

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 01/25/13; Decision Issued: 02/14/13; Agency: VDFP; AHO: Ternon Galloway Lee, Esq.; Case No. 9996; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 9996

Hearing Date: January 25, 2013

Decision Issued: February 14, 2013

SUMMARY OF DECISION

The Agency had found Grievant made an offensive and inappropriate comment to a female while re-inspecting a facility. The Agency then issued Grievant a Group I Written Notice. The Hearing Officer determined that Grievant engaged in the conduct alleged, it was misconduct, and the discipline was warranted. Thus, the Hearing Officer upheld the Agency's discipline.

HISTORY

On August 22, 2012, the Agency issued Grievant a Group I Written Notice for making an offensive and inappropriate comment while conducting a re-inspection. On or about September 13, 2012, Grievant timely filed his grievance to challenge the Agency's action. On December 17, 2012, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A prehearing conference ("PHC") was held on December 19, 2012, and then a scheduling order was issued that set the hearing date for January 25, 2013.

A second PHC was held on January 17, 2013, to address, among other things, Grievant's request for the production of documents. It was determined that all documents in the Agency's possession that Grievant had requested were produced. During this PHC the parties also agreed that the individual who complained about Grievant making the offensive remark would testify at the hearing by telephone and further, her identity would not be revealed until the time of her testimony.¹

A third PHC was held on January 24, 2013, to address Grievant's concern that the Agency's Advocate was scheduled to meet with one of Grievant's exclusive witnesses prior to the hearing. The hearing officer reminded the parties that there is no prohibition on a party/advocate meeting with the opposing party's witness, but should such a meeting take place, certain actions are prohibited like (i) intimidating a witness, (ii) providing a witness with misinformation, and (iii) encouraging a witness to testify one way or the other.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. None were presented.

¹ The Agency's Advocate requested during the hearing that the Hearing Officer order witnesses not to divulge the identity of the Complainant. The Hearing Officer finds she does not have the authority to grant this request.

The hearing officer also admitted the Agency's Exhibits 1 through 14, Grievant's Exhibits 1 through 7, and the Hearing Officer's Exhibits 1 through 3, to which no objections were made.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant represented himself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (3 witnesses)
Grievant
Witnesses for Grievant (4 witnesses)²

ISSUE

Was the written notice warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing³, the Hearing Officer makes the following findings of fact:

1. Grievant has been employed by the Agency for several years as a fire marshal. His job tasks, among others, include performing fire safety inspections of various buildings. (G Exhs. 4-7; A Exh. 4). About 100% of Grievant's work involves working with the public. Other core responsibilities of Grievant's job include (i) communicating effectively orally and in writing; (ii) working effectively and willingly with diverse co-workers, clients, and customers; and (iii) supporting a non-discriminatory and harassment free work environment which contributes to a welcoming and inclusive work place.

² Grievant was given the opportunity to testify but declined.

³ Complainant, by agreement of the parties, testified by telephone.

(Testimony of Fire Marshall Supervisor; A Exh. 14, pp. 2-3).

2. On or about July 9, 2012, Grievant was checking a socket at PDC as part of a follow-up inspection there. (Testimony of PDC Manager). In his presence were two female employees of PDC, the PDC Manager, and several other men. As Grievant was conducting the inspection, one of the female employees asked if there was anything to worry about. Grievant responded with words to the effect of “nothing to get your panties in a wad/bunch about.” The men present were grinning and one made an “ooing sound.” The PDC Manager failed to address the comment. (Testimonies of Complainant and PDC Manager; A Exh. 5).

3. Complainant felt degraded by the comment and was humiliated. She was so upset that she excused herself to the bathroom where she cried and then left work early. The next day Complainant reported the incident to her immediate supervisor and wrote a memorandum about it. (Testimony of Complaint; A Exh. 5). The PDC Manager was issued a Group I Written Notice by PDC for his inaction when the comment was made. (Testimony of PDC Manager).

4. When the incident came to the attention of the Agency, Grievant’s supervisor asked him to generate a memorandum about it. Although Grievant eventually prepared the memorandum, he initially declined to do so twice. When questioned about the comment by his superior, Grievant referred to it as light hearted humor. He also admitted the comment was inappropriate. (Testimony of Fire Marshal Supervisor).

5. Management decided to issue Grievant a Group I Written Notice for unsatisfactory performance due to the remark. A description of the offense in the written notice reads as follows:

On July 9, 2012, while conducting a re-inspection at the [PDC], you made an offensive and inappropriate comment to a female employee of the [PDC]. Specifically you told this employee "don't get your panties in a bunch" in front of other employees which she found both offensive and embarrassing.

(A Exh. 1, p. 17).

6. The Fire Marshal Supervisor determined a Group I Written Notice was the appropriate discipline because he determined Grievant had received both verbal and written counseling before, the offense showed a repeated pattern, and a formal written notice was necessary to get Grievant’s attention that the behavior was unacceptable. Further the supervisor concluded the offense was serious as the remarks bordered on harassment. The Fire Marshal Supervisor issued Grievant a Group I Written Notice. (Testimony of Fire Marshal Supervisor).

7. The above-referenced prior counseling included a memorandum to Grievant from the Chief Deputy dated December 11, 2009. In that memorandum, Grievant was counseled about a poor workplace attitude, unprofessional responses to clients, and

Grievant performing inspections outside his Employee Work Profile. (A Exh. 12).

8. The verbal counseling previously referenced took place on or about March 21, 2012. The subject matter was Grievant's involvement in a dispute with a citizen in the parking area of his work place. The Agency determined after an investigation that parking spaces were scant that day and Grievant became angry with and was rude to a citizen over a parking space that each sought to use. Grievant was verbally counseled by his supervisor regarding the incident and reminded that the Agency was customer oriented and such disputes would not be tolerated. (A Exhs. 9, 10, and 11; Testimony of Fire Marshal Supervisor).

