

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 03/02/16;
Decision Issued: 05/02/16; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10755; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR
Ruling Request received 05/17/16; EDR Ruling No. 2016-4357 issued 05/25/16;
Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10755

Hearing Date: March 2, 2016
Decision Issued: May 2, 2016

PROCEDURAL HISTORY

On September 14, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unprofessional and disruptive behavior.

On October 13, 2015, 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 January 11, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 2, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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:

Virginia Commonwealth University employs Grievant as a Grounds Foreman. She has been employed by the University for approximately 16 years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 23, 2015, the Superintendent of Grounds counseled Grievant regarding the importance of courtesy and respect when dealing with other employees.

The President had a reserved parking space behind a set of buildings. The Driver was responsible for driving the University President to various locations for meetings. To get to the reserved parking space, the Driver had to drive his vehicle from the public street down a driveway, turn left and drive a short distance to the end of the parking lot where a Building was located. A handicapped parking space was on the left side of the reserved space. Once the vehicle was near the end of the parking lot and facing the back of the Building, the Driver had to turn the vehicle to his left to enter the parking space with the front of the vehicle facing the Building.

The University President had a meeting scheduled for 10 a.m. on August 24, 2015 at the Building. The University President entered the sport utility vehicle in the front passenger seat. The Driver sat in the driver's seat and they drove from one part of the campus towards the Building. The Driver entered the driveway to go to the reserved parking space. He passed several parking spaces to his left and to his right. He turned the vehicle to his left and drove past three more parking spaces on his left and his right. Those spaces were filled with vehicles except the reserved parking space on his left.

On the right side were two service vehicles that were not in parking spaces and were parked perpendicular to the parking spaces containing vehicles. The positioning of the services vehicles created a pathway that was too narrow for the Driver to turn his vehicle into the reserved parking space.

Two or three construction workers were working on the concrete near the Building. Grievant was watering plants in front of the reserved parking space. One of the two service vehicles was assigned to Grievant.

The Driver positioned the SUV to the left of the reserved parking space. The Driver opened the vehicle door and stepped on the running board and looked towards Grievant. Grievant said towards the construction workers, "I'm not moving my vehicle anymore." The Driver asked, "Can you move your vehicle so I can get into my assigned parking spot?" Grievant said, "You can park back there" while pointing away from the parking space. The Driver said, "No, Ma'am that is my assigned parking spot." The University President asked the Driver if it was ok to exit at that time. The Driver said, "Yes, sir" and the University President exited the vehicle. Grievant looked at the President and said loudly to the Driver, "I don't care who you are hauling, you don't have to be rude to me!" The University President continued walking and entered the Building.

Grievant then walked to her vehicle. She got inside and moved the vehicle backwards a sufficient distance to enable the Driver to put his vehicle into the reserved space. She drove the vehicle backwards at a fast pace.

The Driver felt Grievant was rude and disrespectful to him. He was not rude to Grievant and did not yell at her even though Grievant yelled at him.

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 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."

Employees are expected to:

Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers. ***

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

Resolve work-related issues and disputes in a professional manner and through established business processes.²

“[U]nsatisfactory work performance” is a Group I offense.³ 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’s job duties included being respectful to other employees. She had been counseled regarding this obligation on July 23, 2015. On August 25, 2015, Grievant parked her service vehicle perpendicular to several parking spaces instead of in a parking space. Her vehicle blocked the Driver from parking his vehicle in a parking space reserved for the University President. Instead of moving her vehicle, when asked to do so, Grievant told the Driver to park in another part of the parking lot. After the President exited the vehicle, Grievant said she did not care who the Driver was hauling, he did not have to be rude to her. Grievant was disrespectful and demeaning to the Driver by saying she did not care who he was hauling. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory job performance.

Grievant denied that she was rude to the Driver. She contends he was rude to her. The University presented sufficient credible evidence to support the issuance of a Group I Written Notice. The evidence did not show that the Driver was rude to Grievant – he merely asked her to move her vehicle which was improperly parked.

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 Management”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.

² See, DHRM Policy 1.60.

³ See Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

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
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

[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

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