

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 04/17/15;
Decision Issued: 05/04/15; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10563; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10563

Hearing Date: April 17, 2015

Decision Issued: May 4, 2015

PROCEDURAL HISTORY

On October 30, 2014, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior.

On November 29, 2014, 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 March 9, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 17, 2015, 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:

The University of Virginia employs Grievant as a Facilities Services Coordinator. Grievant had prior active disciplinary action consisting of a Group I Written Notice for unacceptable attendance/excessive tardiness.

Grievant wanted to have an adjustable desk top at her workstation. She had expressed an interest in obtaining a standing desk approximately 1.5 years earlier. On October 6, 2014, Grievant returned to work after being out of work due to bi-lateral hip replacement. She wanted to reinitiate her request for an adjustable desk to aid in her recuperation. She did not consider herself to be disabled and did not want to obtain the desk as part of a disability accommodation request. Grievant knew that other employees had received adjustable desk tops without having to claim a disability. Unknown to Grievant, the Agency has altered its procedure for receiving accommodations and instructed managers to follow the Agency's disability protocols to obtain modifications to an employee's work space.

On October 15, 2014, the Supervisor met with Grievant to discuss work assignments. Near the end of the meeting, the Supervisor told Grievant that the Agency was going to order the desk but that Agency leadership had decided the request for equipment had to be made via the EOP webpage – "Procedures for Employees with Disabilities to Request Workplace Accommodation." The Supervisor presented Grievant with a Disability Accommodation Worksheet. The Worksheet referred to the Americans with Disability Act and had several check boxes to check regarding disclosures about the Americans with Disabilities Act. At the bottom of the

form was a place for Grievant to sign. The Supervisor presented Grievant with the form for Grievant's signature and began discussing it. The Supervisor mentioned that Grievant's surgeon had not requested an adjustable desk as part of a temporary return to work accommodation. Grievant was upset and began interrupting the Supervisor. The Supervisor asked Grievant to stop interrupting her. Grievant began writing down everything that was being said. The Supervisor handed Grievant the form again and Grievant said she was not disabled even though she had a temporary work restriction from her surgeon during the period of her recuperation. The Supervisor repeatedly asked Grievant to let her finish her sentences. Finally, the Supervisor said, "we are back to where we were several months ago. Why is everything an argument?"

The Supervisor moved away from the table where she and Grievant were sitting. The Supervisor reached to her desk and grabbed her telephone. The Supervisor called the Manager and said, "I have [Grievant] here and it's not going well. Can you come over!" Grievant stood up and said "I'm going to record this conversation." The Supervisor said Grievant could not do so. Grievant left the Supervisor's office but returned less than a minute later. Grievant grabbed her notebook and walked out of the Supervisor's office saying that the meeting would have to happen with the University Ombudsman present and that she was willing to wait until he was available.

The Manager went into the Supervisor's office and they discussed the Supervisor's interaction with Grievant. The Manager left the Supervisor's office and went to Grievant's office. The Manager knocked on Grievant's door which was mostly closed. Grievant said, "Who is it?" The Manager pushed the door open, entered the office, and then returned the door to the mostly close position it was in before the Manager entered the office. The Manager said that she wanted to speak with Grievant to finalize the accommodation request since the accommodation was approved. Grievant's desk telephone rang and Grievant answered the telephone while the Manager waited. Grievant spoke with the caller about a funding source question and then they briefly talked about the caller's doll collection and then ended the call.

Grievant told the Manager she would not meet with the Manager one on one and that she wanted the University Ombudsman present. Grievant said she was in the process of scheduling a meeting with the Supervisor, University Ombudsman, and Grievant as a condition of continuing discussion of the human resource review of her request. The Manager said she wanted to proceed with the discussion at that time and wanted to help Grievant obtain the adjustable desktop. Grievant said she did not believe she needed to qualify as disabled in order to obtain the adjustable desktop and that she wanted to defer the discussion. Grievant said she would set up the meeting in accordance with the Manager's availability. The Manager said she wanted Grievant to fill out the paperwork. Grievant said she preferred not to fill out the paperwork and wanted to have a meeting at a later time. The Manager asked, "Are you telling me you will not meet with me?" Grievant said "yes, we can meet later; I prefer not to meet now under these conditions." The Manager said that was not how the Manager was interpreting what Grievant had said to her earlier. Grievant said she already expressed to the Manager that she wanted to meet with the University Ombudsman present.

The Manager moved towards the door and had placed her hand on the door handle. The Manager said "I don't understand why your tone is so hostile" because she was trying to make sure Grievant had what Grievant needed. Grievant said her tone was not hostile. The Manager reasserted her perception of Grievant's tone as hostile. Grievant abruptly stood up and stated "that door must be opened now!" The Manager was standing between Grievant and the hallway. Grievant stood up and begin walking toward the hallway. Grievant walked towards the Manager and was within a few inches of the Manager. The Manager had her hand on the door handle. The Manager felt her "personal space" was being invaded by Grievant. Grievant abruptly pulled the door open thereby pulling the door handle out of the Manager's hand. Grievant commanded that the Manager, "Get in the hall! I won't be behind closed doors with you." The Manager was startled by Grievant's behavior and said, "What?" Grievant demanded that the Manager, "needed to get in the hall now. We can talk there." The Manager moved into the hallway to avoid touching Grievant as Grievant moved towards the Manager and into the hallway.

When they were in the hallway, the Manager again explained she was confused by Grievant's reaction and was only trying to provide Grievant with what Grievant needed. The Manager also explained her perception that Grievant's tone was hostile and Grievant's behavior towards the Manager was inappropriate. Grievant explained that her tone was not hostile and that she would not meet with the Manager. Grievant took a step towards the Manager and told the Manager to move so Grievant could get back into her office. The Manager again asked Grievant to take a minute to finalize the request. Grievant said, "No." Grievant then walked down the hall into Mr. W's office. The Manager perceived that Grievant had "dismissed me" when she entered Mr. W's office and turned her back on the Manager. The Manager walked down the hallway to pass Mr. W's office. Grievant called for the Manager to stop near Mr. W's office. Grievant asked Mr. W what he had heard and if he thought Grievant was being hostile. Before Mr. W could answer, the Manager told Grievant it was inappropriate to draw Mr. W into the conversation. Mr. W said he was not getting involved. Grievant left Mr. W's office, turned her back to the Manager, and walked to her office and closed the door.

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."¹ 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."

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.

Under this statute, an employee's expression of his or her dispute with an agency is a protected act not subject to disciplinary action. That restriction, however, is not without limitation.

The merits of Grievant's arguments about the adjustable desk are a separate consideration from whether Grievant appropriately communicated her objection to filling out a form. Grievant did not consider herself to be disabled. Her concerns about signing a document discussing her request in the context of having a disability are understandable. Grievant had the right to refuse to sign the document. Grievant's dispute with the Agency regarding how the Agency intended to resolve her request for an adjustable desk was a protected act for which she could not be disciplined merely for arguing with Agency employees. How she communicated her concerns, however, forms a basis for disciplinary action.

Disruptive Behavior is a Group I offense.² Grievant created an intimidating presence with the Manager. Grievant approached the Manager and invaded the Manager's personal space. Although Grievant did not touch the Manager, she effectively forced the Manager out of her office against the Manager's will. Grievant grabbed the door and forced the door handle out of the Manager's hand against the Manager's will. By creating an intimidating presence, Grievant acted contrary to DHRM Policy 1.80 which defines workplace violence to include creating an intimidating presence. Grievant refused to meet with the Manager about Grievant's request and then took action to effectively prevent any meeting from taking place. Grievant failed to follow a supervisor's instructions to meet thereby committing a Group II offense under DHRM Policy 1.60. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

Grievant argued that her behavior was appropriate and that she was justified in refusing to sign the document because she did not consider herself to be disabled. Although Grievant was justified in refusing to sign the document, she was not justified in expressing her displeasure with the Agency's request by creating an intimidating presence to the Manager and refusing to meet with the Manager when asked to do so.

² See, Attachment A, DHRM Policy 1.60.

Grievant had no right to delay the meeting until the University Ombudsman could be present.

Grievant argued that the Supervisor and Manager were hostile towards her and that she was subjected to her verbal abuse. The evidence showed that the Supervisor and Manager were frustrated with Grievant's behavior but not hostile towards her. Their frustration with Grievant was triggered by Grievant's behavior and not on their own initiative.

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"³ 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 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

³ Va. Code § 2.2-3005.

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.