

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 03/13/13; Decision Issued: 03/25/13; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10017; Outcome: No Relief; **Administrative Review: EDR Ruling Request received 03/29/13; EDR Ruling No. 2013-3572 issued 04/08/13; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 03/29/13; DHRM Ruling issued 04/16/13; 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: 10017

Hearing Date: March 13, 2013

Decision Issued: March 25, 2013

PROCEDURAL HISTORY

Grievant was issued a Group II Written Notice of disciplinary action for comments he made to a subordinate. During the Second Step, the disciplinary action was reduced to a Group I offense.

On November 18, 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 he requested a hearing. On February 5, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 13, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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:

Old Dominion University employs Grievant as a Police Sergeant. He has been working for the Agency for approximately 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

On August 27, 2012, Officer S was working in an intersection near the Campus directing traffic. A bicycle rider cut across a lane with an oncoming vehicle and the vehicle struck the bicycle rider. This caused Officer S to go into what she called "shock". She was able to notify the dispatcher of the accident and other officers arrived at the scene. Officer P told Officer S to sit down in a patrol car to the side of the road and Officer S did so. Officer E had parked his vehicle in the intersection in a manner that blocked traffic. Grievant arrived at the intersection and asked Officer S to move Officer E's vehicle because Officer E was busy attending to the bicyclist.¹ Grievant told Officer S to move Officer E's vehicle out of the intersection. Officer S said, "With all due respect, give me time to get myself together." Officer S said she could not move the vehicle. Grievant told her she had to pull herself together and "be tougher than this." Officer S got out of the vehicle and was trying to walk but had difficulty. Grievant asked her if she needed "PRS" referring to immediate medical attention. Officer S said she did not need PRS. Grievant asked if she was sure that she did not need PRS. Officer S said she just needed time to get herself together. Officer R said that she would move Officer E's vehicle and Officer R did so. Grievant left the intersection and returned to

¹ The bicyclist sustained minor injuries.

headquarters to brief the Assistant Chief on the details of the accident. Approximately ten minutes later, Grievant returned to the intersection and observed Officer S still seated in the police vehicle. Grievant believed that Officer S had had sufficient time to compose herself so he asked her to assist Officer P with directing traffic. Instead of doing so, Officer S said she was going to call the Chief to complain about Grievant. Officer S attempted to call the Chief. Grievant said there was no reason for her to involve the Chief and that they could work out their difficulties directly. Grievant was irritated and said, "I know some of your female officers are out to get us sergeants, but we should try to work things out together." Officer S responded, "Sir, I don't know what you are talking about. I have not filed a false report against any officer or Sergeant." Grievant walked away from Officer S. He later returned to her and apologized to her and said that they were both a little bit upset and that he wanted to get traffic moving and to make sure she was all right. Grievant told her to speak with the Lieutenant.

Grievant returned to headquarters and asked Officer R to come to his office. Grievant asked Officer R, "Do you think I was insensitive to Officer [S]?" Officer R replied, "Officer [S] just needed a minute to get herself together and you kept insisting on her returning to her post. We all know that we are police officers and sometimes we may see things that will affect us a little, but if an Officer asks for a few minutes to get themselves together, we would expect a supervisor would grant us that." Grievant replied, "I know what it is, three against one, you female Officers are against me; never mind [Officer R]." Officer R exited Grievant's office without responding.

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."² 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."

Under Agency Policy 1:6, "Supervisory Officers will maintain a pleasant, courteous, and dignified attitude and address their subordinates in a respectful and professional manner." In addition, "Supervisory officers will motivate subordinates to apply themselves by winning confident, inspiring loyalty, maintaining job interest and settling examples of good behavior."

"[U]nsatisfactory work performance" is a Group I offense.³ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See Attachment A, DHRM Policy 1.60.

responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant's work performance was unsatisfactory to the Agency because he expressed to Officer S and to Officer R his belief that some of the female officers were out to get him. Officer S perceived Grievant as accusing her of filing a false complaint. Officer R perceived Grievant's comment as revealing that he had a problem with females. Grievant's comments were not respectful and served to undermine rather than inspire loyalty. The Agency has presented sufficient evidence to support the issuance of a Group I offense.

Grievant argued that he apologized for his "poor choice of words" and that the matter could have been resolved more appropriately with a counseling memorandum. Although it is clear that Grievant's behavior could have been addressed with a counseling memorandum and possibly that would have been a more appropriate outcome, the Agency has presented sufficient evidence to support its issuance of disciplinary action. Once the Agency has met its burden of proof, the Hearing Officer is not free to substitute a different outcome in the absence of mitigating circumstances.

Grievant argued he was denied procedural due process because the Agency did not provide him with the complete nature of the complaints against him when he drafted his statement. This argument fails. Any defect in due process was cured by the hearing process in which Grievant had the opportunity to know the allegations against him and present any defenses he chose during the hearing.

Grievant argued that the Agency failed to present to him and require his completion of Form 31. Although the Agency most likely should have presented Grievant with Form 31, its failure to do so is harmless error. Form 31 serves as an "Administrative Proceedings Rights Notification of Allegations." The Form is intended to formalize the requirements of Va. Code § 9.1-501 governing the conduct of an investigation involving a law enforcement officer. This statute provides:

The provisions of this section shall apply whenever an investigation by an agency focuses on matters which could lead to the dismissal, demotion, suspension or transfer for punitive reasons of a law-enforcement officer:

1. Any questioning of the officer shall take place at a reasonable time and place as designated by the investigating officer, preferably when the officer under investigation is on duty and at the office of the command of the investigating officer or at the office of the local precinct or police unit of the officer being investigated, unless matters being investigated are of such a nature that immediate action is required.
2. Prior to the officer being questioned, he shall be informed of (i) the name and rank of the investigating officer and of any individual to be present during the questioning and (ii) the nature of the investigation.

3. When a blood or urine specimen is taken from a law-enforcement officer for the purpose of determining whether the officer has used drugs or alcohol, the specimen shall be divided and placed into two separate containers. One specimen shall be tested while the other is held in a proper manner to preserve the specimen by the facility collecting or testing the specimen. Should the first specimen test positive, the law-enforcement officer shall have the right to require the second specimen be sent to a laboratory of his choice for independent testing in accordance generally with the procedures set forth in §§[18.2-268.1](#) through [18.2-268.12](#). The officer shall notify the chief of his agency in writing of his request within 10 days of being notified of positive specimen results. The laboratory chosen by the officer shall be accredited or certified by one or more of the following bodies: the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), the College of American Pathologists (CAP), the United States Department of Health and Human Services Substance Abuse and Mental Health Services Administration (SAMHSA), or the American Board of Forensic Toxicology (ABFT).

Grievant was questioned at a reasonable time while he was on duty. He knew he was being interviewed by the Lieutenant and the Lieutenant told him that the Lieutenant was investigating allegations of Officer S about Grievant's actions at the intersection on August 27, 2012. No specimens were collected from Grievant. Grievant received the information he was required to be informed of by statute.

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.

DECISION

⁴ *Va. Code § 2.2-3005.*

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

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

[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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Old Dominion University
April 16, 2013

The grievant has requested an administrative review of the hearing officer's decision in Case No. 10017. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed the relevant facts of this case as follows:

Grievant was issued a Group II Written Notice of disciplinary action for comments he made to a subordinate. During the Second Step, the disciplinary action was reduced to a Group I offense.

FINDINGS OF FACT

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

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Grievant's work performance was unsatisfactory to the Agency because he expressed to Officer S and to Officer R his belief that some of the female officers were out to get him. Officer S perceived Grievant as accusing her of filing a false complaint. Officer R perceived Grievant's comment as revealing that he had a problem with females. Grievant's comments were not respectful and served to undermine rather than inspire loyalty. The Agency has

presented sufficient evidence to support the issuance of a Group I offense.

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following bodies: the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), the College of American Pathologists (CAP), the United States Department of Health and Human Services Substance Abuse and Mental Health Services Administration (SAMHSA), or the American Board of Forensic Toxicology (ABFT).

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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" 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 nonexclusive 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.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review related to policy violation, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In the instant case, the grievant was disciplined for comments he made to a subordinate. As discipline, he was issued a

Group II Written Notice. During the management steps of the grievance procedure, the discipline was reduced to a Group I Written Notice.

In his request for administrative review, the grievant questions whether the hearing decision is consistent with state and agency policy. This Agency's review of the grievant's challenge revealed that the only policy issue raised by the grievant is that prior to the agency's disciplinary action, he was not issued agency Form 31 which pertains to transfers, demotions and/or termination of employment. The hearing officer determined, however, that Form 31 serves as an "Administrative Proceedings Rights Notification of Allegations" and is intended to formalize the requirements of Va. Code § 9.1-501 governing the conduct of an investigation involving a law enforcement officer. The hearing decision points out further that the Grievant was questioned at a reasonable time while he was on duty and he knew he was being interviewed by the Lieutenant and the Lieutenant told him that the Lieutenant was investigating allegations of Officer S about Grievant's actions at the intersection on August 27, 2012. This issue was addressed in the ruling issued on April 8, 2013 by the Office of Employment Dispute Resolution and will not be discussed further.

The Grievant failed to identify any human resource management policy, either state or agency, that the hearing officer violated in making his decision. Thus, we conclude that the grievant is contesting the evidence the hearing officer considered, how he assessed that evidence, and the resulting decision. We have no authority to interfere with the application of this decision.

Ernest G. Spratley
Assistant Director
Office of Equal Employment Services