

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 10/16/13;
Decision Issued: 10/23/13; Agency: VDH; AHO: Thomas P. Walk, Esq.; Case No.
10153; Outcome: No Relief – Agency Upheld.

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 10153

DECISION OF HEARING OFFICER

HEARING DATE: OCTOBER 16, 2013

DECISION ISSUED: OCTOBER 23, 2013

I. PROCEDURAL HISTORY

The agency issued to the grievant a Group I Written Notice on June 12, 2012. She received it on June 19. The grievant filed her grievance Form A on July 17, 2012. The director of the agency qualified the matter for hearing on July 15, 2013. I was appointed as hearing officer on August 13. I conducted a prehearing conference by telephone on August 22, 2013. The hearing in the matter was conducted at the [agency] on October 16, 2013. Prior to the commencement of the hearing the grievant objected to the consideration of the documents found behind Tab 7 in the notebook of exhibits submitted by the agency prior to the hearing. Because the actions and omissions described in that document pertaining to events arising subsequent to the issuance of the subject disciplinary action, I sustained the objection. I have considered only those exhibits submitted by the agency behind Tabs 1 through 6, inclusive. No exhibits were found behind Tab 8. The evaluation forms submitted by the grievant were also considered by me.

II. APPEARANCES

An agency employee represented the agency as lay advocate.

Three witnesses testified on behalf of the agency.

The grievant represented herself. She was the only witness on her behalf.

III. ISSUE PRESENTED

Whether the agency acted appropriately in issuing to the grievant a Group I Written Notice on June 12, 2012 for not demonstrating respect for customers in accordance with the Standards of Conduct Policy?

IV. FINDINGS OF FACT

In March 2012 the grievant was employed by the Virginia Department of Health in an administrative position, working in a County Health Department. One of the customers of that Department was a young lady who had given birth to a child prematurely approximately one year before. The customer was eligible for and received nutritional goods and counseling under the WIC Program. One of the items provided to the customer under the program was Neosure Formula. This formula is designed for premature infants such as the child of the customer.

During a visit by the customer to the Department in early March of 2012 the grievant provided to her a can of Neosure. The grievant was the only worker in the Department trained in the WIC Program present on that date. The grievant was cross-trained in both the administrative and clinical areas.

The following week the customer returned to the Department for a WIC Clinic. She asked another worker at the Department for an additional supply of Neasure. Outside the presence of the customer, but within earshot, the coworker of the grievant asked her about this request. The grievant responded that she had given the customer a can the previous week. The customer overheard this comment and took it to be demeaning. She immediately left the Department.

Approximately one week later a local newspaper carried a letter to the editor from the mother of the customer. The letter described, among other things, the comment made by the grievant and the needs of the child. A complaint about the incident was also sent to the Commissioner of the agency.

On June 12, 2012 the agency issued its disciplinary action which states:

“Employee did not demonstrate respect for customers in accordance with the Standards of Conduct Policy by making a comment overheard by the WIC participant and other staff, that offended the participant and resulted in a negative newspaper article complaining about the WIC Program. This offense is evidenced by statements from the participant and other staff members.”

The grievant has not denied making this statement. She has conceded that the statement could have reasonably been taken by the customer as being dismissive of her.

V. ANALYSIS AND CONCLUSIONS OF LAW

This matter arises under Chapter 30 of Title 2.2 of the Code of Virginia of 1950. That set of statutes provides certain due process rights to state employees, including a formal hearing in

certain circumstances. The agency designated with overseeing these rights is the Department of Human Resource Management. That agency has promulgated a Grievance Procedural Manual (“GPM”) and Rules for Conducting Grievance Hearings (“Rules”). Section VI (B) of the Rules provides that disciplinary actions (such as this case), the hearing officer is to determine “whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.”

The hearing officer is required to determine:

1. The employee engaged in the behavior described in the Written Notice;
2. Whether the behavior constituted misconduct; and
3. Whether disciplinary action taken by the agency was consistent with law and policy.

The hearing officer conducts a de novo review of the evidence. He is not bound by any factual determination or legal determination by the agency. The agency has the burden of proving the allegations in a grievance arising from a disciplinary action, such as this case. The level of proof required is a preponderance of the evidence.

As stated above, the grievant concedes that she made the statement in question. That admission is supported by the other evidence in the record. I, therefore, find that she committed the offense set out in the Written Notice.

The agency treated this statement as a Group I offense. Under Policy 1.60 of the Department of Human Resource Management a Group I offense is an act of minor misconduct of a repeated nature or, for a first offense, one that has a “relatively minor impact on business operations” but is deemed to require formal intervention.

The statement by the grievant for which she has been disciplined is, in the abstract, an innocuous one. It was a true statement. Nothing in the record suggests that it was made with malicious intent.

I cannot ignore the context in which it was made. The customer was in a position to hear the statement. The tone of voice used was such that it could have been interpreted as derogatory or demeaning to the customer. That is the interpretation she gave to it. Also of importance is the mission of the agency to help financially needy individuals with nutritional assistance. The policy of the agency is to treat all customers with respect.

I conclude that the statement does constitute the type of minor misconduct contemplated by Policy 1.60. Because it was not shown to be a repeated act, the next question is whether it had an impact on the agency operations. I find that it did. The reporting of the incident to the Commissioner resulted in the investigation of the incident. This investigation has had an impact on the operations of the agency. A not insignificant amount of time has been expended by supervisors in dealing with this matter. Also, the letter to the newspaper cast the agency in an unfavorable light.

I believe that the agency acted properly issuing the notice. Section VI (B) of those Rules requires a hearing officer to give due consideration to management's right to exercise "its good faith business judgment in employee matters, and the agency's right to manage its operations." The question for me to decide is not whether I would have taken the same action as the agency. The question is also not whether the grievant may have committed other offenses, either before or after the incident giving rise to the disciplinary action. My determination is whether the agency management acted reasonably, as opposed to arbitrarily, in imposing discipline. Here,

the agency did act within the bounds of reason.

The record establishes that the grievant has been a valued employee of the agency for numerous years prior to this incident. She received at least satisfactory employee evaluations on a consistent basis during her long tenure with the agency. These factors were taken into consideration by the agency at the time the Written Notice was issued. The consideration was entirely appropriate.

DECISION

For the reasons stated above, I uphold the issuance by the agency of the Group I Written Notice on June 12, 2012.

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.

ENTERED this October 23, 2013.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer