

Issue: Group III Written Notice with suspension (act of physical violence); Hearing
Date: 08/10/05; Decision Issued: 08/16/05; Agency: GMU; AHO: Jane E.
Schroeder, Esq.; Case No. 8139

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number 8139

Hearing Date: August 9-10, 2005

Decision Issued: August 16, 2005

PROCEDURAL ISSUE

Three pre-hearing conferences were held. In the third pre-hearing conference on August 5, 2005, the attorney for the agency made it clear that he would not be calling the contract worker as a witness, nor would the contract worker's statement¹ be offered for the proof of the statement. At the hearing, the attorney for agency requested that the contract worker testify and that new documents pertaining to the witness be submitted into evidence. The attorney for the grievant objected to testimony, based on prejudice to his client due to the late addition of witness and new documents. Hearing Officer denied the Agency's request, based on the fact that the contract worker was not on the list of witnesses submitted on the August 2nd deadline and on the clear statement of the attorney of the agency on August 5th that he would not be calling the contract worker as a witness at the hearing.

¹Agency Exhibit 1: Police Department Statement of Fact by Contract Worker, dated March 1, 2005

APPEARANCES

Grievant
Attorney for Agency
Attorney for Grievant
Witnesses for Agency:
 Police Officer
 Grievant's Supervisor
 Agency's Representative
Witnesses for Grievant:
 Grievant's friend
 Grievant's former Supervisor
 Grievant's former co-worker
Rebuttal Witnesses for Agency:
 Agency's Representative
 Agency Unit Manager
 Agency Employee
 Contract Worker Manager

ISSUES

In the incident involving the Grievant and Contract Worker on March 1, 2005, was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, was the agency action of a Group 3 Written Notice and three days without pay the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The Grievant filed a timely grievance from Group 3 Written Notice issued for pushing a Contract Worker in a violent manner.² Following failure of the parties to resolve the grievance at the third step resolution step, the agency head qualified the grievance for a hearing.³

The Agency has employed the Grievant since 1992. He had held the position of Trades Technician III for several years prior to the incident on March 1, 2005. He has performed satisfactorily and has no prior disciplinary actions.⁴

February 14th Incident

On February 14, 2005, the Grievant was working at the work bench in the shop at the Agency. The Contract Worker came into the shop, complaining that the Grievant had spread rumors about the Contract Worker being a part-timer. The Grievant asked where he had heard this and the Contract Worker said he heard it from the Grievant's Supervisor. The Contract Worker started yelling about wanting to claim his job back and cursing at the Grievant. The

²Agency Exhibit 6. Group III Written Notice issued March 24, 2005.

³Agency Exhibit 7. Employee Grievance Procedure Form A and attached memos.

⁴Grievant Exhibit 3 (a-1). Performance evaluations 1993-2004.

Grievant got off the work bench and moved to his desk in the back corner of the shop. The Contract Worker stood in the front of the desk, yelling, cursing, threatening to hurt the Grievant, pounding on desk. The Contract Worker then left the shop.

The Grievant then called his Supervisor. The Supervisor admitted he had said something to the Contract Worker, but he was joking. The Grievant expressed great concern about the incident and asked if he should call the police. The Supervisor told him not to call the police, that the Supervisor would call the Contract Worker's supervisor and handle the incident that way.

When the Grievant asked the Supervisor later what was happening, he said that the Contract Worker and the Grievant were not to be in the same area. The Supervisor failed to relay these guidelines to other supervisors who were in charge on the Supervisor's days off.

March 1st Incident

On March 1, 2005, the Grievant was again working at the work bench in the shop when the Contract Worker came into the shop and approached the Grievant. When the Contract Worker started yelling at the Grievant, the Grievant retreated back to sit at his desk in back corner of the shop. The Contract Worker went to the front of the desk yelling, kicking the desk, pounding on the desk, cursing, and threatening to hurt the Grievant and his family.

The Contract Worker then went to the work bench area, retrieved a metal object, and walked around toward the Grievant with his hands raised. When the Grievant saw the Contract Worker coming toward him in an aggressive manner, he was frightened that he would be hurt, and he stood up. When the Contract Worker was arms-length away, the Grievant grabbed his shirt and pushed the Contract Worker away. The Contract Worker dropped his hands and said he was going to the police. He then left the shop.

The Grievant immediately called his Supervisor to tell him that the Contract Worker had come into the shop, that there was an altercation, and that he had grabbed hold of the Contract Worker. The Supervisor had the day off and was at home when he received the call. The Grievant was very distressed, and the conversation was very short.

The Contract Worker went to the police department at the agency, spoke to the Police Officer, signed a statement that he did not wish to prosecute at this time,⁵ and wrote a statement about the incident.⁶

Two hours after the incident, the Police Officer went to the Grievant's shop. He read the Grievant his rights, including his right to remain silent, told the Grievant that he would probably be fired. He asked the Grievant what happened in the incident, but the Grievant declined to talk about it. The Police Officer asked why the Contract Worker had come to the shop. The Grievant said that was a good question and immediately called his supervisor to ask him that question. The Grievant agreed to prepare and written statement and turn it in the next day.

