

Issue: Group III Written Notice with termination (fighting); Hearing Date: 08/21/06; Decision Issued: 08/22/06; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8394; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8394

Hearing Date: August 21, 2006
Decision Issued: August 22, 2006

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Human Resource Analyst
Representative for Agency
Three witnesses for Agency

ISSUES

Was the grievant's conduct such as to 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

Grievant filed a timely grievance from a Group III Written Notice issued for fighting.¹ As part of the disciplinary action, grievant was removed from state employment effective May 5, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Virginia Department of Transportation (VDOT) (Hereinafter referred to as “agency”) has employed grievant as a transportation maintenance operator³ for five years. Grievant has a good work record and no previous disciplinary actions, although he had been verbally counseled after having a verbal altercation with employee B in the past.

The Commonwealth’s policy on workplace violence provides that any physical assault by an employee constitutes workplace violence.⁴ The policy prohibits engaging in behavior that creates a reasonable fear of injury to another person and, injuring another person physically. The agency has promulgated its own policy which further defines workplace violence to include any violence directed at a coworker and any physical assault such as hitting, pushing, holding, or impeding the movement of another person.⁵ The policy states that the agency has a “standard of **zero tolerance** for all acts or threats of violence.” Grievant received training on this policy, received a copy of it, and knew that he was subject to its provisions.⁶

Grievant has been assigned to a maintenance crew for some time. In October 2005, employee B was transferred from another location and assigned to grievant’s crew as a coworker with grievant. Employee B had been counseled in 2004 for his use of obscene and abusive language⁷ and, in 2005 for disruptive behavior.⁸ Employee B has the reputation of having a hot temper and aggravating his coworkers. Grievant and employee B worked together daily and often argued with each other but the arguments never involved more than verbal needling. Grievant sometimes called B the supervisor’s pet.

On April 28, 2006, the work crew had inspected a guardrail and was returning to the area headquarters to obtain materiel needed to effect repairs. Grievant was driving the truck, employee B was sitting in the passenger seat, and two other coworkers were sitting in the rear seat. The two workers in the rear seat were temporary workers who had joined the crew only three days earlier. As they approached the area headquarters, grievant and employee B

¹ Agency Exhibit 5. Group III Written Notice, issued May 5, 2006.

² Agency Exhibit 5. Grievance Form A, filed May 23, 2006.

³ Agency Exhibit 4. Grievant’s Employee Work Profile Work Description, October 25, 2005.

⁴ Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence*, May 1, 2002.

⁵ Agency Exhibit 3. VDOT *Preventing Violence in the Workplace Policy*, effective May 1, 2002.

⁶ Agency exhibit 6. Employee Receipt for *Preventing Violence in the Workplace Policy*, April 17, 2002.

⁷ Agency Exhibit 6. Memorandum from supervisor to employee B, April 28, 2004.

⁸ Agency Exhibit 6. Memorandum from supervisor to employee B, May 31, 2005.

had a minor disagreement about an insignificant matter. Employee B told grievant to “shut the f___ up.” Grievant asked B if he want to get out at the office so B could “cry and suck [the supervisor’s] ass.” B first answered “no” but quickly changed his mind and said he did want to get out of the truck. Grievant refused to stop the truck, drove past the office and went up a hill to a storage shed where the repair materiel was located.⁹

When the truck stopped, B quickly got out, ran around the front of the truck and confronted grievant at the driver’s door of the vehicle. B asked for the truck keys but grievant refused saying that they first had to take things off the truck. Both grievant and B were agitated by this time. As they were face to face, B grabbed grievant by his jacket collars and began shaking him; grievant tried to push B away. They then began belly bumping each other. B tried to get grievant to fight by antagonizing him and calling him a pussy. Grievant told B that he didn’t want to fight because of the soft spot on B’s head.¹⁰ Grievant called B a queer, a rapist and a pervert while they were belly bumping and shoving each other. B then told grievant to come around to the side of the storage shed and settle it like men. Grievant took off his coat, threw it on the ground and followed B around the side of the storage shed. The two coworkers, who are smaller than both B and grievant, wanted no part of the confrontation and went inside the storage shed to get the tools and material they needed. Within a few seconds, the two coworkers heard loud noises and went back outside where they found that grievant had pinned B against the sign rack with one arm under B’s neck. One of the coworkers told grievant and B that they should stop acting like children because it wasn’t worth it. Both stopped the fight, grievant called B a few vulgar names, and B walked down the hill toward the office.

B sustained a minor abrasion on his right forearm, however, it could not be determined whether the injury was actually incurred during the physical altercation. Grievant has since acknowledged that he made a mistake and regretted it ever since. The agency disciplined and removed from employment both grievant and employee B.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 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

⁹ Agency Exhibit 4. Photographs of area headquarters.

¹⁰ Grievant and the coworkers knew that B had previously had brain surgery. A portion of B’s skull was removed during the surgery and as a result, B now has a soft spot on the top of his cranium. B asserted that grievant threatened to hit him on his soft spot; grievant denies making such a threat. He claims he mentioned the soft spot only to suggest to B that fighting would not be in B’s interest because he might accidentally get hit in the soft spot.

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 § 2.2-3000 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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹¹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60. 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. 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 from employment.¹² Fighting and/or other acts of physical violence are examples of a Group III offense.

The essential facts in this case are undisputed. Following a verbal altercation with employee B, grievant and B started calling each other uncomplimentary names and engaged in a belly bumping and shoving match. B challenged grievant to fight, grievant took up the challenge, threw his coat to the ground, and followed B to the side of the storage shed where they engaged in a physical scuffle. Grievant clearly engaged in physical violence that fits squarely within the type of conduct prohibited by both state and agency policies.

¹¹ § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

¹² Agency Exhibit 2. DHRM Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant admits that he made a mistake, that he could have avoided the fight by walking away, and now regrets what he did.¹³ Grievant argues that he was not the aggressor in this situation. While the evidence suggests that B may have initiated the belly bumping, grievant had multiple opportunities to avoid this physical confrontation. During the ride in the truck, grievant made unnecessary offensive comments designed to antagonize B. He could have allowed B to get out of the truck at the office rather than forcing him to stay in the truck. When B challenged grievant to fight, grievant could have walked away. Instead, B took up the challenge by throwing his coat to the ground and following B to the designated fight location. Accordingly, even though B may have been an instigator, grievant willingly took up the challenge and engaged in the physical altercation when he could have avoided it. Grievant's argument that B provoked him into fighting does not excuse grievant's willingness to go ahead and fight with B. Under these circumstances, grievant was equally to blame for engaging in the scuffle next to the storage shed.

Mitigation

The normal disciplinary action for a Group III offense is a Written Notice and removal from state employment. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has been in state service for only five years. He has a satisfactory work performance record. The agency considered these mitigating circumstances but felt that they did not overcome the seriousness of the offense. A physical altercation between employees is something that no state agency should have to tolerate. After carefully reviewing the circumstances of this case, it is concluded that the agency appropriately applied the mitigation provision and that the disciplinary action was within the tolerable limits of reasonableness.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and removal from state employment effective May 5, 2006 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this decision was issued, if any of the following apply:

¹³ Agency Exhibit 5. Letter from grievant to superintendent, May 4, 2006.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.¹⁴ 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.¹⁵ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

¹⁴ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁵ 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]

S/ David J. Latham

David J. Latham, Esq.
Hearing Officer