

Issue: Group III Written Notice with termination (workplace violence); Hearing Date: 11/27/06; Decision Issued: 12/12/06; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8453; Outcome: Agency upheld in full



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8453**

Hearing Date: November 27, 2006  
Decision Issued: December 12, 2006

**PROCEDURAL HISTORY**

On June 14, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence and providing a subordinate with nude pictures. On July 11, 2006, 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 25, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 27, 2006, a hearing was held at the Agency's regional office. Grievant did not appear or testify at the hearing.

**APPEARANCES**

Grievant's Representative  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUE**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. 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?

### **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:

Virginia Commonwealth University employed Grievant as an Emergency Coordinator I within its Police Department. She began working for the Agency in April 2000. The purpose of her position was:

Assist in administering supervision over the operations of the Emergency Communications Center and dispatchers to ensure calm, quality, effective, accurate responses to calls and dissemination of information. Provide supervisory support, advice and leadership in the workplace to communications personnel assigned to each shift.<sup>1</sup>

Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on November 15, 2005.<sup>2</sup>

Grievant supervised six or seven staff including Ms. P and Mr. W. Grievant began a personal relationship with Ms. P in November 2005. Ms. P began working for the Agency in February 2006. The personal relationship ended in April or May 2006.

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<sup>1</sup> Agency Exhibit 3.

<sup>2</sup> Agency Exhibit 6

Grievant supervised Mr. W but they were also friends who socialized outside of work. Grievant asked Mr. W about assisting in resolving problems in the relationship between Grievant and Ms. P. In return for his assistance, Mr. W sought digital pictures of Grievant without her clothing on. She complied with Mr. W's request and sent him five to seven pictures she took of herself using a cell phone camera.<sup>3</sup>

On May 31, 2006, Grievant and Ms. P talked over the telephone and both became upset. Approximately 20 minutes later, Grievant arrived unexpectedly at Ms. P's house. After they spoke for a few minutes, Grievant hit Ms. P. Ms. P's roommate heard the hit and came to check on Ms. P. Grievant went to her car. Ms. P went to and entered Grievant's car. Grievant began waving an unidentified object. Ms. P tried getting the object from Grievant but Grievant would not give the object to Ms. P and Grievant would not let Ms. P out of the vehicle. Grievant made statements to Ms. P that made Ms. P think Grievant might try to commit suicide. Ms. P's roommate called Ms. P. Ms. P told the roommate to call the police. Grievant let Ms. P out of the vehicle after Ms. P told Grievant that Ms. P needed to check on the roommate and that Ms. P would return to the vehicle. Grievant told Ms. P not to call the police. After several minutes, Grievant observed police arriving at her location. She cut both of her wrists. Grievant was taken to the local hospital. She was admitted as a patient, evaluated, and released the following afternoon.

## 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).<sup>4</sup> 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).

### Workplace Violence DHRM Policy 1.80

DHRM Policy 1.80 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,

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<sup>3</sup> It is unclear to what extent Grievant was undressed and whether someone seeing the pictures would identify Grievant or somehow link them to the Agency.

<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

Grievant argues the violence occurred outside of the workplace and, thus, she may not be disciplined for that violence. DHRM Policy 1.80, however, addresses not only violence occurring at the workplace, but also violence outside the workplace. This policy provides:

Violence acts of employee occurring outside of the workplace also may be grounds for disciplinary action, up to and including dismissal. In these situations, the agency must demonstrate in writing that the violence conduct committed has an adverse impact on the employee's ability to perform the assigned duties and responsibilities or that it undermines the effectiveness of the agency's activities.

By striking a subordinate, Grievant adversely impacted her ability to perform her assigned duties including supervising that employee. Grievant also undermined the effectiveness of agency's activities because the mission of the VCU Police Department

is to deter, investigate, and prosecute the type of behavior Grievant engaged in. The fact that Grievant's violent behavior occurred outside of the workplace does not undermine the Agency's ability to take disciplinary action against her. The Agency has presented sufficient evidence to support its issuance to her of a Group III Written Notice. The Agency is authorized to remove an employee upon the issuance of a Group III Written Notice.<sup>5</sup>

### Mitigation

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."<sup>6</sup> Under the EDR Director's *Rules for Conducting Grievance Hearings*, 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."

Grievant's representative contends the disciplinary action should be mitigated because Grievant's behavior did not occur in the workplace. DHRM Policy 1.80 specifically includes behavior occurring outside of the workplace and, thus, there is no basis for mitigation for that reason. Grievant's representative argues Grievant should not be punished for the rest of her life for her actions. The Written Notice becomes inactive on June 14, 2010. The life of a written notice is not a basis to mitigate disciplinary action. Grievant's representative argued the Agency inconsistently disciplined its employees and that Grievant was treated differently because of her sexual orientation, but no evidence proving these allegations was introduced into evidence. In light of this standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.<sup>7</sup>

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<sup>5</sup> The Agency argued that Grievant also should be removed because she sent a subordinate pictures of herself in the nude. Insufficient facts were presented during the hearing to determine when the pictures were taken and the degree to which the pictures reflected nudity and Grievant's identity. The pictures may have justified some disciplinary action, but the Hearing Officer cannot determine what level would be appropriate without additional evidence. Without considering the pictures, however, there remains sufficient evidence to support the Agency's conclusion that Grievant violated the workplace violence policy thereby justifying the issuance of a Group III Written Notice with removal.

<sup>6</sup> *Va. Code § 2.2-3005.*

<sup>7</sup> Grievant seeks to alter the outcome of her proceedings before the Virginia Employment Commission. The Hearing Officer has no authority over matters involving the Virginia Employment Commission.

## 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 all of your appeals to the other party and to the EDR Director. 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>8</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.