

Issue: Group III Written Notice (physical violence); Hearing Date: December 10, 2001; Decision Date: December 11, 2001; Agency: Department of Correctional Education; AHO: David J. Latham, Esquire; Case Number: 5328



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5328

Hearing Date: December 10, 2001
Decision Issued: December 11, 2001

PROCEDURAL ISSUES

The Written Notice introduced into evidence was issued on June 22, 2001 as a Group III Written Notice, but language in the Written Notice states that the agency decided to reduce the level of discipline to a Group II Written Notice.¹ However, a revised Written Notice was never issued. Both parties stipulated the intent was to rescind the Group III Notice and issue a Group II Notice in its stead. The parties also stipulated that a suspension was not imposed in conjunction with the Group II Notice.

APPEARANCES

Grievant
Three witnesses for Grievant
Human Resource Generalist
Attorney for Agency
One witness for Agency

¹ Exhibit 2. Written Notice issued to grievant, June 22, 2001.

ISSUES

Did the grievant's actions on April 18, 2001 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on June 22, 2001 because he and another teacher engaged in a fight on school property. Following a denial of relief at each resolution step, the agency head qualified the grievance for a hearing.

The Department of Correctional Education (DCE) (hereinafter referred to as agency) has employed the grievant as a teacher for two years. Grievant did not have any prior disciplinary action. His supervisor (the principal) considers grievant to be a generally reserved and restrained individual.

Grievant had worked at a college eight years ago; one of his students eventually became a teacher for DCE. That teacher was already working at the DCE facility when grievant was hired two years ago. Grievant had not had any difficulty with the other teacher prior to this incident. Grievant was aware that the other teacher suffers from a condition that causes his bones to be very brittle and easily broken.

On April 18, 2001, the other teacher had just returned to work after being absent for about nine months on long-term disability due to recuperation from a broken right arm that he hit against a desk. During the lunch period, grievant greeted the other teacher, who responded in a gruff, unpleasant manner. When grievant was signing out at the end of the day, the other teacher brushed by him but did not apologize. Grievant went to his vehicle in the parking lot and slowly began to back out of his parking place. The other teacher approached grievant on the driver's side, leaned in his window and asked whether grievant had made an uncomplimentary remark about a female employee; grievant denied doing so. The other teacher said, "If I'm not speaking to you, don't talk to me. I'll put you under; I'll kill you." He then said, "You bitch," to grievant. Grievant responded, "Your momma."

The other teacher then swung his left hand, hit grievant in the chin,³ and stepped back away from grievant's vehicle. Grievant stopped his vehicle,

² § IV.A of the *Rules for Conducting Grievance Hearings* (effective July 1, 2001) provides that the EDR Director or his designee may observe any hearing.

opened the door, exited and grabbed the other teacher in a modified bear hug. Grievant's car door did not strike the other teacher when grievant opened it. Grievant tightly clasped his hands around the other teacher's right upper arm and felt the other teacher's arm break. Grievant then wrestled the other teacher to the ground by tripping him. As the two went to the ground, the other teacher's leg broke. Two employees who had been standing in the parking lot came over and separated the two. Realizing that the other teacher was injured, they assisted him and told grievant to leave the area. Grievant returned to his vehicle and drove off state property.

The other teacher was discharged from employment for initiating the physical altercation, because he had a history of initiating verbal disputes with other employees, and because he had a prior Group II Written Notice for threatening another teacher.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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 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).

Code § 2.1-116.05(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 the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

³ The other teacher was holding a coffee mug and an award certificate in his right hand when he hit grievant.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁴

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training⁵ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Among the examples of Group III offenses is fighting and/or other acts of physical violence.⁶

It is clear from the evidence that the other teacher was the aggressor and instigator of the physical altercation. He was verbally and physically confrontational even before the end of the workday. He approached grievant in the parking lot, despite a warning from his girlfriend not to do so.⁷ He then initiated another verbal confrontation, insulted grievant and hit him in the face for no apparent reason. He was subsequently discharged from employment, and based on the evidence adduced in this hearing, such discipline was warranted. However, the issue herein is whether the grievant engaged in a fight or an act of physical violence.

