# DECISION OF HEARING OFFICER

**In the matter of**
**Case Number: 11422**
**Hearing Date: October 25, 2019**
**Decision Issued: November 12, 2019**

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## SUMMARY OF DECISION

The Agency had found Grievant violated the Standards of Conduct by using profanity in the work place and by disrupting the workplace and failing to follow instructions/policy. The Agency determined the violation(s) warranted a Group II Written Notice and issued such. This Notice was later reduced to a Group I Written Notice at the third step of the grievance proceedings. Grievant then challenged this modified discipline. The Hearing Officer found the Agency met its burden, the issuance of the Group I Notice was consistent with policy and law, and it was reasonable. Accordingly, the Hearing Officer upheld the Group I Written Notice.

## HISTORY

On July 10, 2019, the Agency issued Grievant a Group II Written Notice which the Agency reduced to a Group I Written Notice at the third step of the grievance procedure. Unsatisfied with this decision, on September 4, 2019, Grievant timely filed her grievance challenging the Agency's discipline, the Group I Written Notice. The Office of Employment and Dispute Resolution (EDR) assigned the undersigned as the hearing officer to this grievance on September 10, 2019.

The Hearing Officer held a telephonic prehearing conference (PHC) on September 17, 2019.[1] Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was October 25, 2019. Accordingly, by agreement of the parties, the hearing was set to commence at 10:00 a.m. on October 25, 2019. On September 17, 2019, the Hearing Officer issued a scheduling order noting the hearing schedule and addressing other pertinent matters discussed and ruled on during the PHC.

On the date of the hearing, the Hearing Officer arrived at approximately 9:30 a.m. By 10:00 a.m., the time the parties agreed that the hearing would start, both the Hearing Officer and the Agency's Advocate were present. However, the Grievant had not arrived. At 10:01 a.m. the Hearing Officer dialed Grievant's telephone number in an effort to determine if she planned to attend the hearing. Grievant had previously confirmed with the Hearing Officer that the telephone number dialed was that of Grievant. Multiple rings followed this dialing before the Hearing Officer received an automated message indicating that "no message could be left because the mail box was full." Then the Hearing Officer waited until 10:10 a.m. allowing for a grace period for the Grievant to arrive. Grievant had not appeared for the Hearing by 10:10 a.m. Accordingly, the Hearing Officer commenced the hearing.[2]

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[1] This was the first date available for the PHC.

[2] Moreover, the Agency's Advocate representative reported before the hearing started that Grievant had informed

Prior to taking any evidence, the Hearing Officer granted the Agency's Advocate an opportunity to present any matters of concern. There were none. The Hearing Officer then admitted the Agency's Exhibits 1 through 6, to include the contents in its binder. Although both parties were given an opportunity to submit exhibits in advance of the hearing pursuant to the Scheduling Order, Grievant declined to do so. The Hearing Officer also admitted her three exhibits for the administrative record: the initial letter to the parties, Scheduling Order, and Assignment letter with attachments from EDR. There were no objections to the admission of any of the exhibits.

At the hearing, the Agency's Advocate was given the opportunity to make opening and closing statements and to call witnesses. Cross examination did not take place because Grievant failed to appear for the hearing.

During the proceeding, the Agency was represented by its advocate.

## APPEARANCES

Advocate for Agency
Witnesses for the Agency (1witness)

## ISSUE

Was the written notice 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 disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). 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 all the evidence presented and observing the demeanor of any witness who testified in person during the hearing, the Hearing Officer makes the following findings of fact:

1. The agency has employed Grievant as a transportation operator II. (A Exh. 3, p. 4). Grievant has worked for the Agency for at least 14 years. (A Exh. 1, p. 10).

2. On or about March 11, 2019, Co-worker 1 filed a written complaint asserting that Grievant cursed and used obscene language on the job toward him and another co-worker on or about March 8 and 11, 2019. An example in the complaint of the profanity alleged to have been used by Grievant was "[Co-worker 1], you can go on and tell them whatever the f**k you want to, you ain't nothing but a goddamn warden out here." In addition, Co-worker 1 stated in his

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Agency staff the day before the hearing that she may not attend the Hearing.

complaint that he could hear Grievant speaking about him to other workers and referring to Co-worker 1 as "fat mother**ker, white mother**ker & lazy b**ch." (A Exh. 5, pp. 1-2).

3. Once management received the complaint, an investigation followed. The investigation could not substantiate that Grievant directed profanity toward Co-worker 1 while speaking to him or while speaking to others in the work place about Co-worker 1. However, as a result of the investigation, the Agency determined that Grievant used profanity in the workplace. This is the case, because Grievant admitted that she was cursing to herself on the job because she was upset with what she perceived as her performing her assignment while at least one co-worker was not performing tasks assigned to him. (A Exh. 1, p. 9; A Exh. 2, p. 1; Testimony of Superintendent).

4. The Standards of Conduct, Policy 1.60 (Policy 1.60) precludes use of obscene language, disruptive behavior, and failure to follow instructions or policy. (A Exh. 6; Policy 1.60, p. 22).

5. "Obscene" is defined as "objectionable or offensive to accepted standards of decency." *Blacks Law Dictionary*, 5th Ed. 1979, p. 971.

6. Use of profanity in the Agency's work place is considered offensive and not acceptable and therefore constitutes obscene language. (Policy 1.60; Testimony of Superintendent).

7. Upon the Agency receiving a complaint that an employee has used obscene language or cursed in the work place, the matter is investigated. If the investigation substantiates the usage occurred, appropriate disciplinary action follows. (Testimony of Superintendent).

8. Agency management issued Grievant a Group II Written Notice for her use of profanity in the work place. Grievant grieved the discipline and at the third step of the process, management reduced the discipline to a Group I Written Notice. (A Exh. 1, p. 2; A Exh. 2, p. 1).

9. Grievant's conduct for which she received the group notice was similar in nature to previous misbehavior by Grievant. Specifically, on October 26, 2018, Agency management issued Grievant a written counseling memorandum for using inappropriate language in the workplace. The offense occurred in July 2018. Particularly, the language spoken by Grievant that constituted the July 2018 offense was "they run this place like a slave camp." Grievant was counseled that the language was disruptive, harmful, and divisive to the work place. Also, in the October 26, 2018 counseling memorandum that followed the incident, the Agency reminded Grievant that employees of the agency were expected to:

- Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties;

- Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers;

- Support efforts that ensure a safe and healthy work environment; and

- Resolve work-related issues and disputes in a professional manner and through established business processes.

Further, in the counseling memorandum, Grievant was also advised on appropriate measures to take to handle or resolve work related issues. Specifically, Grievant was instructed to use appropriate methods to address concerns such as reporting issues to her supervisor. The purpose of the October 26, 2018 memorandum was to counsel Grievant about her use of inappropriate language in the workplace so that she could change her behavior. (A Exh. 2 pp. 7-8; Testimony of Superintendent).

## DETERMINATIONS 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. 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/her 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

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 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards 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.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline. Repeated Acts of an offense are deemed appropriate for a Group I Written Notice. Group II offenses are more than minor in nature or

repeat offenses. Also, generally, the misbehaviors significantly impact agency operations. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. A subsequent group notice during the active life of a Group III Written Notice may result in discharge. *See* Standards of Conduct Policy 1.60.

On July 10, 2019, management issued Grievant a Group II Written Notice, reduced to a Group I Written Notice as previously mentioned. Grievant has challenged the issuance of the Group I Written Notice. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

## I. Analysis of Issue(s) before the Hearing Officer

**Issue: Whether the discipline was warranted and appropriate under the circumstances?**

### A. Did the employee engage in the alleged conduct? Further, if so did that behavior constitute misconduct?

The Agency contends that on or about March 20, 2019, Grievant failed to follow instructions/policy, disrupted the work place, and/or used obscene language in the workplace.

The undisputed evidence demonstrates that Grievant used obscene language or profanity in the workplace. A contract worker on the job was offended and complained to management. Although Grievant denies cursing at any employee on the job, she admitted using profanity in the workplace. However, she contends that she was talking and cursing to herself. She asserts, therefore her conduct does not warrant discipline.

A review of the applicable Standards of Conduct, Policy 1.60, broadly prohibits the use of obscene language. Nowhere in the policy does it endorse an employee cursing to herself if she is upset with any condition on the job. Clearly, the facts here establish that Grievant used profanity on the job. The usage was offensive to others as demonstrated by an employee lodging a complaint with management because of the cursing. In addition to the behavior being offensive, it was contrary to the agency's expectations and instructions previously provided regarding how an employee should handle resolving work-related concerns. Grievant was aware of the agency's policy and expectations in this regards. Professionalism was expected. Moreover, she had been advised in the recent past to address such concerns with her supervisor. Yet, Grievant elected to air her concerns about a co-worker's job performance or lack thereof by cursing on the job in the hearing of others.

Without a doubt, Grievant's use of profanity on the job was misconduct.

### B. Was the discipline consistent with policy and law?

As indicated previously, the evidence shows that the Agency has met its burden and shown that Grievant used obscene language in the workplace.

Further, the evidence illustrates that Standards of Conduct, Policy 1.60 identifies use of obscene language as a group offense. For a first occurrence, the behavior is deemed a Group I offense. However, Policy 1.60 notes that for repeated violations of the same offense, a Group II notice may be issued. In the case before this Hearing Officer, the evidence shows that Grievant committed the same/similar offense only eight months before the March 2019 incident. Accordingly, the Agency did have authority to issue Grievant the Group II Written Notice for the repeated offense. It did so, but during the grievance process, the agency elected to mitigate the discipline to a Group I. Hence, Grievant's discipline – the issuance of a Group II/Group I Notice - is consistent with policy and law.

The testimony of Superintendent, who the Hearing Officer found credible, also shows that the discipline was consistent with policy. He testified that upon management receiving a complaint that an employee has used obscene language in the work place, the matter is investigated. If the investigation substantiates the usage occurred, appropriate disciplinary action follows. The Hearing Officer finds the Agency followed the procedures outlined by Superintendent in this case.

The Hearing Officer finds the Agency's discipline is consistent with policy and law.

## II. Mitigation.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."[3] EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[4] More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice.
>
> (ii) the behavior constituted misconduct, and
>
> (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds discipline if it is within the limits of reasonableness.

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

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[3] Va. Code § 2.2-3005 and (c )(6)

[4] *Rules for Conducting Grievance Hearings* VI(A)

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice and that the behavior was misconduct. And further, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable.

In her plea for reversal of the discipline, Grievant claims on her Grievance Form A that she is being retaliated against "because we all cuss." Grievant failed to appear for the grievance hearing. She submitted no documents or witness testimony on her behalf. Other than her assertion, Grievant has failed to meet her burden and make a *prima facie* case showing of retaliation. *See* Ziskie v. *Mineta*, *547 F.3d 220, 229 (4th Cir. 2008)* (citing *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 218 (4th Cir. 2007)). Moreover, Grievant has failed to substantiate any claim of the Agency treating or disciplining her more harshly than any other employee who is similarly situated.

Grievant has also contended in her grievance filing that her cursing on the job is protected speech. As previously discussed, Grievant's language was obscene in the work community. Accordingly, her language lacked first amendment protections. *See Miller v. California* 413 U.S. 15 (1973).

Of note also, the Agency had issued Grievant a Group II written Notice for her repeated offense. It then elected to mitigate the discipline due to her long work history with the Agency. Under the facts, the Agency had no obligation to do so. Accordingly, after careful consideration of all the evidence whether specifically mentioned or not, the Hearing Officer finds the Agency's discipline is reasonable.

## DECISION

Hence, for the reasons stated here, the Hearing Officer upholds the Agency's issuance of the Group I Written Notice.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.[1]

[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].

Entered this 12th day of November, 2019.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate/Agency Representative
Grievant/Grievant's Advocate
EDR's Director of Hearings

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