

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 01/22/13;
Decision Issued: 01/29/13; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9991; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9991

Hearing Date: January 22, 2013

Decision Issued: January 29, 2013

PROCEDURAL HISTORY

On July 26, 2012, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior.

On August 1, 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 December 17, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 22, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Motor Vehicles employs Grievant as a Generalist Senior at one of its Facilities. The purpose of her position is:

The Customer Service Center Generalist works in the Customer Service Centers processing CSC transactions and administering vision, driver, and road tests for driver's licenses, and issuing DMV credentials. All programs and services are administered in a customer service-focused manner and in accordance with statutory and administrative procedural requirements such as the Motor Vehicle Code of Virginia, DMV policies, procedures, rules and regulations, the Privacy Protection Act and the Freedom of Information Act.¹

No evidence of prior active disciplinary action was introduced during the hearing.

On several occasions, the Agency counseled Grievant regarding controlling her temper and avoiding negative interactions with coworkers and customers.

Grievant reported to the Assistant Manager. They considered each other to be friends. They were close enough friends that the Assistant Manager had allowed her credit card to be used to purchase items for Grievant's children.

¹ Agency Exhibit 15.

Grievant returned from vacation on July 9, 2012 and learned that her schedule had been changed without the Agency providing her with prior notification. She became angry and engaged in what the Agency considered to be an inappropriate conversation with her manager. The Agency notified Grievant that it was considering taking disciplinary action against her and asked that she provide a response to the allegations. After the Manager read Grievant's response, she decided not to take disciplinary action against Grievant but instead to give Grievant a written counseling memorandum.

On July 17, 2012, the Manager was away from the office but believed it was necessary to notify Grievant of her decision as soon as possible. The Manager called Grievant in the afternoon. Grievant was working in the back office area. The Assistant Manager was counting money at the money desk near Grievant. When the Manager called, she told Grievant that the Agency would not be giving her a Written Notice but rather would be giving her a written counseling memorandum. The Manager and Grievant ended their conversation without further discussion. Grievant said, "I hate f--king liars. I can't stand f--king liars."² The Assistant Manager asked Grievant what was wrong. Grievant walked away and did not say anything. About five minutes later, Grievant walked back to the Assistant Manager. The Assistant Manager did not ask Grievant to speak with her privately because the Assistant Manager was counting money at the money desk. Grievant said she had spoken with the Manager and that Ms. C lied about Grievant. Grievant said that the Manager told Grievant that the Manager had spoken with Mr. W and that he said that Ms. C's statement about the incident that occurred within the past two weeks about Grievant were untrue. Someone stated that Ms. C wrote a statement that Grievant had tried to fight Ms. C in the office. The statement also said Grievant had called Ms. C a fat bi-ch and had cursed at her. Grievant made numerous other statements that were not part of her telephone call with the Manager. Grievant did not clarify to the Assistant Manager that she was discussing items beyond the scope of the telephone call leaving the Assistant Manager to believe that Grievant was reciting her telephone conversation with the Manager. The Assistant Manager told Grievant to "leave it alone and just let it go." The Assistant Manager asked Grievant "if she really wanted to open another can of worms." While Grievant and the Assistant Manager were talking, other employees walked into the back office and could hear Grievant's loud demeanor and accusations.

CONCLUSIONS OF POLICY

The Agency contends Grievant should receive a Group I Written Notice for disruptive behavior. Disciplinary action against Grievant cannot be upheld because Grievant was engaged in protected activity and her behavior did not exceed the limits of reasonableness.

² No evidence was presented that employees other than the Assistant Manager overheard Grievant make these statements.

In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation:

The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline).

Virginia Code § 2.2-3000(A) states:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The EDR director concluded:

Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."

The EDR Director had broadly interpreted Virginia Code § 2.2.-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

In EDR Ruling 2009-2128, the EDR Director narrowed the protection as follows:

This protection, however, is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness. The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis. Further, under analogous Title VII retaliation case law, it is important to note that:

[a]lmost every form of 'opposition to an unlawful employment practice' [the "protected act" under Title VII] is in some sense 'disloyal' to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies. Otherwise the conduct would not be 'opposition.' If discharge or other disciplinary sanctions may be imposed simply on 'disloyal' conduct, it is difficult to see what opposition would remain protected.

The same can be said for the ability of an employee to raise their workplace concerns with management, which the General Assembly has protected in Virginia Code § 2.2-3000.

In this case, the Manager called Grievant to discuss proposed disciplinary action against Grievant. She was upset with the Agency's proposed actions against her and how several staff in the Agency had treated her. The Assistant Manager asked her what was wrong and they began a dialog. Grievant was attempting to discuss her concerns with her immediate supervisor. Whether Grievant's concerns had merit is not of significance. None of Grievant's comments threatened anyone. Grievant did not engage in unlawful behavior. Her behavior did not exceed the limits of reasonableness. Her behavior was protected and cannot be subject to disciplinary action.

The Agency argued that Grievant's comments were disruptive because she made them in a location where other employees could over hear her.³ It was clear to the Assistant Manager that Grievant was upset when she ended her telephone call with the Manager. When Grievant returned to speak with the Assistant Manager, the Assistant Manager should have taken Grievant into a private office to hear Grievant's concerns or told Grievant to wait until she had finished her money counting tasks. Grievant was not at fault for the conversation being held open to other employees.

The Agency pointed out that Grievant used profanity when she said "f—king" as part of her conversation with the Assistant Manager. The Assistant Manager did not indicate that she was offended by Grievant's profanity although she recognized it was inappropriate in the workplace. The Assistant Manager did not consider Grievant's use of profanity to be significant enough to refer to it in her detailed statement about her conversation with Grievant. Grievant's use of profanity in this context is not sufficient to support disciplinary action.

The Agency argued that Grievant made untrue factual statements to the Assistant Manager about her conversation with the Manager. The Agency established that the Manager only told Grievant that the Agency would not be issuing Grievant a Written Notice and would only be giving her a written counseling memorandum.

³ It is not clear that other employees overheard Grievant say she hated f—king liars. When Grievant returned to speak with the Assistant Manager for a lengthier time period, other employees were able to observe Grievant.

Grievant told the Assistant Manager, however, that the Manager made numerous comments to Grievant during that telephone call. What is clear from Grievant's testimony and written statements, she sometimes confuses dates, people, and events. The Hearing Officer does not believe Grievant intentionally misled the Assistant Manager but rather Grievant was expressing a "hodgepodge" of facts and concerns as she believed they existed. In any event, Grievant was complaining to her supervisor.

Grievant asks the Hearing Officer to grant her request for a transfer to a location she prefers. After Grievant asked to be transferred, the Agency transferred her to a different location but not the one she preferred. The Hearing Officer may order the transfer or assignment of an employee as a form of relief only (1) to return the employee to the status quo in correcting improper or unsupported disciplinary action, retaliation, discrimination, or misapplication or unfair application of policy, or (2) if it is determined that the employee is entitled to the relief based on the effect of law or, in the absence of agency discretion, policy, procedure, or agency practice. Neither of these conditions applies in this case. The Hearing Officer cannot grant Grievant's request for specific transfer.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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.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.