Issue: Group III Written Notice with termination (fighting in the workplace); Hearing Date: 04/07/04; Decision Issued: 04/08/04; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 647

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 647**

Hearing Date: April 7, 2004
Decision Issued: April 8, 2004

## PROCEDURAL HISTORY

On January 21, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for "the fighting in the workplace." On the February 2, 2004, 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 she requested a hearing. On March 16, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 7, 2004, a hearing was held at the Agency's regional office.

## APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Witnesses

## ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for fighting in the workplace.

## 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:

The Department of Mental Health Mental Retardation and Substance Abuse Services employed Grievant as an MR Specialist I at one of its facilities for approximately 18 years until her removal on January 21, 2004. No evidence of prior disciplinary action was introduced at the hearing.

At approximately 6:50 a.m., on January 17, 2004, Grievant was in a housing unit dressing a client when Ms. SD came into the room and said she wished to speak with Grievant. Grievant and Ms. SD had an ongoing heated and emotion-filled dispute of a personal nature. Grievant told Ms. SD to come into the room, close the door, and turn down the radio. Grievant and Ms. SD began arguing, with each person becoming angry. Ms. SD slapped Grievant in the face. Grievant repositioned the Client on his side and then raised the rails on his bed. A fight ensued. Ms. SD broke a necklace Grievant wore around her neck. Grievant grabbed Ms. SD's hair and pulled her hair while punching her. Grievant pulled Ms. SD's hair so hard that she removed some hair leaving a bald spot with a diameter of approximately five inches.[1] Grievant then ran to the door and called for help.

Grievant and Ms. SD wrote incident reports where each one claimed the other one started the fight. Ms. SD was able to return to work following the fight, but was unable to work from January 18, 2004 to January 26, 2004 because of the injury she suffered.[2] She had to take Percocet to relieve pain resulting from the injury.

[1] Grievant argues that Ms. SD was wearing a hairpiece and the injury to her may not have been as severe as it otherwise may have appeared. No evidence was presented establishing that Ms. SD wore a hairpiece. The appearance of the injury Ms. SD suffered suggests she did not wear a hairpiece.

[2] Agency Exhibit 9.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[3] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

Neither Grievant nor Ms. SD testified at the hearing. The Hearing Officer must rely upon the written statements of witnesses and on the hearsay testimony of those who testified at the hearing.

"Fighting and/or other acts of physical violence" is a Group III offense.[4] Grievant engaged in a fight with Ms. SD in the workplace. Her behavior rises to the level of a Group III offense.

Grievant contends that she should not be disciplined because she engaged in self-defense after Ms. SD approached Grievant with the intent to engage in a confrontation. An employee is entitled to defend him or herself when attacked by a coworker. That employee, however, may use only the force necessary for self-defense. Based on the injuries suffered by Ms. SD, it is clear the Grievant's use of force exceeded the force necessary for self-defense -- Grievant went on the attack. This conclusion is especially true in light of the fact that Grievant regularly receives training in how to avert physical attacks.

Grieving contends that she should not be removed because the Agency did not terminate employees in two of six other incidences of fighting.[5] The details of those fights were not presented at the hearing. An Agency witness testified that employees were not terminated on two occasions because of mitigating factors relating to those specific cases. Since the facts surrounding those two cases were not presented at the hearing, the Hearing Officer cannot conclude that the Agency has inconsistently disciplined its employees involved in fighting.

Grievant contends the disciplinary action against her should be mitigated because of her long tenure with the Agency and because she is a valuable employee. *Va. Code § 2.2-1001* requires the EDR Director to "[a]dopt rules … for grievance hearings." The *Rules for Conducting Grievance Hearings* set forth the Hearing Officer's

[3] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

[4] DHRM § 1.60(V)(3)(f).

[5] The Agency removed Ms. SD.

authority to mitigate disciplinary action. The Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argues that prior to issuing a Written Notice, Agency managers only told her the Agency would issue a Group III but did not mention Grievant would receive a Group III with removal. The Agency contends it informed Grievant she may receive a Group III Written Notice with removal. Even if the Hearing Officer assumes for the sake of argument that the Agency failed to mention removal, the Agency's actions would not have been contrary to policy. Grievant could present whatever response she wished during the grievance step process.

## 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 **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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 14th St., 12th Floor
   Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

    Director
    Department of Employment Dispute Resolution
    830 East Main St. STE 400
    Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.[6]

[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].

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

[6] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.