Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 11/08/12; Decision Issued: 11/15/12; Agency: DBDHS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9944; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9944

Hearing Date: November 8, 2012
Decision Issued: November 15, 2012

PROCEDURAL HISTORY

On August 2, 2012, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On August 21, 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 she requested a hearing. On October 24, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 8, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Representative
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 Department of Behavioral Health and Developmental Services employs Grievant as an LPN at one of the Agency's facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On June 30, 2012, the Resident walked into the area of the building where the Security Officer was working. The Security Officer usually sat inside a Plexiglas booth but was standing outside of the booth to hold a door open so other employees could pass. The Resident walked into the area and Grievant began speaking with the Resident. She mentioned it was inappropriate for the Resident to have told another resident not to take his medication. The Resident denied the allegation and began cursing at Grievant. He told Grievant, "bitch, go f—k yourself!" Grievant responded in a normal voice by saying, "well, f—k you too." The Security Officer gestured for the Resident to stop his behavior. The Resident turned and left the building.

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."[1] Group II offenses "include acts of misconduct of a more serious

[1] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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."

"[U]nsatisfactory work performance" is a Group I offense.[2] In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant received annual training regarding her obligation to refrain from using language that demeans, threatens, intimidates, or humiliates residents. When Grievant said "well, f—k you too" she used language that was demeaning and humiliating to the Resident. Her actions were unsatisfactory work performance thereby justifying the issuance of a Group I Written Notice.

Grievant argued that the Security Officer's testimony was unreliable because he had difficultly hearing. The Security Officer testified that he sometimes had difficulty hearing because of damage he received to his hearing while serving in Vietnam. During the hearing, the Security Officer was sitting approximately twenty feet from the Hearing Officer and demonstrated no inability to hear and to hear with clarity. The Security Officer recognized that he sometimes had difficulty hearing but testified with confidence regarding what he heard Grievant say to the Resident. His testimony was credible and there is no reason for the Hearing Officer to doubt that the Security Officer heard what he claimed to have heard Grievant say.

Grievant presented the testimony of an LPN who testified that she did not hear Grievant say anything to the Resident. The LPN did not hear all of the conversation between Grievant and the Resident. The LPN only entered the room as the Resident was turning to leave and the conversation was over.

Grievant argued that she did not curse at the Resident but rather repeated what he said to her. She contends the Resident said, "Who the f—k do you think you are talking to! Because she was surprised at his statement, Grievant repeated it to the Resident and said, "Who the f—k do you think you are talking to?" but did so in a tone that served to convey a message that she was questioning the appropriateness of his question to her. Based on the evidence presented, even if Grievant merely repeated the Resident's question back to him, by including f—k in her question she violated the Agency's expectations regarding the use of curse words to residents. In other words, even if the Hearing Office adopts Grievant's version of the facts as true, there remains a sufficient basis to take disciplinary action.

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 Human Resource

[2] See Attachment A, DHRM Policy 1.60.

Management…."[3] 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**.

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

[3] Va. Code § 2.2-3005.

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.[4]

[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

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