

Issue: Group III Written Notice with Suspension (threats/coercion); Hearing Date: 07/16/14;
Decision Issued: 07/23/14; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10386;
Outcome: No Relief - Agency Upheld; Administrative Review: EDR Ruling Request received
08/06/14; EDR Ruling No. 2015-3969 issued 08/25/14; Outcome: AHO's decision affirmed.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10386

Hearing Officer Appointment: June 10, 2014

Hearing Date: July 16, 2014

Decision Issued: July 23, 2014

PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice (with suspension from April 9, 2014 through April 22, 2014) issued April 9, 2014 by the Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A dated April 22, 2014.

The Grievant is seeking the relief requested in his Grievance Form A including restoration of any lost pay and benefits and rescission of the Group III Written Notice.

The Grievant, the Agency's advocate, and the hearing officer participated in a first pre-hearing conference call on June 19, 2014.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order and an Amended Scheduling Order entered on June 25, 2014, which is incorporated herein by this reference.

At the hearing, the Grievant represented himself and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing¹.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the

¹ References to the agency's exhibits will be designated AE followed by the exhibit number (the hearing officer did not admit into evidence pages 2-12 of AE 12). Any references to the Grievant's exhibits will be designated GE followed by the page number.

circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant is a training instructor at a training facility of the Agency (the "Facility"). The Grievant has been employed by the Agency since 2003 and has been working at the Facility since 2007.
2. Amongst other things, the Grievant is an instructor for the Agency concerning the Prison Rape Elimination Act ("PREA").
3. The Grievant is a trainer in the unit of the Training Development Manager (the "Training Manager"). On October 29, 2013, at approximately 11:00 a.m. the Grievant had a verbal altercation with another Agency employee. AE 13. This altercation, while relevant to this proceeding, is not the subject of the disciplinary charge in this case.
4. Concerning the October 29, 2013 altercation, the Grievant admitted to the Training Manager that the Grievant "did shout in a loud voice several times telling [the other employee] to leave his office." AE 13. The Grievant also admitted to the Training Manager that the Grievant slammed his door closed after the other employee was removed from the Grievant's office. AE 13.
5. The Training Manager met with the Grievant and the other employee on October 31, 2013 and informed both employees of "the importance of conducting themselves in a professional manner." AE 13.
6. The Training Manager "emphasized the importance of communicating in a manner that displays respect. [The Training Manager] informed them that once both of them could not agree and felt themselves entering into negative conflict, the conversation should be ended. The expectation that [the Training Manager has] is for them to seek guidance from [a Facility supervisor] or Management". AE 13.

7. The Training Manager cautioned the Grievant that "continuing to engage in negative verbal conversation could lead to a more serious altercation and disciplinary action under the Department's standards of conduct." AE 13.
8. The Grievant was advised and undertook in future to avoid conversations that begin to turn into altercations by maintaining professionalism, ending the conversation and seeking guidance from supervisory or management staff, including the Training Manager. AE 13.
9. Exercising his prerogative of progressive discipline, the Training Manager did not issue formal discipline but managed this incident as an informal verbal counseling. AE 13.
10. The Grievant has an active Group I Written Notice for failure to follow instructions. AE 12, page 1.
11. On April 3, 2014, during the Facility's 10:00 a.m. break, the Grievant went to the Accounting Office to obtain a receipt for certain meal tickets which he had purchased from the accountant a couple of days before.
12. An Administrative and Office Specialist II, (the "Accounting Specialist") was working at the counter of the Accounting Office when the Grievant entered the office and asked for his receipt for the meal tickets which he had bought from the accountant previously.
13. While the Accounting Office has very occasionally issued receipts to the Grievant for cash purchases of meal tickets (GE 160), the typical practice of the Accounting Office is not to issue receipts for such cash payments by employees of the Facility.
14. The Grievant strongly believed and believes that the issuance of receipts for cash purchases of meal tickets by employees was and is a function of the Accounting Office. When the Accounting Specialist refused to write the receipt (instead telling the Grievant that she would order a receipt book and the Grievant could write one out for the number of tickets he buys and she would initial or sign it), the Grievant became confrontational and loud insisting repeatedly that the Accounting Specialist "will write me a receipt". GE 27 & 29.
15. The Grievant became increasingly insistent, demanding and belligerent and the Accounting Specialist also began to raise her voice to a similarly loud level as the encounter over a \$15.00 receipt degenerated into a verbal altercation. GE 28.
16. The loudness of the altercation so alarmed CP, an administrative assistant in an adjoining office, that CP called to alert the Training Manager who proceeded forthwith to the Accounting Office to address the situation. GE 30.

17. The Accounting Specialist had been getting ready to walk on her 10:00 a.m. break when the Grievant came into the Accounting Office to demand his receipt, and in an effort to get away from the confrontation and to de-escalate the situation, the Accounting Specialist tried to leave her office through the only doorway but the Grievant blocked the doorway and leaned forward in a manner which the Department's Deputy Director of Administration testified she would have found threatening when the Grievant voluntarily demonstrated what he had done.
18. MM who supervises the Accounting Department was directly behind the Grievant and observed the Grievant block the doorway when the Accounting Specialist tried to leave. MM testified that he perceived the Grievant's behavior as threatening.
19. Eventually, the situation diffused and the Training Manager was on hand to direct the Grievant to Conference Room 1, while the Training Manager talked to some of the people involved including the Grievant.
20. The Grievant provides staff training on PREA. Accordingly, the Grievant is knowledgeable concerning what may be perceived as threatening or intimidating behavior and should be keenly aware of how size, power, authority and personal space impact feelings of safety. AE 3 at 4. The Grievant is approximately 6 feet 2 inches tall while the Accounting Specialist is only 5 feet 3 inches and the Grievant is also perceived as younger and stronger per the testimony of the Accounting Specialist, which was not contested by the Grievant.
21. The Grievant admits that his behavior was unacceptable (AE 3 at 4) and, of course, the advice of the Training Manager and the concomitant undertaking of the Grievant after the October 29, 2013 altercation, required the Grievant to contact the Training Manager before any escalation as occurred with the Accounting Specialist and not *ex post facto*, as the Grievant did on April 3, 2014.
22. While the Accounting Specialist told the Human Resource Manager that "she did not feel in physical danger", the Accounting Specialist stated at the time to the Human Resource Manager that the Grievant's comments and manner of dealing with her were "very disrespectful and aggressive." GE 31. At the hearing, the Grievant testified unequivocally and convincingly that she felt threatened. Of course, the other eye witness to the encounter, MM, also testified that the Grievant's behavior was threatening.
23. Concerning the incident of April 3, 2014, which is the subject of this disciplinary case, on April 9, 2014, the Human Resource Manager issued to the Grievant a Group III Written Notice because:

[The Grievant] has displayed threatening/coercive behavior towards [Facility] employees in the work environment.

AE 1.

24. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE POLICY, LAW, ANALYSIS AND DECISION

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 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 the 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. *Grievance Procedure Manual*, § 5.8.

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 operative Agency Standards of Conduct (the "SOC") are contained in Agency Operating Procedure 135.1 ("Policy No. 135.1"). AE 10. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

Pursuant to Policy No. 135.1, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency.

Policy No. 135.1 provides in part:

V (D). THIRD GROUP OFFENSES (GROUP III):

1. These offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.

2. *Group III* offenses include, but are not limited to:

.....

(1) Threatening or coercing persons associated with any state agency, including but not limited to employees, supervisors, patients, visitors, and students.

AE 10.

Furthermore, Section IV (E) of the SOC provides:

The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours, that in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with this operating procedure based on the severity of the offense.

AE 10.

In this instance, the Agency appropriately determined that the Grievant's violations of Agency policies concerning threatening or coercing any persons associated with any state agency constituted a Group III offense.

On April 3, 2014, at approximately 10:00 a.m., when the Facility has a scheduled break for its employees, the Grievant went to the Accounting Office where the Accounting Specialist worked. He entered and stood at or near the counter where the Accounting Specialist was.

At first, the Grievant was matter-of-fact and professional in asking for his receipt but the encounter deteriorated fast when the Accounting Specialist refused.

Grievant quickly became angry, very loud and intimidating towards the Accounting Specialist, demanding repeatedly that the Accounting Specialist issue his demanded receipt. As the Accounting Specialist continued to refuse and tried to leave the office to get away from the Grievant, the Grievant blocked the doorway.

The fact that the Accounting Specialist eventually also became equally loud does not excuse the Grievant's behavior, particularly in view of his prior counseling by the Training Manager. The Grievant coerced the Accounting Specialist by repeatedly demanding that she issue him the receipt. The Grievant's physical demeanor reflected anger, frustration and his attempt to intimidate the Accounting Specialist. The Grievant has no authority over the Accounting Specialist yet he admonished her that issuing the receipt he demanded was an accounting function.

The Grievant also blocked the Accounting Specialist from leaving to go on her walk during the Facility break. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for threatening and coercing the Accounting Specialist on April 3, 2014. Upon the issuance of a Group III Written Notice, a suspension of up to 30 workdays is authorized under the Standards of Conduct. Accordingly, the Grievant's 10 workday suspension is upheld. *See also*, EDR Case No. 8787.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions could have supported termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the

Department did consider mitigating factors in disciplining the Grievant and instead of terminating the Grievant's employment, chose to suspend the Grievant for 10 workdays. AE 1.

The Grievant has specifically raised mitigation as an issue in the hearing and in his Form A. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Written Notice and all of those listed below in his analysis:

1. the Grievant's good service to the Agency of over 10 years;
2. the Grievant's good service to the Facility since 2007;
3. the often demanding nature of the Grievant's work environment; and
4. the fact that the Accounting Specialist also became very loud in shouting at the Grievant; and
5. the fact that the Facility's policy or practice of issuing or not issuing receipts to employees for cash purchases of meal tickets is undetermined.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The Grievant argued that the Agency rushed to judgment, did not provide progressive discipline and the discipline was too harsh. However, the Grievant has an active Group I Written Notice and if he had followed the verbal counseling advice of the Training Manager from the incident on October 29, 2013, the Grievant would entirely have avoided the escalation of the matter with the Accounting Specialist, instead leaving it for the Training Manager to pursue with the Accounting Office. Accordingly, the hearing officer decides that the Agency did pursue progressive discipline within its prerogative and the punishment was by no means too harsh.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management

which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

At the hearing, the Grievant asserted "racial profiling" by the Human Resource Manager. However, the hearing officer has not found any probative evidence of racial discrimination or profiling. The only party who raised any scintilla of race was the Grievant himself in a statement

the Grievant made to the Human Resource Manager during the rebuttal meeting on April 8, 2014. AE 2 at 2. The Grievant's immediate supervisor is black, the Training Manager is black and the Deputy Director of Administration is black. The Training Manager recommended the disciplinary action to the Human Resource Manager. AE 6. The Deputy Director of Administration specifically looked at the racial issue and found "no indication of racial bias on the part of [the Human Resource Manager]." AE 3 at 2.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

- 1. A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
- 2. A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

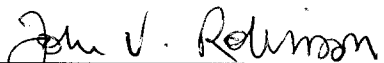
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 7 / 23 / 14



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).