

Issue: Group I Written Notice (abusive language); Hearing Date: 02/11/14; Decision Issued: 03/03/14; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No. 10203; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10203

Hearing Date: February 11, 2014

Decision Issued: March 3, 2014

SUMMARY OF DECISION

The Agency had found that Grievant used obscene or abusive language in the work place on April 17, 2013. The Agency then issued Grievant a Group I Written Notice. The Hearing Officer found Grievant engaged in the conduct, it was misconduct, and the discipline was consistent with policy. The Hearing Officer then upheld the discipline.

HISTORY

On May 28, 2013, the Agency issued Grievant a Group I Written Notice for use of obscene or abusive language in the work place. On or about June 24, 2013, Grievant timely filed his grievance to challenge the Agency's action. On December 11, 2013, 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 20, 2013, and an order addressing topics discussed during that PHC was issued on the same date. It set the hearing for January 21, 2014, as agreed to by the parties during the PHC.¹ Thereafter, Grievant requested a continuance stating that two of his witnesses were not available to testify on the scheduled date for the hearing. No objection was raised to continuing the matter. Finding good cause to postpone the hearing, the Hearing Officer continued the matter to February 11, 2014, a date agreed to by the parties.

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. The Agency requested permission for a witness to testify on its behalf that was not previously disclosed to Grievant. Grievant objected and the Hearing Officer denied the request. During the hearing, the Hearing Officer admitted the Agency's Exhibits 1 through 5, and Grievant's Exhibits 1 through 15, and the Hearing Officer's Exhibit. The Agency also offered a sixth exhibit during the course of the hearing that was not timely provided to Grievant. The Hearing Officer sustained Grievant's objection to its admission.

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 witness presented by the opposing party.

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

¹ This was the first date that both parties were available for the hearing.

APPEARANCES

Advocate for Agency
Witness for the Agency (1 witness)
Grievant
Witnesses for Grievant (6 witnesses)

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 hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is a prison. The educational division of the prison provides vocational skills training to offenders/inmates five days a week. Grievant is employed as one of the vocational instructors in this division. Among other tasks, Grievant provides instruction in the educational division’s carpentry shop and classroom. (Testimony of Warden).
2. Agency policy permits the carpentry shop/class to build furniture for Agency employees providing they pay a \$10.00 fee and furnish the materials needed to make the item. (Testimony of Warden; A Exh. 3).
3. The Sergeant, an Agency employee, utilized this policy. He paid the required fee, provided the shop with materials to build him a chest, and supplied the shop with wheels to be mounted on the chest so it could roll. The shop built the chest with wheels and the Sergeant was pleased with it. (Testimony of Warden).
4. Weeks passed and the Sergeant failed to retrieve the chest because he was in the process of relocating his residence. During this time, another employee saw the chest and inquired about purchasing it. The chest was then sold to this other employee as the shop determined it could build the Sergeant another chest identical to the one sold. Grievant understood the Sergeant had no objection to his selling the original chest and building the Sergeant another one. (Testimony of Warden).

5. Upon the Sergeant learning that his chest was sold he denied giving permission for the item to be sold. Upset about the situation, he attempted unsuccessfully to speak with Grievant's supervisor. Enraged about the sale, on April 17, 2013, the Sergeant went to Grievant's shop/classroom and initiated an altercation with Grievant that lasted about 20 minutes. The Sergeant was loud and used profane language throughout the argument. He also made threats directed at Grievant. (Testimonies of Warden and Auto-Body Repair Instructor, and Vocational/Electrical Instructor; G Exhs. 6, 11).

Grievant perceived the Sergeant was bullying him and decided to "stand up to the bully." In doing so, Grievant got up, walked around to the front of his desk with his arms folded and confronted the Sergeant. In addition, Grievant was loud, used profanity, and said words to the effect of "So What you want to do now?" Sergeant perceived Grievant's actions as a threat and stated to Grievant "Don't come any further or I'll knock your fucking teeth out." More words were exchanged between the two, including use of the "fuck" word by Grievant and the Sergeant. The Sergeant then walked away. At no time did Grievant make physical contact with the Sergeant. Although the evidence is insufficient to determine the exact time, at some point during or soon after the April 17, 2013 altercation Grievant was scared because the Sergeant threatened Grievant. Grievant never called for or sought assistance during the altercation. This is so even though a correctional officer was present in the classroom during the altercation. (Testimonies of Warden and Auto-Body Repair Instructor; A Exhs. 2, 3; G Exhs. 9, 10).

