct, and the Agency's discipline was consistent with law and policy. Next, a focus on whether the discipline was reasonable is undertaken.

The evidence shows Grievant has worked for the Agency at least six years. Furthermore, her supervisor thought of her as a good supervisor. However, the evidence also shows that Grievant's supervisor described Grievant as a supervisor with good intent but bad methods. Additionally, the evidence demonstrates that Grievant's group notice issued on August 27, 2012, is aggravated by the fact that it is for a repeated offense and also one for which Grievant had been counseled about in the recent past. Further, the Hearing Officer finds it is reasonable and a matter of safety for management to expect its employees to behave civilly in the work place.

Accordingly, having considered all of Grievant's arguments, any evidence submitted to support them, as well as all other evidence, the Hearing Officer is not persuaded that the Agency acted unreasonably.

### **DECISION**

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

### **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:

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<sup>4</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>5</sup> *Rules for Conducting Grievance Hearings* VI(B)

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  
Departmental of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> 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 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>6</sup>

Entered this 3rd day of December, 2012.

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Ternon Galloway Lee, Hearing Officer  
cc: Agency Advocate  
Agency Representative  
Grievant  
Senior Consultant, Office of EDR

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.