Actions After the Incidents

⁵Agency Exhibit 2: Agency's Police Department Statement of Victim's Rights

⁶Agency Exhibit 1: Police Department Statement of Fact by Contract Worker, dated March 1, 2005

The Police Officer wrote in his report⁷ and testified that the Grievant admitted he was wrong in grabbing the Contract Worker and pushing him away. The Grievant testified that he did not admit he was wrong, but only asked, "Was I wrong?"

The Police Officer met the next day with the Grievant and his Supervisor. The Grievant handed the Police Officer his written statement⁸, and very little was said. The Police Officer then closed the case, since Human Resources would be handling the matter. The Police Officer described the case as a minor incident, not a criminal matter.

The Supervisor sent the Grievant a memorandum to inform him of an upcoming Group III Written Notice for the offense of one instance of fighting and/or other acts of physical violence.⁹ Grievant was subsequently given a Group III Written Notice and suspended from work for three days without pay.¹⁰

The Grievant then filed a Grievance, which went through the three resolution steps before being qualified for hearing.¹¹

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the

⁷Agency Exhibit 3: Agency's Police Department Incident Report

⁸Agency Exhibit 4: Police Department Statement of Fact by Grievant, dated March 1, 2005.

⁹Agency Exhibit 5: Due Process Notification Memorandum

¹⁰Agency Exhibit 6: Group III Written Notice.

¹¹Agency Exhibit 7: Grievance Form A and attachment letters for steps 2 and 3

disciplinary action was warranted and appropriate under the circumstances.¹²

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct, and

Policy Number 1.80: Workplace Violence.¹³

Policy 1.60: Standards of Conduct provides a set of rules governing the professional 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. provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment¹⁴

Policy 1.80: Workplace Violence 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.

Under Policy Violations, it states:

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

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section “Framework for Determining Whether Discipline was Warranted and Appropriate” states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency’s discipline was consistent with the law (e.g. free of unlawful discrimination) and policy (e.g. properly characterized as a Group I, II, or

¹²Grievance Procedure Manual, § 5.8.

¹³Grievant Exhibit 4: DHRM Policies and Procedures Manual, Policy 1.80.

¹⁴DHRM Polices and Procedures Manual, Standards of Conduct V.B.3.

III offense) and finally, (iv) 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.

In reviewing agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations. Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice; (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with the law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness. . . .¹⁵

Using the framework suggested, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

The Written Notice describes the behavior as follows:

(The Contract Worker) and you were both inside a maintenance store room. Inside the store room, after verbal exchanges (a.k.a. "trash talking") between the two of you, you shoved and/or pushed (The Contract Worker) in a violent manner which he indicated made him fear for his safety. (The Contract Worker) reported this incident to the police. You also made a statement of this incident to the police. Both statements indicated that you did in fact shove and/or push (the Contract Worker).

I find that this statement is not consistent with the written evidence. In the statements of the Contract Worker,¹⁶ the Grievant,¹⁷ and the Incident Report by the Police Officer,¹⁸ there is no mention of the Contract Worker being pushed in a violent manner or that the *Contract Worker* was in fear for his safety. The Contract Worker's statement was that his shirt was twisted by the Grievant and he was punched. The Grievant's statement was that after the Contract Worker approached him in an aggressive manner with a metal object in his hand, that the *Grievant* felt threatened and thought it was appropriate to defend himself, and that he grabbed the Contract Worker's shirt. The Incident Report said the Contract Worker reported that he was grabbed by the shirt and punched and that Grievant said he was wrong for grabbing the Contract Worker.

When the Supervisor was questioned at the hearing regarding the inaccurate and incomplete statement, he testified that Human Resource helped him with the statement and that

¹⁵DEDR Rules for Conducting Grievance Hearings, VI.B., Effective Date 8/30/2004.

¹⁶Agency Exhibit 1: Police Department Statement of Fact by Contract Worker, dated March 1, 2005.

¹⁷Agency Exhibit 4: Police Department Statement of Fact by Grievant, dated March 1, 2005.

¹⁸Agency Exhibit 3: Agency's Police Department Incident Report

was all he needed to put down to justify a Group III notice.

In this case, the Grievant testified that he grabbed the Contract Worker's shirt and pushed him back after he was threatened, backed into the corner of the work shop and was approached by the Contract Worker who had his hand raised and had a metal object.

While the description given by the Supervisor in the Written Notice was inaccurate and incomplete, this hearing officer finds the Grievant engaged in the behavior of grabbing the Contract Worker's shirt and pushing him.

(ii) Whether the behavior constituted misconduct

Fighting and/or other acts of physical violence are Group III offenses.¹⁹ Grabbing someone's shirt and pushing him is an act of physical violence. Therefore this hearing officer finds that, under the Standard of Conduct, the behavior constituted misconduct.

(iii) Whether the agency's discipline was consistent with the law (e.g. free of unlawful discrimination) and policy (e.g. properly characterized as a Group I, II, or III offense)

The agency's discipline was free of unlawful discrimination. The offense is properly characterized as a Group III offense. Therefore, the hearing officer finds that the agency's discipline was consistent with the law and policy, with the exception that the law allows for self-defense, and the Agency did even consider self-defense in this case. As to self-defense, the discipline was inconsistent with the law.

(iv) 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.

There were three mitigating circumstances that this hearing officer finds justifies a reduction or removal of the disciplinary action.

First, the Agency failed to protect the Grievant after the February 14th incident. In that incident the Contract Worker approached the Grievant in a violent manner, cursing, threatening, and kicking the desk. Under the DHRM Policies and Procedures Manual,²⁰ this was an act of workplace violence. The Supervisor testified that he was unaware of the policy and any responsibilities the Agency would have under the policy.

The Grievant complained to his Supervisor about the incident and asked if he should report it to the police. The Supervisor told him not to report to the police, that he would handle it. Yet the Supervisor did not even tell other supervisors that the Contract Worker and Grievant were not to work in the same area. The March 1st incident was a direct result of the Agency not taking appropriate action to address the workplace violence and the Contract Worker being given permission by a supervisor to go into the shop where the Grievant was working.

Second, the Agency exceeded the limits of reasonableness in its portrayal of the situation

¹⁹DHRM Policies and Procedures Manual, Policy No. 1.60, Standards of Conduct V.B.3.f.

²⁰DHRM Policies and Procedures Manual, Policy No. 1.80, Workplace Violence.

in the Written Notice. Please see section (i) above. The Supervisor wrote a biased one-sided view of the incident, claiming he just wanted to write enough to justify the Group III notice. He testified that he knew that the Grievant felt threatened, yet he wrote that the Contract Worker felt threatened. He knew that the Grievant claimed the Contract Worker came at with a metal object, but the Supervisor testified that he did not know how to include the metal object in his Written Notice.

Finally and most significantly, the Agency exceeded the limits of reasonableness in its refusal to consider self-defense. The Supervisor testified that it was his understanding that self-defense could never be used by an employee at the agency. He said there was zero tolerance of violence. According to the Supervisor, self defense is never to be considered at the Agency. Even if a person was being attacked with a weapon, the person would be guilty of a Group III offense if he pushed the person to stop the attack. He testified that, in this case, even if he believed there was justified self-defense, he still would have given the Grievant a Group II Written Notice.

The Supervisor's Supervisor, the Agency Representative, testified that the Agency has no such policy against self-defense, and that a claim of self defense could be considered.

Self defense in Virginia is permitted if the evidence shows that Defendant was without fault in provoking or bringing on the difficulty, that the Defendant reasonably feared under the circumstances that he was in danger of harm, and he used such force that was reasonably necessary to protect himself from the threatened harm. (*Diffendal v. Commonwealth*, 8 Va. App. 417 (1989)).

The conduct of the Grievant was warranted under the circumstances he faced on March 1. There was no evidence presented that the Grievant provoked the attack. He was in the shop when the Contract Worker came and started threatening him with bodily harm. He was backed into a corner by the Contract Worker coming at him with a metal object. He felt threatened and his response was to push the person away. He did not punch him; he did not escalate the situation. He used reasonable force to protect himself when he pushed the person away. This behavior is consistent with justifiable self-defense.

This Hearing Officer finds that the Grievant was entitled to use self defense and that the level of self defense that he used was reasonable.

The evidence has shown that the Agency was unreasonable in failure to deal appropriately with the workplace violence on February 14, in its portrayal of the incident in the Group III Written Notice, and in its refusal to consider and find self-defense in this case.

Due to the mitigating factor of self-defense, the hearing officer finds that the discipline exceeds the limits of reasonableness.

The Agency has demonstrated, by a preponderance of the evidence that the Grievant did grab and push the Contract Worker - a Group III offense. The hearing officer finds that the discipline is inconsistent with the law as to the issue of self defense. The hearing officer finds there are compelling circumstances that warrant mitigation of this disciplinary action. Therefore, given all the evidence presented at the hearing and the applicable law, the hearing officer finds that the grievant's conduct did not warrant disciplinary action under the Standards of Conduct.

DECISION

The disciplinary action of the agency is reversed.

The Group III Written Notice issued on March 24, 2005 is hereby RESCINDED.

The three days pay and leave time deducted shall be awarded to the Grievant.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject 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 office to revise the decision to conform it to written policy. Requests should be made to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
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. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

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 **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-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 15 days; the day following the issuance of the decision is the first of the 15 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 15 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 DHRM, 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.

Jane E. Schroeder, Esq.
Hearing Officer