

Issue: Group III Written Notice with Termination (workplace harassment, abusive language, disruptive behavior); Hearing Date: 11/02/15; Decision Issued: 11/13/15; Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10694, 10695; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 11/27/15; EDR Ruling No. 2016-4279 issued 12/22/15; Outcome: AHO’s decision affirmed;** **Administrative Review: DHRM Ruling Request received 11/27/15; DHRM Ruling issued 01/08/16; Outcome: AHO’s decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10694 / 10695**

Hearing Date: November 2, 2015  
Decision Issued: November 13, 2015

#### **PROCEDURAL HISTORY**

On July 28, 2015, Grievant was issued a Group III Written Notice of disciplinary action for racial harassment.<sup>1</sup>

On July 27, 2015 and August 27, 2015, Grievant timely filed grievances to challenge the Agency's action. On September 14, 2015, the Office of Employment Dispute Resolution consolidated the two grievances. The matter proceeded to hearing. On September 28, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 2, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
Witnesses

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<sup>1</sup> Grievant argued that the written notice was not properly issued because the President did not authorize the discipline and/or the persons acting on behalf of the President did not have the authority to do so. The matter presented to the Hearing Officer is that of a Group III Written Notice with removal issued by the University. The evidence before the Hearing Officer showed that the University acted to remove Grievant based on a Group III Written Notice.

## **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?
5. Whether the Agency discriminated and/or retaliated against Grievant.

## **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:

Virginia State University employed Grievant as a Business Manager. She had been employed by the University for approximately 7 years. Except for the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the University. No evidence of prior active disciplinary action was introduced during the hearing.

The University planned to have a Homecoming event on October 25, 2014 to welcome its alumni and guests. Between 25,000 and 30,000 people were expected to attend the event. Grievant, Mr. R, Mr. H, and other staff participated in the event planning meetings. Mr. H served as the University's safety officer. He did not attend all of the planning meetings. During at least one of the planning meetings, Grievant stated to the group that although she would be working for the University on Friday October 24, 2014, on Saturday October 25, 2014, she would not be working for the University

but would attend the Homecoming in the capacity of a former University student. Mr. H did not attend that meeting or if he attended, he failed to hear Grievant's comments.

The event included having vendors provide food and merchandise to Homecoming visitors. Grievant was responsible for completing paperwork authorizing vendors to set up booths on a field designated for vendors. In the morning of October 25, 2014, problems arose with several vendors. Grievant received calls from University employees asking her to address those problems. Grievant briefly performed work duties to resolve the vendor concerns.

Shortly after 5:30 p.m., Grievant and her friends went to the vendor area to eat. Grievant approached the Vendor's booth and paid for her meal. She walked to the side and back of the booth and began speaking with an employee preparing her food. She waited for her food to be prepared. She was in an area where most customers would not stand.

Mr. H wanted to have vendors end the food service by approximately 6 p.m. He intended to go to each vendor and notify the vendor to begin shutting down food service by disconnecting "gas bottles" and to stop frying food. Mr. H observed Grievant behind the Vendor's booth. Mr. H wanted her to assist with notifying vendors to stop their operations. Mr. H believed Grievant was working in her capacity as a University employee.

Mr. H's style of communication was to be direct and sometimes authoritative. He often was responsible for instructing vendors to comply with safety regulations. Grievant perceived Mr. H as someone who poorly communicated with other people.

Mr. H approached Grievant and asked her to help "close vendors." Grievant said that that was Mr. R's job. Mr. H questioned how she could be in charge of an event yet not work the event. Mr. H said they should close the food vendors. Grievant said she was "not on the clock" and that Mr. H needed to learn how to talk to people. Grievant became loud and began cursing at Mr. H. Mr. H suspected Grievant may have used her position on the committee to obtain free food from the vendors. His assumption was based in part on Grievant standing behind the vendor's display instead of where food customers would normally wait for their food. Mr. H asked Grievant why she was using her position to get food from the vendors. Grievant was offended and angered by Mr. H's assertion. She said she had paid "out front and am picking up" in the back. Mr. H mentioned that Grievant was a State employee and could not accept anything for personal gain. Grievant continued to curse and asked Mr. H if he paid for his drink. Mr. H answered "yes" and said that he bought the drink from a vendor at the end of the row of vendors. During Grievant's conversation with Mr. H, Grievant said, "I don't like your white mother f—king ass." She also said, "You don't know who the f—k you [are] messing with." She also called Mr. H a "redneck." Mr. H perceived Grievant's comments as racial insults.

Mr. R was approximately 50 feet away when he heard Grievant's loud voice.<sup>2</sup> He turned and observed the confrontation. He walked to Grievant, put his arm around her and led her away from the area. His objective was to end the confrontation so as not to disrupt the event for the University's guests. Mr. H also walked in a different direction away from the area. Mr. R asked Grievant what was the problem. Grievant said she was "tired of his white ass." She told Mr. R she did not like Mr. H and that he did not know how to talk to people. Mr. R said that "two wrongs don't make a right." Grievant continued to refer to Mr. H as a "white ass" and "redneck mother f—ker." She also referred to Mr. H as a "cracker."

On October 28, 2014, Mr. H complained to his supervisor about Grievant's behavior. Mr. H's supervisor did not take any action regarding Mr. H's complaint. When Mr. H filed a second complaint several months later, the University investigated the matter.

The University provided Grievant with a laptop and a computer table for her use at work and when she was at home performing work duties. When the CIO met with Grievant to ask for Grievant's equipment, Grievant handed the CIO a laptop inside a bag. Grievant told the CIO she had the tablet at home and would have to go home to get the tablet. A day or two later, Grievant brought a case containing the tablet to the University and gave it to the CIO. The CIO did not inspect the laptop or the tablet at the time Grievant gave them to her. She gave the items to another employee. The other employee told the CIO that the items had been damaged. The laptop had a noticeable dent on the top. It appeared to result from an intentional blow to the laptop. The laptop was inoperable. The screen of the tablet was cracked. Because of the damage to the laptop and tablet, the University chose to deduct the depreciated value of the equipment from a check it sent Grievant to pay for her accumulated leave balances.

## **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."<sup>3</sup> 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."

DHRM Policy 2.30 governs Workplace Harassment. Section A(1) provides:

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<sup>2</sup> Several vendors, guests, and employees could hear and observe Grievant's outburst.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual's race ....

Workplace harassment is defined as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

On October 25, 2014, Grievant engaged in workplace harassment. She referred to Mr. H as a "white ass", "white mother f—ker", "redneck", and "cracker". She intended all of these statements to be insults based on Mr. H's race. She made verbal statements to Mr. H that served to denigrate, show hostility and aversion to Mr. H based on his race. The comments created an offensive work environment for Mr. H. He was offended by Grievant's comments. Grievant created a hostile work environment because Mr. H did not welcome her repeated racial insults. Mr. H complained to Agency supervisors about Grievant's offensive statements. Based on an objective standard, Grievant's behavior was workplace harassment.

DHRM Policy 1.60 (C)(1) provides:

Any employee who engages in conduct determined to be harassment or encourages such conduct by others shall be subject to corrective action, up to and **including termination**, under Policy 1.60, Standards of Conduct. (Emphasis added.)

The Chief of Staff testified that because of the University's history and mission, it has a zero tolerance for racial discrimination. Grievant's behavior was inconsistent with that mission and the Standards of Conduct. The University has presented sufficient evidence to support its decision to issue Grievant a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant denied using racially offensive statements towards Mr. H. The University, however, has presented sufficient evidence to support its burden of showing that Grievant used racially offensive language. Mr. H's testimony was credible. Mr. R's testimony was credible. Indeed, Mr. R testified that he had a good working relationship with Grievant. Mr. R would have no motive to lie about Grievant.

Grievant argued that Mr. H engaged in similar behavior but was not disciplined thereby showing that the University singled her out for disciplinary action.<sup>4</sup> The evidence showed that Mr. H challenged Grievant but he did not curse, he was not loud, he did not insult Grievant, and he did not use racially offensive language in his conversation. The University did not single out Grievant for disciplinary action. Mr. H's behavior did not rise to the level justifying the issuance of disciplinary action. Although Mr. H's poor communication skills and inappropriate suggestion that Grievant received free food may have offended Grievant, none of his behavior could have justified Grievant's racially offensive response.

Grievant argued that issuance of a Group III Written Notice should not be upheld because Grievant's actions occurred while she was not being compensated by the University. It is not necessary for an agency to show that an employee was being compensated at the time of the misbehavior in order to issue disciplinary action.<sup>5</sup> It is sufficient if the Agency can show that the misbehavior related to or affected the Agency. In this case, Grievant spoke to an employee with whom she had participated in planning meetings. She was attending the University's event for which she was partly responsible. The University has presented a sufficient connection between Grievant's behavior and the University's interests in order to support the issuance of disciplinary action.

Grievant argued that the disciplinary action was excessive. Although Grievant's behavior could have been corrected with lesser means than removal, the University has presented sufficient evidence to support its decision. The Hearing Officer cannot substitute his decision for that of the Agency simply because the Hearing Officer may disagree with that decision.

Grievant asserted that the University discriminated against her based on her race and that the University retaliated against her. No credible evidence was presented to support these assertions.

The University reduced its final payment to Grievant by the amount (\$644.43) of the damage to her laptop and tablet. Grievant argued that the University improperly reduced her payments for leave balances to account for the damaged laptop and tablet she returned. She asserted that the items were in good working condition when she returned them. The Hearing Officer was unable to determine that Grievant was untruthful in her assertion. The University failed to determine the condition of the equipment at the moment Grievant returned the items to the CIO. She failed to examine the equipment but rather had them examined by another employee who did not testify at the hearing. Based on the evidence presented, Grievant has met her

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<sup>4</sup> Grievant also presented evidence of other employees disciplined for using profanity. Those employees were not similarly situated with Grievant because their profanity did not contain racially offensive words.

<sup>5</sup> See, Virginia Department of Transportation v. Stevens, 53 Va. App. 654 (2009).

burden to show that the University failed to comply with policy. The University should return Grievant's \$644.43 without reducing payment from her leave balances.

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 ...."<sup>6</sup> 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 III Written Notice of disciplinary action with removal 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 14<sup>th</sup> St., 12<sup>th</sup> 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

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<sup>6</sup> Va. Code § 2.2-3005.



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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>7</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.