6. On May 28, 2013, for his conduct during the altercation Grievant's supervisor, the Regional Principal of the Educational Division, issued Grievant a Group II Written Notice (Group II) for workplace violence. (Testimony of Regional Principal/Grievant's Supervisor).

7. Prior to the issuance of the Group II Written Notice, the Regional Principal and the Warden deemed it appropriate for the two of them to discuss the conduct and determine Grievant's discipline or a recommended disciplinary action. This discussion was the consensus among the two superiors because the Sergeant involved was a subordinate of the Warden and the Grievant was a subordinate of the Regional Principal. (Testimonies of Warden and Regional Principal).

During the third step of the grievance process, the Agency the discipline by reducing the Group II for workplace violence to a Group I for use of abusive/obscene language. (Testimony of Warden; G Exh. 5; A Exhs. 1, 2).

8. Cursing by inmates housed at the Agency and by employees in the workplace is common. (Testimonies of Vocational Electrical Instructor, Plumbing and Pipefitter Instructor, Auto-body Repair Instructor, and Regional Principal).

9. At a meeting in the past, the Regional Principal used cursed words.² (Testimony of Regional Principal).

10. When Grievant received his written notice, no other employee of the Agency had received a Group I Written Notice for simply cursing. (Testimony of Regional Principal).

² The evidence was not sufficient to establish the date of this meeting.

11. Employees received work place violence training. (Testimonies of Plumbing and Pipefitter Instructor and Sheet Metal/HVAC Instructor).

12. Under Agency Policy 135.1 use of obscene or abusive language is a Group 1 Written Offense. (A Exh. 7, p. 7).

13. The word “obscene” is defined as follows:

1. offensive, rude, disgusting according to accepted moral standards

(“obscene” Cambridge.com 2014. <http://dictionary.cambridge.org>. (March 2, 2014).

14. The word “abusive” is defined as follows:

1. characterized by wrong or improper action;
2. using harsh insulting language; and/or
3. physically injurious.

Related words provided by the dictionary source include, but are not limited to “affronting,” “insulting,” and “offensive.”

(“abusive” Merriam-Webster.com 2014. <http://dictionary.merriam-webster.org>. (March 3, 2014).

15. Under Agency Policy 130.3 Workplace violence is defined as follows:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to beating, stabbing, suicide, shooting, rape, attempted suicide, attempted rape, psychological trauma such as threats, obscene phone calls and/or electronic communications, and intimidating presence, and harassment of any nature such as stalking, shouting, or abusive language.

(A Exh. 4, p. 1); G Exhs. 1, p.1).

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.³

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth’s Standards of Conduct and disciplinary process that the Department of Corrections (“DOC”) must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.⁴

These standards group offenses in three categories – Group I, Group II, and Group III offenses. The least severe are noted as Group I violations of workplace conduct; Group II offenses are more severe; and Group III offenses are the most severe normally warranting termination for a first offense.⁵ When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.⁶

As stated previously, Agency management initially issued Grievant a Group II Written Notice for workplace violence. During the grievance process it mitigated the discipline and reduced it to a Group I Written Notice for using abusive and or obscene language. The Hearing Officer examines the evidence to determine if the Agency’s discipline was warranted and appropriate under the circumstances.

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?

The Agency issued Grievant a Group II Written Notice initially contending Grievant engaged in workplace violence on April 17, 2013. In its third step response to the grievance, the

³ Grievance Procedural Manual §5.8

⁴ Virginia Department of Corrections Operating Procedure 135.1 I.

⁵ Virginia Department of Corrections Operating Procedure 135.1V.

⁶ *Id.*

Agency mitigated the Group II to a Group I Written Notice finding Grievant used abusive and/or obscene language.

A review of the evidence shows that on April 17, 2013, Grievant was involved in an altercation with the Sergeant. The evidence demonstrates that the Sergeant started the confrontation when he entered Grievant's classroom enraged about Grievant selling a chest with wheels that was paid for by the Sergeant and initially made by Grievant's shop class for the Sergeant. The chest was sold because the Sergeant failed to timely pick it up and the Grievant determined that an identical chest could be made for the Sergeant.

Further, the evidence shows that during the referenced confrontation, the Sergeant was loud and threatened the Grievant. At some point during the altercation, Grievant believed he needed to stand up to the Sergeant, whom he referred to as the bully. In doing so, Grievant walked from behind his desk, approached the Sergeant with his arms folded, and commented, "So what are you gonna do now." The evidence shows the Sergeant interpreted Grievant's gesture as a threat as the Sergeant stated "Don't come any further or I'll knock your fucking teeth out." Next, more words were exchanged between the two, including use of the "fuck" word. The altercation ended when the Sergeant left the room. The incident was witnessed by several employees. One was a correctional officer who was present in the room during the altercation. At no time did Grievant ask or call for help during the incident.

Considering the totality of the circumstances mentioned above, the Hearing Officer finds Grievant's behavior was rude and offensive. Thus, it was obscene. This is so because during the altercation, Grievant was loud, cursed, used the "Fuck" word, and performed a gesture - moving to the front of his desk with his arms folded - that the Sergeant (albeit the instigator) perceived as a threat. In addition, Grievant's behavior was abusive in that it was insulting and provoking. This is evident because upon Grievant's movement, the Sergeant responded by uttering "Don't come any further or I'll knock your fucking teeth out." And further, more profanity between the participants ensued.

Having made this finding, the Hearing Officer is mindful that the altercation was started by the Sergeant and that Grievant contends he was only defending himself and implies he had no other recourse. But she finds Grievant bears some blame because he could have asked for assistance in defusing the situation, especially considering a correctional officer was present in the classroom. Instead, Grievant decided to confront the "bully." What is more, the evidence establishes (through Grievant's own witnesses) that the Agency had provided some workplace violence training. For this reason also, Grievant should have reasonably known to ask for assistance to calm the situation.

Accordingly, considering the above, the Hearing Officer finds the Agency has met its burden and shown Grievant engaged in the misconduct alleged.

Of note also, the evidence indicates that Grievant was initially disciplined for workplace violence. While the Agency chose to mitigate the discipline and reduce it to a Group I for use of obscene/abusive language, the Hearing Officer finds Grievant's conduct could have been construed as threatening and thus a violation of the Agency's prohibition against workplace

violence.

B. Was the discipline consistent with policy and law?

As discussed above, Grievant used obscene and abusive language on April 17, 2013, in the workplace. Under Agency Policy 135.1 his conduct constitutes a Group 1 offense. Thus, the issuance of the Group I notice was consistent with policy.

Grievant argues that cursing by employees is a normal occurrence at the Agency and, excluding himself, no employee has ever been disciplined for using profanity. Grievant has not demonstrated that other employees cursed in a situation similar to his. During the April 17, 2013 incident

- (i). the parties were engaged in an altercation;
- (ii). voices were raised;
- (iii) Grievant moved from the back of his desk to the front of it approaching the Sergeant with his arms folded; and
- (iv) both participants used profanity.

Grievant provided no evidence to illustrate in his reference to other employees cursing in the workplace that those other employees were involved in a situation like his on April 17, 2013. Thus, Grievant presented insufficient evidence to show inconsistent Agency discipline.

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”].”⁷ 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.”⁸ 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,

⁷ Va. Code § 2.2-3005 and (c)(6)

⁸ *Rules for Conducting Grievance Hearings* VI(A)

unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁹

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 conduct described in the group notice, the behavior was misconduct, and the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable and therefore should be mitigated.

To advance his mitigation claim, Grievant makes several contentions. He claims disparate treatment. The Hearing Officer previously addressed this claim and finds the evidence insufficient to establish Grievant has been treated differently. Grievant also asserts that the Agency's discipline was too harsh and he should have been counseled. Of note, Grievant was initially more seriously disciplined as the Agency had issued him a Group II Written Notice for workplace violence. As indicated previously here, a review of the evidence shows Grievant's gesturing was perceived as a threat by the Sergeant. Although the Agency abandoned the workplace violence claim, the evidence may have been sufficient to sustain it. Instead, the Agency mitigated Grievant's discipline and issued him a lower level written notice. Further, it is management's prerogative to determine the degree of mitigation. Only if that discipline is unreasonable will the Hearing Officer disturb it.

Next, Grievant asserts that the Agency has failed to provide workplace violence training and had it done so, Grievant could have properly responded to the Sergeant. The Hearing Officer has considered the testimony of Grievant's witnesses regarding the receipt of workplace violence training. While some witnesses could not recall receiving such training, several indicated they had. Thus, the Hearing Officer is not persuaded that the Agency failed to provide workplace violence training.

Having undergone a thorough review of all Grievant's arguments and the evidence, the Hearing Officer cannot find the Agency acted without reason when it issued Grievant the Group I Written Notice.

DECISION and ORDER

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not. Having done so, for the reasons noted here, the Agency's discipline is upheld.

APPEAL RIGHTS

⁹ *Rules for Conducting Grievance Hearings* VI(B)

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.¹⁰

Entered this 3rd day of March, 2014.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate
Grievant
EDR

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.