

Issue: Group II Written Notice with 5-day suspension (violation of workplace violence policy); Hearing Date: 09/24/03; Decision Issued: 10/02/03; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 5808



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5808

Hearing Date: September 24, 2003
Decision Issued: October 2, 2003

PROCEDURAL HISTORY

On June 26, 2003, Grievant was issued a Group II Written Notice of disciplinary action with five work day suspension for:

Violation of the Violence in the Workplace Policy (1.80)¹ by inappropriately displaying a pocketknife and failure to disclose the complete details of the violation in the workplace incident. I have attached a copy of your email account of the incident. This account omitted in the fact that you displayed a knife also during the time this incident occurred.

On July 2, 2003, 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 September 4, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2003, a hearing was held at the Agency's regional office.

¹ The Written Notice cites DHRM Policy 1.80 but the Agency chose to rely on its own policy. The outcome of this case would not have changed, had the Agency relied on DHRM Policy 1.80.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Nine witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for engaging in workplace violence.

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 Virginia Department of the Transportation employs Grievant in its Information Technology Division. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

On June 10, 2003 at approximately 1:25 p.m., Grievant, Mr. AP, Mr. NA, and the Development Supervisor were sitting or standing in a semi-circle inside an office cube discussing a software database issue. Mr. AP and Mr. NA were consultants employed by a contractor providing services to the Agency. Mr. AP and Mr. NA reported to the Development Supervisor. Grievant reported to another Agency manager within the Agency's information systems division.

Mr. DR approached the group² and positioned himself within the semi-circle so that he had an employee located near his right shoulder and another employee near his left shoulder. Mr. DR informed the group that he believed he had been falsely accused of conducting a practical joke on another employee and he was not going to accept

² Mr. DR and the four men in the group knew each other and had varying levels of interaction for several years.

blame for that joke. He became “progressively more agitated and at some point pulled a pocketknife out and opened it.”³ Mr. DR was holding a small pocketknife, approximately 1.5 inches long when folded. He held both of his arms at chest level and was gesturing while he spoke. At first, Grievant thought Mr. DR was joking. Grievant pulled a small pocket knife from his pocket and opened it. He then said words to the effect of “I also have a knife if anyone wants to protect themselves.” Grievant was laughing as he made this statement and Mr. AP, Mr. NA, and the Development Supervisor also laughed. Grievant soon realized that Mr. DR was not joking.⁴ Grievant quickly closed his pocketknife and put it away. Mr. DR threatened to do bodily harm to whoever falsely accused him of responsibility for the practical joke. The Development Supervisor tried to “diffuse the situation” by asking Mr. DR to calm down. The Development Supervisor told Mr. DR that the Development Supervisor was less concerned about the practical joke and more concerned that Mr. DR was waving a knife around. Mr. DR had a history of being hot tempered. On several occasions he had become angry and made comments for which he later felt obligated to apologize. Only the Development Supervisor and Mr. AP knew of Mr. DR’s quick temper.⁵

Grievant had another meeting to attend so he stood up and left the group. The conversation continued for approximately five minutes after Grievant left.

Immediately following the conversation, the Development Supervisor sent Grievant an email asking for a brief synopsis of what he had heard while sitting in the work cube. On the following morning, Grievant sent the Development Supervisor an email describing what had happened except that Grievant failed to mention that he also displayed a small pocketknife. The Development Supervisor sent a similar email to Mr. AP and Mr. NA. Mr. AP and Mr. NA did not reference Grievant’s display of a pocketknife in their emails to the Development Supervisor because they believed Grievant had displayed the pocketknife in a joking manner and it did not occur to them that Grievant’s behavior was important or material to the incident with Mr. DR.

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).⁶ Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally

³ Grievant’s June 11, 2003 email.

⁴ Mr. AP believed that Mr. DR had pulled out the knife as a joke but then became angry as he talked.

⁵ Mr. AP, Mr. NA, and Grievant did not feel threatened by Mr. DR’s actions.

⁶ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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).

“VDOT has a standard of zero tolerance for all acts or threats of violence against its employees while they are engaged in performing work responsibilities.” VDOT adopted a Preventing Violence In The Workplace Policy to prevent instances of violence from occurring. This policy defines workplace violence as "any act of violence, harassment, intimidation, or other threatening behavior that occurs in the workplace." Threatening behavior is further defined to include:

1. Verbal -- verbal threats of violence towards persons or property; the use of vulgar or profane language towards others; derogatory comments or slurs; verbal intimidation, exaggerated criticism or name calling.
2. Physical -- any physical assault such as hitting, pushing, spitting, kicking, holding, impeding, or blocking the movement of another person.
3. Visual -- threatening or intimidating writings, electronic mail, posters, cartoons, publications, drawings, or gestures.

VDOT’s policy also addresses weapons and states:

Unauthorized possession or use of firearms, or other dangerous weapons is prohibited. Dangerous weapons are any item/s used or that could be used with the intent to cause harm, threaten, or intimidate.

The Agency’s policy reveals a distinction between evidence of actual events and of possible events. When defining workplace violence, the Agency does not describe violence as possible consequences. “Threatening behavior” requires evidence of behavior that is intended to threaten or actually threatens another person. In contrast, the policy defines dangerous weapon to include an item that could be used to harm, threaten, or intimidate.

Grievant’s behavior does not meet the definition of workplace violence, because Grievant did not intend to intimidate anyone. In addition, everyone believed Grievant was joking.⁷ No one took Grievant’s offer seriously. None of the other employees observing Grievant’s behavior were actually threatened or intimidated by Grievant’s behavior. Grievant did not thrust or make any aggressive gestures with the knife.

Grievant did not possess a dangerous weapon when he carried and opened the pocketknife. The evidence showed that several employees, including managers, carried pocketknives. When Grievant’s pocketknife was open, its length only slightly exceeded

⁷ Initially, the group also believed that Mr. DR was joking.

the width of his hand. A small pocketknife is most likely to serve as a tool rather than as a weapon.⁸

Grievant did not violate the Agency's policy prohibiting workplace violence. Although Grievant's behavior was not contrary to the Agency's workplace violence policy, his actions justify disciplinary action.

It is inappropriate behavior for an employee to remove a pocketknife, open the pocketknife, and offer it "for protection" to other employees, even in a joking manner. Grievant's display of a pocketknife was unnecessary to perform his job, could⁹ have been misinterpreted by other employees, and may have increased the risk that Mr. DR would act violently. "Inadequate or unsatisfactory work performance" is a Group I offense. Grievant's behavior rises to the level of a Group I offense.

The Agency contends Grievant failed to properly report an act of violence in the workplace. Grievant properly reported the actions of Mr. DR in a timely manner. The Agency contends Grievant failed to properly report his workplace violence because he failed to include in his email account of the events that he also displayed a knife. This argument is untenable because Grievant cannot be deemed to have failed to report workplace violence that did not occur. Grievant's display of a pocketknife under the facts of this case was not workplace violence and, thus, he had no obligation to report it. Although the Grievant did not send his email to his immediate supervisor, he sent an email to the Development Supervisor. Grievant's failure to send an email to his immediate supervisor was harmless error.

Grievant contends the Agency owes him an apology for taking disciplinary action against him. The Hearing Officer lacks the authority to order an agency or employee to apologize. Even in those circumstances where the Hearing Officer may believe that an apology is appropriate by an agency or employee, the Hearing Officer could not order such relief.

⁸ The Agency's policy defines dangerous weapons as any item that could be used with the intent to cause harm, threaten, or intimidate. Since Grievant could have used in the pocketknife to threaten, one could argue that Grievant possessed a dangerous weapon. The problem with this argument is that almost any item could be used to threaten another person. For example, an employee could use a pen to threaten another employee. If a literal reading of the policy is adopted, then any employee carrying a pen would be possessing a dangerous weapon in violation of the workplace violence policy. The Hearing Officer will not construe the Agency's policy in such an extreme manner.

⁹ Consideration of what could have happened is appropriate when determining whether an employee's behavior was unsatisfactory job performance. Employees are expected to take into consideration possible consequences of decisions and actions they take. Employees, especially supervisors such as Grievant, are expected to exercise appropriate judgment after considering the risk that negative consequences may occur from their actions. Grievant did not consider what could have happened before he displayed his pocketknife. Because he failed to properly weigh the potential consequences of his actions, his work performance was unsatisfactory.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a five day suspension is **reduced** to a Group I. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant's suspension for five days is **rescinded**. GPM § 5.9(a)(2). Standards of Conduct, Policy No. 1.60(D)(1)(a). The Agency is directed to provide the Grievant with **back pay** for the period of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, Policy No. 1.60(IX)(B)(2).

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.
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.

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.¹⁰

¹⁰ Agencies must request and receive prior approval from the Director of EDR 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 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