

Issue: Group III Written Notice with termination (acts of physical violence); Hearing Date: 11/18/05; Decision Issued: 11/28/05; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8198; Outcome: Agency upheld in full; **Administrative Review: DHRM Ruling Request received 12/12/05; DHRM Ruling issued 12/17/05; Outcome: Affirmed (no policy violation cited; no basis to interfere with decision); Judicial Review: Appealed to Circuit Court in City of Winchester on 01/27/06; Outcome pending**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8198**

Hearing Date: November 18, 2005  
Decision Issued: November 28, 2005

**PROCEDURAL HISTORY**

On September 1, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*On September 1, 2005, [Grievant] assaulted another employee after a heated exchange. This is in violation of a Group III offense for item #6 "acts of physical violence or fighting."*

On September 7, 2005, 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 October 18, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 18, 2005, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate

Witnesses

## **ISSUE**

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

## **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 Corrections employed Grievant as a Probation Officer 1 at one of its Facilities. She began working for the Agency on November 1, 2000. The purpose of her position was to, "Supervise adult offenders, conduct investigations, and document activities."<sup>1</sup> Prior to the incident giving rise to this grievance, her work performance was satisfactory to the Agency. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Mr. F was a Probation and Parole Officer working at the Facility where Grievant worked. He had been employed for approximately six months. Several weeks prior to September 1, 2005, Mr. F inappropriately displayed his badge and used his status as a Probation and Parole Officer to resolve a domestic dispute arising in his neighborhood. Grievant and the Agency learned of Mr. F's behavior. Grievant confronted Mr. F and advised him that he should not inappropriately use his position with the Agency to resolve private matters. Mr. F became angry with Grievant's comments. Mr. F told Grievant to stay away from him.

On September 1, 2005, Mr. F walked into the Secretary's office and asked her how she was doing. Grievant entered the office and put her arm around Mr. F's waist. Mr. F immediately protested Grievant's action. He told Grievant to back up off of him and that he took harassment seriously. Mr. F and Grievant sat down in chairs in front of the Secretary's desk and continued their discussion. Mr. F claimed he should not be subjected to sexual harassment from Grievant. Grievant denied any harassment.

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<sup>1</sup> Agency Exhibit 5.

Grievant claimed she did not know her actions were offensive to Mr. F. The discussion increasingly became heated. Mr. F made numerous gestures to display his anger. Mr. F said "Like I said don't put your hands on me." Grievant responded, "Since you have become full-time you think you are all that, like you are above the law or something." Mr. F threatened Grievant.

Probation Officer P heard the arguing and entered the Secretary's office. She said that they were in a professional environment and if they had serious issues that they needed to discuss them outside. Mr. F stood up and walked towards the office door. Grievant also stood up and walked towards the office door. Mr. F and Grievant were facing each other arguing loudly and cursing repeatedly. Grievant said "watcha gonna do about it." Mr. F and Grievant came within an inch of each other as they yelled at each other.<sup>2</sup> Mr. F said "Now what" and yelled that Grievant better not touch or put her hands on him. To get Mr. F away from her, Grievant raised both of her hands and pushed Mr. F away. Mr. F moved backwards a few inches. Mr. F and Grievant continued with their arguing, cursing, and yelling. Probation Officer P stepped in between Grievant and Mr. F and told Mr. F to leave.

Mr. F went to the Deputy Chief's office and said "you better get over here. You need to talk to [Grievant] now." The Deputy Chief rushed to the Secretary's office and saw the Secretary, Probation Officer P, and Grievant inside the office. The Deputy Chief said "what's going on" and asked Probation Officer P to leave. The Deputy Chief had her back to the doorway and began talking to Grievant and the Secretary. As she was talking to Grievant, the Deputy Chief heard someone yelling from behind her. She blocked the doorway. Mr. F pushed against the back of the Deputy Chief and Grievant pushed against her front. Grievant and Mr. F yelled and cursed each other. Mr. F pointed his finger over and around the Deputy Chief and at Grievant. Mr. F angrily said "Don't you ever put your f—king hands on me again." Grievant responded, "I'll knock your f—king head off your shoulders." Probation Officer T and the Chief moved Mr. F into the Chief's office. Parole Officer E was able to close the door to the Secretary's office so that Grievant remained inside the office.

While in the Chief's office, Mr. F said "I have tried to be professional but [Grievant] will not keep her hands off and I am tired of it." He added that the next time this happened someone would be picking her up because she will be on her back.

The Agency removed Mr. F from employment based on his actions on September 1, 2005.

## **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

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<sup>2</sup> Grievant and Mr. F are approximately the same height.

require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. 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.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

“[A]cts of physical violence or fighting” is a Group III offense.<sup>3</sup> Fighting, as used under the Standards of Conduct, includes both physical and non-physical actions. In order to establish fighting occurred, it is not necessary for the Agency to show a Grievant engaged in a physical fight with Mr. F.<sup>4</sup> Grievant engaged in fighting based on several factors. First, she consistently positioned herself near Mr. F in a manner to encourage the confrontation. For example, Grievant stood up from her chair in the Secretary’s office as Mr. F stood up. She could have remained seated. Grievant pushed against the Deputy Chief to move towards Mr. F. She could have remained back from the Deputy Chief. Second, Grievant consistently cursed and yelled at Mr. F. She could have made her points without cursing or yelling. Third, she threatened physical injury to Mr. F by saying “I’ll knock your f—king head off your shoulders.” When these factors are considered together, it is clear Grievant actively engaged in a fight with Mr. F. Although Mr. F may have had a more pronounced and aggressive role in fighting with Grievant, Grievant actively participated and continued to confront Mr. F. Grievant should have removed herself from the conflict and reported her concerns to her supervisors. By choosing to remain involved in the confrontation, Grievant made herself a participant in that confrontation and prolonged the confrontation. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. Removal from employment is permitted by the Standards of Conduct when an employee receives a Group III Written Notice. Accordingly, the Group III Written Notice with removal must be upheld.<sup>5</sup>

Grievant contends she pushed Mr. F in self-defense because he bumped his chest into her. Assuming this is true, this fact does not relieve Grievant of responsibility for a Group III offense. It is not necessary for the Agency to show a battery in order to establish fighting under the Standards of Conduct.

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<sup>3</sup> DOCPM § 5-10.17(B)(6).

<sup>4</sup> DOCPM § 5-10.17(B)(6) must be read in light of DOCPM § 130.3, *Workplace Violence*. Workplace violence is defined 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 ... psychological trauma such as threats, ... an intimidating presence, and harassment of any nature such as ... shouting, or abusive language.” Grievant engaged in workplace violence.

<sup>5</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

## 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 **15 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 14<sup>th</sup> St., 12<sup>th</sup> 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 15 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 15-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.<sup>6</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.