By the grievant's own admission, as well as the agency's evidence, it is clear that grievant did engage in an act of physical violence when he exited from his truck, grabbed the other teacher hard enough to break his arm, tripped him and took him to the ground in such a way as to break his leg. Therefore, the agency has shown, by a preponderance of the evidence that grievant did commit a Group III offense.

Grievant argues that he was not fighting with the other teacher but merely attempting to restrain him from taking further offensive action against grievant or his vehicle. He contends that he could not simply leave after being hit because the other teacher was holding a coffee mug and a framed certificate, both of which could potentially have been used as weapons to strike grievant or his

⁴ § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

⁵ Now known as the Department of Human Resource Management (DHRM).

⁶ Exhibit 1. Section V.B.3.f, *DHRM Standards of Conduct*, effective September 16, 1993.

⁷ Exhibit 13. Statement of other teacher's girlfriend, April 26, 2001.

vehicle. This argument is speculative on grievant's part and is not supported by any probative evidence. While the other teacher could have used his coffee mug as a weapon, he did not attempt to do so. Neither grievant nor any witness said that the other teacher did anything other than back away from grievant's vehicle after striking grievant. Grievant's argument, therefore, is that he made a preemptive move against the other teacher to prevent something that may or may not have occurred. If the other teacher had, for example, raised his right arm as if to throw the mug at grievant, then grievant's preemptive move might have been justified.

However, in the absence of such an imminent threat, grievant's actions were neither self-defense nor even preemptive defense. Rather, it appears that grievant was stung by being hit and decided to go on the offense. Viewing the evidence in the light most favorable to grievant, he did not attempt to strike the other teacher but merely made an attempt to restrain him by putting him in a bear hug and taking him to the ground. Grievant's actions would have been justifiable if the other teacher had continued his physical attack or if he was threatening to continue the attack. However, once the other teacher had ceased his attack and backed away from the truck, his offense ceased. At that point grievant became the offender by exiting his vehicle and going after the other teacher. Thus, grievant went from being an innocent victim to becoming an active participant in the physical violence.

There is no evidence that grievant intended to break the arm and leg of the other teacher. However, grievant was well aware of the other teacher's propensity to easily sustain broken bones. He therefore knew that the other teacher might be injured even from actions intended only to restrain him. Moreover, grievant admitted that he felt the other teacher's arm break when he first grabbed him in a bear hug. However, rather than immediately releasing him, grievant then took him to the ground in such a way as to cause a broken leg. Had grievant released the other teacher immediately, rather than continuing to manhandle him, his argument of mere restraint would be given more weight. However, it must be concluded that grievant went further than was necessary solely to defend himself or prevent further injury to himself.

More significantly, since the other teacher had backed away from grievant's vehicle and was not making any further offensive moves, grievant could have remained in his vehicle, continued backing out of the parking place and gone on his way. His decision to shut off his vehicle, exit the vehicle and go after the other teacher was probably the result of a momentary adrenaline and testosterone rush that temporarily overwhelmed his better judgement. In any case, grievant did become the aggressor when the facts demonstrate that he had the ability to avoid any further physical involvement. Therefore, grievant has not shown sufficient mitigation to overcome his active role in this altercation.

The agency has reduced the level of discipline to a Group II Written Notice without suspension, even though this is clearly a Group III offense. The agency felt that grievant's prior good record, and the fact that he did not initiate the altercation, were factors that justify a reduction in discipline. The Hearing Officer has no authority to increase the level of discipline and in this case, does not disagree with the agency's rationale.

As indicated at the beginning of this decision, both parties agree that it was the agency's intent to issue a Group II Written Notice. Since that has not been done, the agency should issue a Group II Written Notice to replace the defective Notice in the record. The active period for a Group II Written Notice is three years.⁸ The new Written Notice should reflect the correct active period.

DECISION

The disciplinary action of the agency is affirmed.

The agency shall issue a Group II Written Notice to replace the defective Written Notice now in the record. The Group II Written Notice for an act of physical violence is AFFIRMED. This Written Notice shall be retained in the grievant's personnel file for the period specified in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

⁸ Exhibit 1. Section VII.B.2.b, *Ibid*.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer