

Issue: Group II Written Notice; Hearing Date: 12/14/12; Decision Issued: 12/31/12; Agency: DBHDS; AHO: Ternon Galloway Lee, Esq.; Case No. 9975; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9975

Hearing Date: December 14, 2012

Decision Issued: December 31, 2012

SUMMARY OF DECISION

The Agency had found Grievant violated its Policy Number 053-62 regarding showing dignity and respect to others in the work place and then issued Grievant a Group II Written Notice. The Hearing Officer determined that Grievant engaged in the conduct alleged and upholds the discipline.

HISTORY

On September 20, 2012, the Agency issued Grievant a Group II Written Notice for failure to follow its Policy Number 053-62 regarding showing mutual respect to others in the work place. On or about September 20, 2012, Grievant timely filed her grievance to challenge the Agency's action. On November 26, 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 29, 2012, and subsequently the Hearing Officer issued several orders: a scheduling order and orders, at the request of Grievant, for the appearance of three witnesses. A second PHC was held on December 13, 2012, to address objections raised by the Agency regarding two witnesses ordered to appear to testify for Grievant. The Agency represented that both witnesses were mentally challenged and employed part-time by the Agency through the Department of Rehabilitative Services ("DRS"). After hearing arguments, the Hearing Officer determined additional information was needed from the parties and reserved ruling on the matter until such could be obtained.

As agreed to by the parties, the Hearing Officer scheduled the hearing for December 14, 2012.¹ On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office, to include any additional information regarding the Agency's objections previously mentioned. At this time, the Agency withdrew its objection to Grievant's Witness 1 (DRS Client 2) providing testimony. However, the Agency reported that DRS Client 2 was mentally challenged and requested that this witness' DRS counselor be allowed to sit beside him as he testified. Grievant did not object to this request and it was granted.

Next the Agency continued to object to Grievant's Witness 2 (DRS Client 3) testifying at the hearing. The Agency contended that this proposed witness was also mentally challenged and had stated he did not desire to testify. The objection was mooted after Grievant remarked that DRS Client 3 was not an eye witness and she would

¹ This was the first date available between the parties.

honor his desire to not testify. The Hearing Officer then excused DRS Client 3 from testifying.

Prior to commencing the hearing, the Hearing Officer also admitted the Agency's Exhibits 1 through 6, and the Hearing Officer's Exhibits 1 through 4, to which no objections were made. Grievant was given an opportunity to submit exhibits but declined to do so.²

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 represented herself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (4 witnesses)
Grievant
Witnesses for Grievant (2 witnesses, including Grievant)

ISSUE

Was the written notice 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 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 is employed as a food service technician for the Agency in its food service department. (A Exh. 2, p. 1).

² The Hearing Officer determined that Grievant was mailed a copy of the Agency's exhibits by certified mail return receipt. By Grievant's admission, she was not at her residence when the postal carrier attempted to deliver the exhibits; accordingly, the postal carrier left Grievant a note informing her they could be obtained at the post office. However, Grievant elected to not get them from the post office.

2. Prior to September 2, 2012, the Agency had employed several mentally challenged individuals who are clients of the Department of Rehabilitative Services (“DRS”). (A Exh. 1, p.2). They included DRS Client 1, DRS Client 2/Grievant’s Witness 1, and DRS Client 3/Grievant’s Witness 2. These individuals and Agency employees receive services such as job application assistance and vocational counseling through DRS. Also, as with Grievant, the Agency’s management assigned them tasks in its food service department. (A Exh. 1, p. 2; Testimony of Grievant’s Witness 1, Statements by Grievant).

3. DRS Client 1 had been employed at the Agency since June 2012. (Testimony of DRS Client 1 Vocational Counselor). In addition to being mentally challenged, DRS Client 1 was known to the Agency staff, including Grievant, to be mentally challenged, very sensitive, and easily offended. (Testimonies of Immediate Supervisor and Agency Witness 1).

4. DRS Client 1 has been a client of his DRS vocational counselor for four years. This counselor has observed that when DRS Client 1 becomes upset, he shuts down. (Testimony of Vocational Counselor for DRS Client 1).

INCIDENT ON SEPTEMBER 2, 2012

5. On Sunday, September 2, 2012, Grievant’s immediate supervisor informed Grievant that “[DRS Client 1] was working with [Grievant] on the snacks.” Grievant then stated to her supervisor that she did not want to work with DRS Client 1 because it was hard for him to understand how to do the snacks. Grievant also stated that if she had to work with DRS Client 1 that she would not talk to him. Further, she stated that her preference was to work with Grievant’s Witness 1, another client of DRS, because Grievant could tell him what to do on a job related tasks with no problems. Grievant repeated her comparison of DRS Client 1 and Grievant’s Witness 1 several times and stated she could not work with DRS Client 1. (A Exh. 5; Testimonies of Immediate Supervisor and Agency Witness 1).

6. The above conversation occurred in the supervisor’s office. Those present and/or within hearing of this dialogue included the following:

- (i) the Immediate Supervisor;
- (ii) DRS Client 1 who was stationed by the file cabinet signing in;
- (iii) Grievant who was at the entrance of the door to the supervisor’s office;
- (iv) Agency Witness 1; and
- (v) Grievant’s Witness 1/DRS Client 2

(Testimonies of Immediate Supervisor, Agency’s Witness 1, Grievant’s Witness 1, and Grievant).

7. On information and belief the size of the supervisor’s office is approximately 10 feet by 6 feet. The Hearing Officer bases this finding on the food service manager’s

testimony that the supervisor's office area was a very small area, specifically about one-third to one-half the size of the room to which the grievance hearing was conducted. The Hearing Officer observed that the hearing room was approximately 20 feet by 12 feet. Thus, she finds on the evidence provided, the supervisor's office was about the dimension noted above. (Testimony of Food Service Manager).

8. DRS Client 1 heard Grievant's comments and became enormously upset. This prevented him from performing assigned tasks at work that day. Thus, Immediate Supervisor sent DRS Client 1 home. This necessitated the supervisor employing overtime for staff to accomplish the work that had been expected to be completed by DRS Client 1 with the assistance of Grievant. (Testimony of Immediate Supervisor; A Exh. 5).

The next day, DRS Client 1 telephoned his DRS vocational counselor three times. He left messages informing his counselor that an incident occurred at work that was upsetting and caused him to "walk off." Once DRS Client 1 was able to confer with his counselor he explained that he became upset because an individual at work did not want to work with him but wanted to work with his co-worker, DRS Client 2. He interpreted Grievant's comments to identify him as retarded. (Testimony of DRS Vocational Counselor for DRS Client 1).

9. Grievant apologized to DRS Client 1 about 12 days after making the statements referenced above to her immediate supervisor. (Testimony of Food Service Manager; HO Exh. 4, p. 11).

10. In consequence of Grievant's conduct on September 2, 2012, management issued her a Group II Written Notice on September 20, 2012. The notice states that the offense was Grievant's failure to follow Policy 053-62. (A Exh. 1).

POLICY 053-62

11. The subject of Policy 053-62 is Mutual Respect Through Adherence to Vision, Mission, and Values of [Agency]. The policy's vision, mission, and values are set forth below:

- Vision: continuously pursue the highest quality services that empower individuals in their recovery
- Mission: to partner with those we serve to promote personal independence
- Values: demonstrate and encourage compassion, self-determination, empowerment, honesty, integrity, cooperation, teamwork, and respect

(A Exh. 3, p. 2).

In pertinent part the policy also provides the following:

[Agency] is committed to providing a caring work environment conducive to the performance of job duties and free from intimidating, harassing or coercing behaviors in any form or manner. All individuals are expected to treat others with respect and dignity. Managers and supervisors will be role models and will embrace the [Agency] Vision, Mission, and Values.

(A Exh. 3, p. 2).

12. In addition, Policy 053-62 specifies that employees who contribute to the success of the Agency's mission, among other things,

- (i) Perform assigned duties and responsibilities with the highest degree of public trust; and
- (ii) Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residents, students, volunteers, vendors, and contractors.

(A Exh. 3, p. 2).

13. Policy 053-62 also notes that disruptive behaviors violate the Agency's mission and values and will not be tolerated by the Agency. Such prohibitive behaviors according to the policy will subject an employee to corrective progressive disciplinary action under the standards of conduct. (A Exh. 3, p. 3).

The Policy explains in pertinent part that such intolerable behaviors include intimidating and disruptive behaviors to include the following:

overt actions such as verbal outbursts and physical threats as well as passive activities such as refusing to perform assigned tasks or interfering with someone being able to complete his or her assigned duties

(A Exh. 3, p. 3).

OTHER

14. On June 13, 2012, Grievant received training specifically regarding Policy 053-62. (A Exh. 4).

15. At the time management issued Grievant the written notice, her active disciplinary record included a Group I Written Notice for unsatisfactory job performance. (A Exh. 6).

16. Grievant has a prior history of problems with interpersonal relationships with her

co-workers. During the pertinent period the Agency has been assisting Grievant in addressing this problem. (Testimony of Food Service Manager).

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.³

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.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further an offense is appropriately identified as a Group II offense when it significantly impacts business operations/constitute neglect of duty or violation of a policy/procedure. Group III offenses are the most severe and normally warrant termination. *See* Standards of Conduct Policy 1.60, at pp. 8,9.

³ Grievance Procedural Manual §5.8

On September 20, 2012, management issued Grievant a Group II Written Notice 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 failed to show mutual respect in the workplace as required by Policy 053-62.

An examination of this policy demonstrates that several expectations of employees set forth in it are keenly relevant here. First, of basic importance, this policy requires employees to, among other things, (i) perform assigned duties and responsibilities with the highest degree of public trust; and (ii) demonstrate respect for agency coworkers, supervisors, managers, etc. Second, of equal significance, intimidating and disruptive behaviors are prohibited. Such behaviors consist of, among others, activities like refusing to perform assigned tasks or interfering with someone being able to complete his or her assigned duties.

The Hearing Officer now undertakes an analysis of the evidence to determine if any conduct of Grievant was in violation of the referenced policy.

At the time of the alleged offense by Grievant, DRS Client 1 had been employed at the Agency since June 2012. He was a client of the Department of Rehabilitative Services, receiving such services as help in applying for jobs and vocational counseling. It was no secret to Agency staff, including Grievant, that DRS Client 1 was mentally challenged, very sensitive, and easily offended.

The evidence shows that on Sunday, September 2, 2012, DRS Client 1 was in the small supervisor's office signing in for work. Grievant's immediate supervisor, Grievant and several others were also present in the area. At that time, Grievant's supervisor instructed Grievant to work with employee DRS Client 1. Grievant stated that she could not work with him because it was hard for employee DRS Client 1 to understand how to do the snacks. What is more, Grievant replied that if she had to work with this employee, she would not talk to him. Grievant continued her comments by repeatedly stating to her supervisor that she preferred to work with another employee (DRS Client 2) because she could tell this other employee what to do with no problems. The evidence demonstrates that this entire conversation was heard by DRS Client 1 and the others in the area.⁴

⁴ Specifically, Grievant was positioned at the entrance of the office.

After hearing Grievant's comments, DRS Client 1 became upset and could not settle down to work. He interpreted Grievant's comments to label him retarded. Because he was unable to perform his job, he was sent home which required the supervisor to employ overtime by staff to accomplish the work that had been assigned to DRS Client 1.

Having considered the above facts, the Hearing Officer is mindful of Grievant's assertions. Grievant inferred that she was not aware that DRS Client 1 heard her comments. In addition, Grievant testified in effect that she did not refuse to work with DRS Client 1. Rather, she simply informed her supervisor that she preferred to work with someone else.

With regard to Grievant's claims, the evidence establishes that the supervisor's office was a small area. Grievant was present as well as, among others, the supervisor and DRS Client 1. No evidence was presented that Grievant's view of DRS Client 1 was obstructed during the above-referenced dialogue. Further, Grievant was aware of DRS Client 1's disability and sensitivity. In addition to the immediate supervisor, an eye witness to the incident, Agency Witness 1, testified that Grievant remarked that she could not work with DRS Client 1. Grievant's eye witness whose testimony was offered to rebut the Agency's claim was unable to state with certainty Grievant's exact comments. Thus, considering the certainty to which Agency Witness 1 testified and having observed the demeanor of the parties' witnesses the Agency Witness 1's testimony is found to be persuasive. Thus, by a preponderance of the evidence, the Hearing Officer finds Grievant made the comments alleged by the Agency and she knew or should have known that DRS Client 1 heard them and that they were offensive.

Now the Hearing Officer exams whether Grievant's behavior constituted misconduct. First, Grievant failed to defer to her superior when she declined to comply with the supervisor's directive. Thus, she violated policy 053-062 by not performing her assigned task. Second, Grievant showed lack of respect for her co-worker, DRS Client 1. This is evident by Grievant having knowledge of her co-worker having a mental disability and being hypersensitive. Yet in DRS Client 1's presence and hearing, which Grievant was aware of or should have been aware of, Grievant stated that she could not work with him because he had difficulty understanding what to do. Likewise, she compared him to another co-worker whom she stated was capable of doing the work. As noted above, because of Grievant's statements, DRS Client 1 became extremely upset and could not work that day. Accordingly, Grievant effectively prevented her co-worker from performing his assigned work for the day.

In summary, Grievant's comments failed to foster teamwork, compassion, and respect –core tenets of Policy 053-62. Hence, the Hearing Officer finds Grievant engaged in the conduct alleged and it violated the policy.

The Hearing Officer does note, however, that had Grievant in a private setting appropriately expressed her concerns about the assignment to her supervisor, the Agency may not have met its burden. Such, though was not the case.

B. Was the discipline consistent with policy and law?

The Standards of Conduct provide that Group II offenses include acts of misconduct that are more than minor in nature or repeat offenses.

The evidence shows that Grievant's conduct was more than minor. It violated the Agency's mutual respect policy in the manner noted above. Grievant did not show mutual respect to DRS Client 1. As a result, this employee became so upset, he had to be sent home. This had a negative impact on the Agency's ability to manage its affairs as the Agency was required to employ overtime to make up for DRS Client 1's absence from work.

The policy notes that behaviors that violate Policy 053-62 will subject an employee to corrective progressive disciplinary action under the Standards of Conduct. The evidence shows that Grievant has had prior interpersonal relationship problems in the past that the Agency has been attempting to address with Grievant. Further, at the time of the offense Grievant had an active Group I Written Notice that had been mitigated from a Group II Written Notice.

Considering Grievant's misconduct was more than slight, of a repeat nature, and significantly impacted the Agency's operation, the Hearing Officer finds that the Agency's issuance of the Group II Written Notice for the offense 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"]."⁵ 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 give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."⁶ 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,

⁵ Va. Code § 2.2-3005 and (c)(6)

⁶ *Rules for Conducting Grievance Hearings* VI(A)

unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁷

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 Hearing Officer recognizes that Grievant did apologize; however, that expression of regret came days after the offense and after substantial damage had occurred. Its goal to mitigate was therefore minimal. Moreover, the evidence shows Grievant had an active Group I Notice at the time of the offense and that she had interpersonal relationship problems on the job before.

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:

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., 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

⁷ *Rules for Conducting Grievance Hearings VI(B)*

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., 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.⁸

Entered this 31st day of December, 2012.

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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.