

Issue: Group III Written Notice (workplace violence); Hearing Date: 05/29/18;
Decision Issued: 06/05/18; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11194; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11194

Hearing Date: May 29, 2018

Decision Issued: June 4, 2018

PROCEDURAL HISTORY

On December 20, 2017, Grievant was issued a Group III Written Notice of disciplinary action for workplace violence.

On January 19, 2018, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 16, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 29, 2018, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its locations. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked as one of several crew members reporting to the Supervisor. Grievant was one of a few crew members with specialized skills enabling him to operate specialized equipment such as road stripping equipment and road milling equipment. The least desirable task for a crew member was working as a flagger.

The Supervisor sometimes scheduled Grievant to work as a flagger and assigned a less experienced crew member to work the specialized equipment. This angered Grievant. Grievant believed the Supervisor was assigning him to work as a flagger as a form of retaliation.

On September 21, 2017, Mr. D was working in the Shop when Grievant entered the room. Mr. D asked Grievant how he was doing. Grievant said, "Not worth a damn, I would just as soon kill myself rather than come into this place!" Mr. D said that things are not that bad. Grievant said, "I am about to snap! I am ready to go in there and beat that little mother f—ker's brains out! Then I would kill myself because I am not going to jail." Grievant was angry, emotional, and teary eyed when he made these statements. Grievant was referring to beating the brains out of the Supervisor.

Mr. D notified the Supervisor that Mr. D was concerned about Grievant and that Grievant was really mad and someone needed to talk to Grievant. Mr. D did not initially tell the Supervisor that Grievant had made comments about the Supervisor. The Supervisor notified the Manager. When the Supervisor later found out that Grievant was referring to the Supervisor, the Supervisor became concerned.

The Manager met with Grievant. Grievant was upset and said he “couldn’t take this sh-t anymore.” Grievant said, “I’m going to get rid of those two and I’m going home to blow myself up since I’m not going to jail anymore.” Grievant said he did not know how much more of this he could take. Grievant told the Manager he was upset because the Supervisor was making him work as a flagger instead of operating specialized equipment. The Manager referred Grievant to the Employee Assistance Program.

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.”

DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;

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

- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

On September 21, 2017, Grievant threatened to cause physical injury to the Supervisor and to commit suicide. He was angry and emotional when he made these statements. His statements were workplace violence. Workplace violence may be a Group III offense depending on the circumstances. Under the circumstances of this case, Grievant's behavior rose to the level of a Group III offense. Threatening to harm another employee justifies an agency's decision to issue an employee a Group III Written Notice. Accordingly, the Agency's issuance to Grievant of a Group III Written Notice must be upheld.

Grievant argued that the disciplinary action should be reduced because he has been bullied by the Supervisor. Although there appears to be some merit to Grievant's defense that the Supervisor treated him differently to punish Grievant, the Supervisor's actions merely explain Grievant's behavior, they do not excuse Grievant's behavior. An agency is not obligated to tolerate one employee threatening to injure another employee. There is no basis to reduce the disciplinary action in this case regardless of how frustrated Grievant was with the Supervisor's actions.

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"² 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

² *Va. Code § 2.2-3005.*

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 is **upheld**.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal 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]

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

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer