

Issue: Group II Written Notice with Suspension (disruptive behavior); Hearing Date: 03/12/13; Decision Issued: 03/22/13; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10024; Outcome: No Relief – Agency Upheld; **Administrative Review**: DHRM Ruling Request received 04/04/13; DHRM Ruling issued 04/09/13; Outcome: No policy violation identified – declined to review; **Administrative Review**: EDR Ruling Request received 04/04/13; EDR Ruling No. 2013-3575 issued 04/15/13; 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: 10024**

Hearing Date: March 12, 2013

Decision Issued: March 22, 2013

#### **PROCEDURAL HISTORY**

On September 24, 2012, Grievant was issued a Group II Written Notice of disciplinary action with a ten workday suspension for disruptive behavior.

On November 16, 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 January 29, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 12, 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:

Norfolk State University employs Grievant as an Administrative and Program Specialist III. She has been employed by the Agency since 1994.

Grievant had prior active disciplinary action. On June 30, 2011, she received a Group I Written Notice for disruptive behavior.<sup>1</sup>

On August 23, 2012, the Construction Manager asked Grievant for receipts in order to reconcile his credit card account. Grievant said that the report was not due yet so why did he need them. The Construction Manager said that they were due and that he had the bank statements in his hands. The Construction Manager walked towards Ms. J who had worked with him on the log sheets. He entered her office. Ms. J's office had a half door and open window to enable Ms. J to provide customer service. As the Construction Manager and Ms. J were talking, Grievant came to the half door and said the Construction Manager's name and said that she had his receipts and the next time he needed Grievant to do something, he should ask her and not someone else to do it. The Construction Manager said "I don't need you to do it, [Ms. J] is helping me with it; all I need is receipts." Grievant leaned into the office through the door window and said loudly, "What is wrong with you; are you on your period?" The Construction Manager was standing approximately six or seven feet away from Grievant and heard Grievant's comment clearly. He was annoyed by Grievant's insult, but he resumed his discussion with Ms. J who also heard the comment.

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<sup>1</sup> Agency Exhibit I.

Following her interaction with the Construction Manager, Grievant met with the Director and said she had a conversation with the Construction Manager and that he was yelling and rude to her. She said she was thinking of filing charges against him because he continued to be rude and disrespectful to her. The Director had known the Construction Manager for four years and knew that the Construction Manager was not the type of person who yelled in the office. The Director was surprised by Grievant's allegations.

The Construction Manager met with the Director and the Director asked what had happened with his interaction with Grievant because Grievant said she "may have to take harassment charges on" the Construction Manager. The Construction Manager was upset at being accused of something he did not do. The Director said, "Let's see what happens" regarding whether Grievant would file charges.

On August 24, 2012 at 11:55 a.m., the Director sent Grievant an email stating:

Concerning a reported incident that occurred yesterday August 23<sup>rd</sup>, between yourself and [Construction Manager], I am directing once again to refrain from using unprofessional language and maintaining a professional attitude. In my discussion with you, you stated that [Construction Manager] was rude, loud, crude and yelled at you during a discussion concerning records needed. [Construction Manager] has relayed to me that he was not rude, crude, and did not yell. Your accusation that he was "on his period" was totally inappropriate and is not to be tolerated. I have verified with a witness that [Construction Manager] was not rude and did not yell. Additionally this incident occurred at the front desk in the main lobby which the public access the Facilities building. This has been a problem in the past and cannot continue.<sup>2</sup>

On August 24, 2012, at lunchtime, Grievant walked into the Construction Manager's office and said, "What are you trying to do; get me fired?"<sup>3</sup> The Construction Manager asked, "What do you mean?" The Construction Manager said that Grievant had gone to the Director and said she was considering filing harassment charges against him. Grievant became argumentative and was upset and continued to accuse the Construction Manager of trying to get her fired. Grievant left the Construction Manager's office and then returned while being very upset and continued to express her displeasure with the Construction Manager. The Construction Manager asked her to calm down and said he was not trying to get her fired. Grievant left and then returned to his office against upset and "got into the face" of the Construction Manager. The Construction Manager felt threatened by Grievant's behavior. After Grievant left his office, the Construction Manager went to Mr. K's office and said that he could not

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<sup>2</sup> Agency Exhibit D.

<sup>3</sup> Grievant's behavior was likely in response to receiving the email from the Director.

continue to work at the office because Grievant kept “barging” into his office while being mad at him. Mr. K told the Construction Manager to go home and send him an email about what had happened.

### **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.”<sup>4</sup> 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.”

Disruptive behavior is a Group I offense.<sup>5</sup> Grievant was disruptive on August 23, 2012 because she insulted the Construction Manager by asking if he was on his period. Her comment offended and annoyed the Construction Manager. On August 24, 2012, Grievant’s behavior was disruptive because she approached the Construction Manager several times while she was angry and argued with him about his interaction with her and his comments to the Director. She continued to argue with the Construction Manager to the point he was no longer able to perform his job and felt he had to leave the office. The Agency has presented sufficient evidence to show that Grievant engaged in disruptive behavior justifying the issuance of disciplinary action.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant had prior active disciplinary action consisting of a Group I Written Notice for disruptive behavior. The Agency has presented sufficient evidence to support its decision to elevate the Group I offense to a Group II Written Notice with a ten workday suspension for repeated behavior.

Grievant argued that she was whispering when she asked the Construction Manager if he was on his period. This argument fails. Grievant was annoyed and both the Construction Manager and Ms. J heard her comments from a distance of several feet. Grievant was not whispering.

Grievant argued that she was just kidding with the Construction Manager when she asked if he was on his period. The evidence showed that Grievant was attempting to insult the Construction Manager and was not attempting to joke with him.

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<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>5</sup> See, Attachment A, DHRM Policy 1.60.

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 ....”<sup>6</sup> 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 II Written Notice of disciplinary action with a 10 workday suspension 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 14<sup>th</sup> 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:

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<sup>6</sup> Va. Code § 2.2-3005.

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> 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>7</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

April 9, 2013

[Grievant]

RE: **Grievance of [Grievant] v Norfolk State University**  
**Case No. 10024**

Dear [Grievant]:

I am writing in response to your letter dated April 4, 2013, in which you requested an administrative review by this Department of the hearing decision on the above referenced case.

Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request a policy - related administrative review by the Director of the Department of Human Resource Management (DHRM) within 15 calendar days from the date the original decision is issued if that party believes the hearing decision is inconsistent with either state or agency human resource management policy.

In each instance where such a request is made to this Agency for an administrative review based on misinterpretation or misapplication of policy, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent and explain why that is the case. In your case, you have not identified any such policy.

Please be advised that the issue you raised is one of compliance and will be addressed by the Office of Employment Dispute Resolution.

Sincerely,

Ernest G. Spratley, Assistant Director  
Office of Equal Employment Services

c: Sara R. Wilson, Director, DHRM  
Christopher Grab, Director, OEDR (via email)  
Pamela F. Boston, Esq., NSU