

Issue: Group III Written Notice with Suspension (disruptive behavior); Hearing Date: 10/23/14; Decision Issued: 11/18/14; Agency: Radford University; AHO: Lorin A. Costanzo, Esq.; Case No. 10471; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF HUMAN RESOURCE MANAGEMENT**  
**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**  
**DECISION OF HEARING OFFICER**

**In the matter of: Grievance Case No. 10471**

**Hearing Date: October 23, 2014**  
**Decision Issued: November 18, 2014**

**PROCEDURAL HISTORY**

Grievant was issued a Group III Written Notice with 10 workday suspension on August 11, 2014 Grievant for Disruptive Behavior (Written Notice Offense Code/Category "37"). Grievant timely grieved issuance of the Group III Written Notice. The grievance proceeded through the resolution steps and, when the outcome was not satisfactory to Grievant, she requested a hearing. The matter was qualified for a hearing and the undersigned was appointed hearing officer effective October 6, 2014 by the Department of Human Resources Management, Office of Employment Dispute Resolution.

A pre-hearing telephone conference was held on October 10, 2014. The grievance hearing was held on October 23, 2013 with Grievant in attendance. At hearing, by agreement of the parties, the exhibits of the parties were admitted *en masse*. At conclusion of the hearing the Grievant requested to submit a written closing and both parties agreed to e-mail written closing arguments by 10/29/14. Written closing arguments were received by the Hearing Officer on October 29, 2014.

**APPEARANCES**

Grievant  
Agency's Advocate  
Agency Party Designee  
Witnesses

**ISSUES**

Whether issuance of a Group III Written Notice with 10 workday suspension was 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 action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.<sup>1</sup>

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. Grievant is employed by Agency in their Housekeeping Department as a Housekeeping Manager. Agency has approximately 1300 employees of which approximately 80 are in their Housekeeping Department.<sup>2</sup>

2. Grievant is one of four Housekeeping Managers currently reporting directly to the Director of Housekeeping. Each Housekeeping Manager has one or more Supervisors reporting to them and each Supervisor has Housekeepers reporting to the Supervisor.<sup>3</sup>

3. In March of 2013 Executive Director of HR, while conducting a training session on workplace harassment, had an employee asked her what to do she was being harassed at work. As a result of a request by the employee for the Executive Director of HR to meet with her and several others, a meeting was held. At the meeting 13 or 14 housekeeping employees expressed concerns about feeling they were in a hostile work environment. Housekeeping employees alleged, among other matters, being yelled at and called names. Additionally, the employees raised concerns and expressed confusion as to policy and/or departmental guidelines being enforced.<sup>4</sup>

4. Executive Director of HR initiated an investigation into allegations of a Hostile Work Environment within the Housekeeping Department. Allegations involved four named individuals, including Grievant. Of approximately 50 complaints approximately 25 addressed issues involving Grievant. In March of 2013 Executive Director of HR met with these four employees.<sup>5</sup>

5. Investigation was conducted from about March of 2013 until the "Report on Investigation of Hostile Work Environment in the Housekeeping Department" was issued by the Executive Director of Human Resources on August 8, 2014.<sup>6</sup> In her investigation, Executive Director of HR noted confusion over a number of departmental policies they believe to be unfair. Her 8/8/14 Report found the work environment in the Housekeeping Department to be intimidating, hostile or offensive but did not find a basis for the treatment related to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Furthermore, the work environment was found to be hostile, disruptive and highly inappropriate.<sup>7</sup>

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<sup>1</sup> Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

<sup>2</sup> Testimony.

<sup>3</sup> G. Ex. pg. 5 and testimony.

<sup>4</sup> Testimony.

<sup>5</sup> Testimony.

<sup>6</sup> A. Ex. pg. 1-6.

<sup>7</sup> A. Ex. pg. 1-6.

5. On August 11, 2014 Grievant was issued a Group III Written Notice with 10 workday suspension (from 8/12/14 through 8/25/14) for Disruptive Behavior (Written Notice Offense Code/Category "37"). The Written Notice indicated under *Nature of Offense and Evidence*:

-DISRUPTIVE BEHAVIOR- an investigation of alleged hostile work environment concluded [*Grievant*] has created an intimidating, hostile, offensive work environment in the Housekeeping Department. She threatened, issued, or mandated "records of discussion" and other disciplinary action to include termination from employment in an excessive manner to coerce employees into complying with established rules, regulations, policies and guidelines. Her evaluation of cleanliness standards is inconsistent with other Housekeeping Managers which led to employees being afraid of her coming around to check their work.

### **POLICY 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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) addresses the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.*

#### ***Standards of Conduct (Policy No. 1.60):***

To establish procedures on the Standards of Conduct and Performance for employees of the Commonwealth and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resources Management has promulgated Policy No. 1.60, *Standards of Conduct*. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct of employees and acceptable standards for work performance of employees. The *Standards of Conduct* 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.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. 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 would warrant termination.

The *Standards of Conduct* further provides that the examples of offenses set forth are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. The Standards of Conduct provides:

*Examples of offense, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary*

*actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*

The *Standards of Conduct* provides the normal disciplinary action for a Group III Offense is Written Notice and discharge. In lieu of discharge, the agency may: (1) suspend without pay for up to 30 workdays, and/or (2) demote or transfer with disciplinary salary action.<sup>8</sup>

**Investigation:**

In March of 2013 Executive Director of HR was conducting a training session on workplace harassment when an employee asked what to do if she was being harassed now. After the training session Executive Director of HR met with the employee who asked if she would meet with the employee and others later to discuss matters. About a week later Executive Director of HR met with what turned out to be a group of 13 or 14 housekeeping employees who raise allegations concerning hostile work environment in the Housekeeping Department. Due to these allegations an investigation was initiated into matters and actions concerning four named individuals, including Grievant.<sup>9</sup>

As the investigation progressed over time more and more individuals came to Executive Director of HR with concerns of matters going on in the Housekeeping Department. Ultimately the August 8, 2014 "Report on Investigation of Hostile Work Environment in Housekeeping Department" was issued by the Executive Director of HR identifying 12 named employees filing complaints, 12 employees who filed complaints about the Housekeeping Department since the Investigation began, and three employees outside of the Housekeeping Department who approach with concerns with the way the Housekeeping staff is treated.<sup>10</sup> Testimony indicated other individuals came forward but requested to remain anonymous. Approximately 50 complaints were received with approximately 25 addressing issues involving Grievant.

The "Report on Investigation of Hostile Work Environment in Housekeeping Department" issued by the Executive Director of Human Resources dated August 8, 2014 addressed actions of Grievant and three other employees.<sup>11</sup> The Report provided in pertinent part:

Conclusion:

There are approximately 80 employees in housekeeping. I have interviewed and/or met with over one-third (1/3) of the staff to include employees who no longer work for [Agency]. I have reviewed the internal personnel files for 25 housekeepers and find numerous "records of discussion" in most of the employee files I reviewed. I find their allegations can be substantiated for [Grievant] and substantiated in part for [3 named individuals]. The majority of the complaints I received are about [Grievant], her management style and her demeanor. After speaking to several supervisors who report to [Grievant], they expressed discomfort with standing up to her or disagreeing with her directives. They fear retaliation if they do not follow her directions, even when they disagree or believe the directives to be unfair or unethical. ...

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<sup>8</sup> A. Ex. pg. 12-30.

<sup>9</sup> Testimony.

<sup>10</sup> A. Ex. pg. 1-6.

<sup>11</sup> A. Ex. pg. 1-6.

I have found the work environment in the Housekeeping Department to be intimidating, hostile or offensive but I have not found a basis for the treatment related to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Therefore, I find the work environment to be hostile, disruptive and highly inappropriate.

The investigation raised the concerns to management of Grievant's actions and communications at work dealing with employees she supervises. Upon investigation Agency was concerned that her behavior at work was disruptive and created a work environment that unreasonably interfered with employees' work performance.<sup>12</sup> The significant number of employees who addressed complaints during the investigation was given consideration by Agency. Grievant's management style and actions affected not only a significant number of employees, as evidenced by the number of complaints, but had a disruptive effect on Agency's employees and the workplace.

Executive Director of HR expressed strong concern that Grievant was excessively utilizing *Records of Discussions* and was requiring the Supervisors working under her to use *Records of Discussions* when they did not feel it necessary. Supervisors felt a degree of fear and intimidation that exceeded what Executive Director of HR believed would be expected in a normal chain of command situation. Employees indicated being afraid of Grievant and her walking by. Executive Director of HR felt the level of fear far exceeded the common level of concern or distress found when a supervisor is around. Testimony addressed that the level of fear and/or distress greatly exceeded what was considered a common level of concern. Additionally, a significant number of the employees address fear of being seen with Executive Director of HR being afraid for their job.

Executive Director of HR indicated that her investigation was conducted over a period exceeding one year due to the fact that, once the investigation was initiated, additional employees would raise issues and complaints throughout the investigative process that would have to also be investigated.

***Disruptive Behavior:***

The Report's recommendation was for a Group III for Disruptive Behavior which has the effect of creating an intimidating, hostile or offensive work environment and unreasonably interfered with employees' work performance.

Grievant was issued a Group III Written Notice for Disruptive Behavior (Written Notice Offense Code/Category "37") and the *Nature of Offence and Evidence* stated:

Disruptive Behavior - an investigation of alleged hostile work environment concluded Grievant has created an intimidating, hostile, offensive work environment in the Housekeeping Department and she threatened, issued, or mandated "records of discussion" and other disciplinary action to include termination from employment in an excessive manner to coerce employees into complying with established rules, regulations, policies and guidelines. Her evaluation of cleanliness standards is inconsistent with other Housekeeping Managers which led to employees being afraid of her coming around to check their work.

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<sup>12</sup> A. Ex. pg. 1-6.

Extensive time was expended by Agency in investigation of matters raised by numerous employees including employees being interviewed and records being searched. While the work environment in the Housekeeping Department was found in Agency's investigation to be intimidating, hostile or offensive, it was not found the basis related to race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. The Report concluded with a finding that the work environment was found to be hostile, disruptive and highly inappropriate.

Management was concerned over the number of Housekeeping employees being given what they consider to be an excessive number of *Records of Discussion* by Grievant or at Grievant's direction and the effect it was having on Agency and its employees. Additionally, Management was concerned with the perception that the *Record of Discussion* was a form of discipline and that some *Records of Discussion* contained words to the effect the employee's failure to correct a behavior could result in further discipline. Evidence indicates that some, not all, of the Grievant's *Records of Discussion* did indicate an admonition to the effect that the employee's failure to correct a behavior could result in further disciplinary action.<sup>13</sup> This wording inferred or gave the appearance that the *Record of Discussion* was a disciplinary action.

The evidence indicates Grievant was aware or should have been aware employees did consider the *Records of Discussions* to be a disciplinary action or "write up" and there was considerable fear of losing their jobs associated with these *Records of Discussion*. The Housekeeping Department did not address the *Record of Discussion* with written policy or guidelines but was used as a discretionary matter by management. Agency indicated the *Record of Discussion* was to document that a verbal counseling had been made and it was not itself a disciplinary matter.

Evidence addressed Grievant's actions in the workplace which included shouting, yelling at employees, and threatening the use of *Records of Discussions*. Grievant's words and actions acted to create unnecessary employee stress, anxiety, and worry in employees that their job was on the line at times, especially when they had to meet with Grievant or discuss matters with her. Testimony addressed concern of being threatened with *Records of Discussion* and told if they did not do things right Grievant was giving out "write-ups". Evidence described employees being nervous on the job, feeling intimidated, feeling degraded, feeling dumb, not being politely spoken to, and being shouted at. Evidence addressed not only the effects of Grievant's behavior on Housekeeping employees but also on others outside of the Housekeeping Department.

The August 8, 2014 Report noted the following statements made by employees concerning Grievant:

- **[Grievant]** has one of her workers so scared they won't even go to the bathroom for fear of being jumped on.
- I would rather be punished than to confront **[Grievant]**.
- **[Grievant]** told me, "I wish she would just quit....I can't stand her!"

For the reasons stated above, Agency has met its burden, by a preponderance, that Grievant's behaviors were disruptive of the Agency workplace, and its business activities, and unreasonably interfered with employees' work performance.

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<sup>13</sup> A. Ex. pg. 41, 42 and G. Ex. pg. 44, 50, 52, 54, 70, 71, 73, 74, 75, 83, 85, 89, 90, 93, 102, and 103.

**Evaluation of cleanliness standards:**

The Written Notice addresses Grievant having an inconsistent evaluation of cleanliness standards. There is insufficient evidence in this case to determine that Grievant's evaluation of cleanliness standards was inconsistent with other Housekeeping Managers or to determine that her evaluation of cleanliness standards led to employees being afraid of her coming around to check their work.

Agency witness addressed in testimony his involvement in matters and his determination that Grievant's evaluation of cleanliness standards was not found to be inconsistent with other Housekeeping Managers.

**Mitigation:**

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 the rules established by the Department of Human Resources Management ..." <sup>14</sup> A hearing officer is not a "super-personnel officer" and therefore, in providing any remedy the hearing officer should give appropriate level of deference to the actions by agency management that are found to be consistent with law and policy. <sup>15</sup> Furthermore, 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."

The evidence indicates that Agency did take into consideration mitigating circumstances in this matter. The *Standards of Conduct* at §B. 2. c. provides Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination and provides this level is appropriate for disruption of the workplace. In lieu of discharge, the agency may suspend without pay for up to 30 workdays, and/or demote or transfer with disciplinary salary action. <sup>16</sup> In this case the Agency decided not to discharge Grievant and further decided to impose a 10 day suspension and not impose a 30 day period of suspension it could have imposed.

Hearing Officer does not find Agency's discipline exceeds the limits of reasonableness.

**CONCLUSIONS**

For the reasons stated above, based upon consideration of all the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency's discipline does

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<sup>14</sup> Va. Code § 2.2-3005.

<sup>15</sup> § VI. A. Rules for Conducting Grievance Hearings.

<sup>16</sup> A. Ex. pg. 12-30.



not exceed the limits of reasonableness.

### **DECISION**

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with 10 workday suspension was warranted and appropriate under the circumstances and Agency's issuance of a Group III Written Notice with 10 workday suspension to Grievant is **UPHELD**.

### **APPEAL RIGHTS**

As the *Grievance Procedure Manual (effective date: July 1, 2012)* 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.

#### **A. Administrative Review:**

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

**1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM.** This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

**2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR.** This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is [edr@dhrm.virginia.gov](mailto:edr@dhrm.virginia.gov)).

#### **B. Final Hearing Decisions:**

A hearing officer's 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.

**C. Judicial Review of Final Hearing Decision:**

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/ Lorin A. Costanzo

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Lorin A. Costanzo, Hearing Officer

Copies e-mailed to: Grievant  
Agency Advocate