



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11598

Hearing Date: December 7, 2020

Decision Issued: December 8, 2020

PROCEDURAL HISTORY

On July 29, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.¹

On August 19, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 14, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 2020, a hearing was held by remote conference.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

¹ The Written Notice incorrectly refers to DHRM Policy 1.80. That policy was replaced with DHRM Policy 2.35, Civility in the Workplace.

2. Whether the behavior constituted misconduct?
3. Whether the University'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 University 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:

Norfolk State University employed Grievant as an Apparel Worker I / Housekeeper. No evidence of prior active disciplinary action was introduced during the hearing.

Ms. J was a supervisor for the University in Grievant's unit.

On June 3, 2020 at approximately 10 a.m., Ms. J and Ms. C approached Grievant while he was working in the Building. Ms. J wanted to talk with Grievant about the quality of his prior work and the work Grievant was to complete that day. They found Grievant working on the third floor. Ms. J approached Grievant and asked him to meet them on the second floor. Grievant replied that he "was not going to do anything." Grievant said this as the group was walking towards the janitorial closet. Grievant entered the closet and the door closed behind him. Ms. J used her badge to open the closet door to continue speaking with Grievant. She held the door open with her left hand. Ms. J told Grievant, "[Ms. C] would like for me to show you what needs to be completed today." Grievant wanted the door to the closet closed and he started to pull the door shut as Ms. J was speaking. Ms. J said, "I will shut the door, go ahead. I don't want the door to slam shut." Grievant used his right hand to grab Ms. J's left wrist and then pulled her wrist away from the door. Grievant said, "Let my door go!" Ms. J asked,

“Why did you just grab me?” Grievant replied, “I did not mean to grab you.” Ms. J was upset and “shaken” by Grievant’s behavior. She immediately left the Building. She went to the Campus Police Department and made a written complaint. Ms. J indicated she did not wish to pursue criminal charges against Grievant.

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.”² 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 2.35 provides:

The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace. ***

Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Workplace violence is defined as:

Any physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress.

On June 3, 2020, Grievant was attempting to exit the janitor’s closet and wanted the door closed. Ms. J was holding the door open. Grievant grabbed Ms. J’s wrist and pulled her hand away from the door. His action was a “physical assault” within the meaning of the policy. His action created a reasonable fear of injury to Ms. J. She was fearful regarding what else Grievant might do to her. The University has presented sufficient evidence to support the issuance of a Group III Written Notice for violation of DHRM Policy 2.35. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the University’s decision to remove Grievant must be upheld.

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant argued that he was trying to leave the janitor's closet but Ms. J was blocking him. He asked Ms. J to move to the side but she did not move while continuing to hold the door open. Grievant asserted that when he went to grab the door to shut it, his hand brushed Ms. J's hand. Grievant's assertions are not persuasive. Ms. J testified that Grievant grabbed her wrist and not that he merely brushed against her. Ms. J's testimony was credible. Her reaction to Grievant's behavior was consistent with someone who believed she had been grabbed inappropriately. Grievant has not presented any reason for Ms. J to lie. The University has presented sufficient evidence to show that Grievant intentionally grabbed Ms. J's wrist in order to close the door.

Grievant argued the level of disciplinary action was excessive. Although the University could have issued Grievant lesser disciplinary action, violation of DHRM Policy 2.35 can be a Group III offense. The University presented sufficient evidence to support its conclusion that Grievant engaged in a Group III offense.

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"³ 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 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:

³ Va. Code § 2.2-3005.

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.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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