Issues: Group I Written Notice (disruptive behavior) and Retaliation (grievance activity participation); Hearing Date: 09/20/12; Decision Issued: 09/28/12; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 9876, 9923; 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: 9876, 9923

Hearing Date: September 20, 2012
Decision Issued: September 28, 2012

PROCEDURAL HISTORY

On April 14, 2012, Grievant was issued a Group I Written Notice of disciplinary action for an inappropriate verbal exchange with a coworker.

On April 30, 2012, Grievant timely filed a grievance to challenge the Agency's action. On June 13, 2012, Grievant filed another grievance alleging the Agency assigned her as a "floater". The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On August 30, 2012, the Office of Employment Dispute Resolution issued Ruling Number 2013-3422 consolidating the two grievances for a single hearing. On September 12, 2012, EDR assigned this appeal to the Hearing Officer. On September 20, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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 Department of Motor Vehicles employs Grievant as a Weigh Tech at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility had a refrigerator used by employees working at the Facility. Mr. B placed a jar of strawberry preserves in the refrigerator. Grievant placed a jar of strawberry preservers in the refrigerator. The two jars were similar in size and appearance. On April 4, 2012, Mr. B ate some scrambled eggs and toast with strawberry preserves during his break. After he finished eating, Mr. B stood in front of the sink. Grievant walked to the end of the sink, smiled, and said, "Did you just eat some of that jelly?" Mr. B said "yes, I did, why?" Grievant said, "Because, that's mine, and I just wanted to let you know that you're gonna get sick, because I put something in there, because I got tired of people eating my stuff in the refrigerator." Mr. B said, "Well, I'm sorry, but I didn't know that was your strawberry preserves, because I had some in there and so did [another employee]." Grievant then walked beside Mr. B, smiled, and repeated "Well I just want to let you know you're gonna get really sick, because I did put something in there." Grievant then laughed again. Mr. B said, "I guess that's supposed to be funny?" Grievant walked away from Mr. B while laughing all the way to the women's restroom.

Mr. B was angry regarding Grievant's statements to her and concern for his health. He reported the matter to the Supervisor. He asked to end his shift early and go home because he no longer felt like working. The Supervisor asked Mr. B to continue working. Shortly after learning of the incident, the Manager instructed the Supervisor to have items in the refrigerator removed and the refrigerator clean. Other employees became concerned about their safety.

Grievant requested to be transferred to another Facility. Because she was the junior employee at that facility, she was asked to work as a "floater."

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."

"[D]isruptive behavior" is a Group I offense.[2] On April 4, 2012, Grievant told Mr. B that she had put something in the strawberry preserves he had eaten in order to make him sick. Mr. B was fearful that Grievant may have poisoned him and jeopardized his health. He wanted to leave the Facility and go home. The Agency has presented sufficient evidence to show that Grievant's behavior was disruptive thereby justifying the issuance of a Group I Written Notice.[3]

Grievant argued that Mr. B's statements were untruthful. She argued that she told Mr. B that she had been sick in the prior weeks and had been eating from the jar from which he had just eaten. She argued that she was informing Mr. B that he would also get sick because he was eating from her jar of strawberry preserves.

Mr. B's testimony was credible. He wrote down Grievant's statements immediately after she made them. Grievant did not testify during the hearing. The Hearing Officer cannot assess the truthfulness of Grievant's arguments.

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 Employment Dispute

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

[2] See, Attachment A, DHRM Policy 1.60.

[3] The Agency reduced the disciplinary action to a Group I Written Notice for disruptive behavior rather than disciplining Grievant for workplace violence.

Resolution…."[4] 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.

Grievant contends the disciplinary action should be mitigated because the Agency inconsistently disciplined its employees. Grievant established that on April 7, 2012 another employee, Mr. E, walked into the Facility carrying doughnuts and asked several employees "Who wants poisoned doughnuts?" Mr. E intended his comments as a joke but several employees complained that his comments were not funny. The Agency counseled Mr. E not to repeat his behavior but did not give him a Group I Written Notice.

The Agency argued that it treated Mr. E differently from Grievant because Grievant's comments were directed to one employee rather than to a group of employees and because that one employee had already consumed the food Grievant claimed to have poisoned. The Agency's arguments are sufficient for the Hearing Officer to conclude that the Agency did not improperly single out Grievant for disciplinary action. It is reasonable to conclude that an employee who learned food may be poisoned after he had consumed the food would likely be more upset and angry than an employee who had not yet eaten possibly poisoned food. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[5] (2) suffered a materially adverse action[6]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory

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[4] Va. Code § 2.2-3005.

[5] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[6] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[7]

Grievant alleged that the Agency had reduced her position to that of a "floater" rather than one holding more significant duties. The evidence showed that Grievant had requested to be assigned to a different Facility and the Agency granted that request. Grievant was treated the same as other employees at that Facility. Other employees at that Facility worked as floaters on occasion.

Grievant alleged that the Supervisor was delaying issuing employee evaluations because of Grievant's pending grievance hearing. The evidence showed that the Supervisor had completed employee evaluations and had them signed by the Reviewer prior to the grievance hearing and that the Supervisor intended to meet with employees the week after the grievance hearing in order to present the evaluations. The Supervisor testified he would not be changing any evaluations based on employee testimony during the hearing. The Hearing Officer has no reason to believe that the Agency compromised the testimony of any employees or attempted to retaliate against them for participating in the grievance hearing.

The Agency did not retaliate against Grievant. Grievant has not established that the Agency acted contrary to any policy by having her work as a floater.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's request for relief is **denied**.

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

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

[7] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.

3. 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.[8]

[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

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