9. Grievant's supervisor determined that the July 9, 2012, and March 21, 2012 incidents were similar in that they both involved Grievant making offensive remarks to clients/customers. (Testimony of Fire Marshal Supervisor).

10. How to communicate with people is important to the Agency and Grievant received several trainings on, among other topics, communicating with clients, customers, and the public. (Testimony of Fire Marshal Supervisor; A Exh. 13).

11. The Agency contends Grievant violated Policy 1.60, the Standards of Conduct ("SOC") by failing to:

- (i) perform his assigned duties and responsibilities with the highest degree of public trust;
 - (ii) demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers;
 - (iii) make work related decisions and or take actions that are in the best interest of the agency; and
 - (iv) work cooperatively to achieve work unit and agency goals and objectives.
- (A Exh. 3, p. 2).

12. Further, the Agency contends Grievant's behavior on July 9, 2012, projected a negative image of the Agency which could jeopardize trust that citizens and customers have in the Agency. (Testimony of Fire Marshal Supervisor).

13. In his appeal response to the discipline, Grievant contended that the discipline was not appropriate for several reasons. First Grievant contended that PDC had disciplined someone. Second he contended a local weather forecaster made the same remarks on television while predicting the weather. Third, Grievant contended that the Agency was retaliating against him because of disputes he had previously had with the Chief Deputy. (Testimony of Fire Marshal Supervisor).

14. The Chief Deputy was not involved in the disciplining process. (Testimony of State Fire Marshal).

15. Grievant's evaluations for 2009 through 2012 rated him as a contributor, major contributor, major contributor, and contributor, respectively. (G Exhs. 4 through 7).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁴

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than

⁴ Grievance Procedural Manual §5.8

minor in nature or repeat offenses. Further an offense is appropriately identified as a Group II offense when it significantly impacts business operations/constitute neglect of duty or violation of a policy/procedure. Group III offenses are the most severe and normally warrant termination. *See* Standards of Conduct Policy 1.60, at pp. 8,9.

On July 9, 2012, management issued Grievant a Group I Written Notice for the reason previously noted here. Accordingly, the Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group I Written Notice and did that behavior constitute misconduct?

As noted before, the Agency contends that on July 9, 2012, Grievant while conducting a re-inspection at PDC stated words to the effect of “it’s nothing to get your panties in a bunch over.” Grievant agrees he made the statement, but at the time thought it was light humor. Accordingly, the Hearing Officer finds the conduct described did occur.

Next, the Hearing Officer examines if the conduct was misconduct. Agency policy indicates that employees are expected to perform their job with the highest degree of public trust; show respect for the Agency customers; take actions that are in the best interest of the Agency; and work cooperatively to achieve the Agency goals and objectives.

The evidence shows that Grievant’s comment was humiliating, degrading, and offensive. Further, the remark failed to show respect to the Agency’s customers/constituents, one of several goals of the Agency. What is more, the evidence shows that the comment does not foster improved communications between the Agency and the public and/or its customers/clients. Also, Grievant’s conduct has the potential of portraying a negative image of the Agency. Such jeopardizes customers/clients’ trust in the Agency. Accordingly, the Hearing Officer finds, Grievant’s conduct was misconduct and violated Agency policy.

B. Was the discipline consistent with policy and law?

The Standards of Conduct provide that Group I offenses are those that are less serious in nature, but warrant formal discipline.

The evidence shows that Grievant’s conduct was of a repeated nature as in December, 2009 Grievant received written counseling for inappropriate responses to clients. On March, 2012, Grievant was verbally counseled for being rude to a citizen. He

was told at the time that such conduct was not tolerable. The July 9, 2012 offense was of a repeat nature. It was inappropriate, at the least. Further, the remark was degrading and humiliating to the point that a female PDC employee was so upset she cried and left work early. What is more, the comment showed a lack of respect for customers. And it illustrates that Grievant did not perform his job, the re-inspection, to the highest degree of public trust. The Hearing Officer also finds that Grievant's supervisor reasonably believed the conduct bordered on harassment. The comment was aggravating as it was in response to a female's question, referenced underwear normally worn by females, and made in the presence of several men who grinned and made comments like "ooh" in response to it. Grievant's supervisor concluded formal discipline was appropriate. The Hearing Officer agrees and finds the discipline is consistent with law and policy.

II. Mitigation.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."⁵ EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."⁶ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁷

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the behavior alleged, it was misconduct, and the Agency's discipline was consistent with law and policy. Next, a focus on whether the discipline was reasonable is undertaken.

The Hearing Officer recognizes that Grievant's evaluations of record indicate

⁵ Va. Code § 2.2-3005 and (c)(6)

⁶ *Rules for Conducting Grievance Hearings* VI(A)

⁷ *Rules for Conducting Grievance Hearings* VI(B)

Grievant was either a contributor or major contributor on the job. Consideration has also been given to Grievant's contention that his comment was no different from that made by a television weather forecaster and (presumably) therefore the misconduct did not require formal disciplining. This argument is not persuasive. Careful thought has also been given to Grievant's claim of retaliation. The Hearing Officer finds Grievant failed to substantiate this assertion.

Accordingly, having considered all of Grievant's arguments, any evidence submitted to support them, as well as all other evidence, the Hearing Officer is not persuaded that the Agency acted unreasonably.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

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
Departmental of Human Resource Management
101 N. 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 N. 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.⁸

Entered this 14th day of February, 2013.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant
Director of EDR

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.