

Issues: Group III Written Notice (workplace violence) and Termination; Hearing Date: 07/18/08; Decision Issued: 07/24/08; Agency: VDH; AHO: William S. Davidson, Esq.; Case No. 8878; Outcome: No Relief – Agency Upheld In Full.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8878

Hearing Date: July 18, 2008
Decision Issued: July 24, 2008

PROCEDURAL HISTORY

The Grievant received a Group III Written Notice on April 10, 2008 for:

Pattern of hostile, disruptive, threatening and intimidating behavior between January-March, 2008 in violation of Dept. of Human Resource Management Policy 1.80, Workplace Violence, which prohibits threatening behavior or verbal abuse occurring in the workplace by employees or third parties. [Grievant's] continuing and repeated inappropriate behavior was also a violation of the Nurse Manager's repeated instructions about inappropriate behavior in the workplace.

Pursuant to the Group III Written Notice, the Grievant was terminated on April 11, 2008. On April 16, 2008, the Grievant timely filed a grievance to challenge the Agency's actions. The Grievant requested an expedited process in this matter. On June 9, 2008, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On July 18, 2008, the first available date for the attorney for the Grievant and the Agency representative, a hearing was held at the Agency's location.

APPEARANCES

Grievant
Grievant's Attorney
Agency Party
Agency Representative
Witnesses

ISSUE

1. Whether or not the Grievant's behavior amounted to a pattern of hostile, disruptive, threatening and intimidating behavior between January and March, 2008 in violation of DHRM Policy 1.80.

2. Whether the Grievant's behavior exhibited a behavior of continuing and repeated inappropriate behavior in violation of the Nurse Manager's repeated instructions about inappropriate behavior in the workplace.
3. Whether the Grievant's actions justified the issuance of the Group III Written Notice and subsequent termination.

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and should give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 Agency provided the Hearing Officer with a notebook containing ten (10) tabbed sections, nine (9) of which had Exhibits, and that notebook was accepted in its entirety as

Agency Exhibit 1. The Grievant provided the Hearing Officer with a notebook containing six (6) tabbed sections and that notebook was accepted in its entirety as Grievant's Exhibit 1.

The Agency's case against the Grievant is founded largely in the language of DHRM Management Policy 1.80-**Workplace Violence**. That Policy defines Workplace Violence as follows:

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. (Emphasis added) ¹

Further, that Policy defines Third Party as follows:

Individuals who are not state employees, such as relatives, acquaintances, or strangers. ²

Finally, Policy 1.80 states that "Employees violating this policy will be subject to disciplinary actions under Policy 1.60, Standards of Conduct, up to and including termination, based on the situation." ³

The Agency presented much evidence in this matter indicating that the Grievant's spouse called a Manager in the Agency and made, what that Manager deemed to be, a threat. The Agency was concerned enough about the alleged threat that it secured police security at two (2) locations for at least two (2) months. The Agency spent significant time and effort in its presentation before the Hearing Officer to show that the employees of the Agency were fearful because of the Grievant's husband's alleged threat. Indeed, the Agency interpreted Policy 1.80 to mean that, if a relative made a threat, even though unsolicited and unknown by the employee, then that provided the Agency with sufficient grounds to say that the employee had violated Policy 1.80 and therefore was subject to disciplinary action under Policy 1.60. Upon questioning by Grievant's counsel and the Hearing Officer, Agency witnesses indicated that perhaps this Policy had been misinterpreted. Agency witnesses were asked if the Grievant could be fired if a stranger, acquaintance or relative made an unsolicited and unknown threat to someone at the Agency where the threat somehow involved the Grievant and the witnesses testified that such a threat, as it did not come from nor was it solicited by the Grievant, would not be a violation of Policy 1.80. The Agency produced no evidence whatsoever indicating that the Grievant solicited, was aware of, or condoned her husband's alleged telephonic threat. Indeed, when the Grievant first became aware of this through conversations with her superiors, she truthfully and bluntly indicated that, if her spouse made such a statement, the Agency was quite correct in calling the police. Therefore, the Hearing Officer rules that the spouse's alleged threat has no bearing in the

¹ Agency Exhibit 1, Tab 8, Page 1

² Agency Exhibit 1, Tab 8, Page 1

³ Agency Exhibit 1, Tab 8, Page 2

Hearing Officer's decision. There was no evidence that the spouse was arrested or even questioned by the police regarding the alleged threat.

The Agency introduced as evidence a confidential report dated April 1, 2008.⁴ That report clearly, pursuant to the Agency's witnesses' testimony, became a basis for the issuance of this Group III Written Notice. In the Findings of Fact section of that report, the author found eighteen (18) distinct violations. The Agency presented either no evidence or insufficient evidence regarding numbers 5, 7, 8, 9 and 12. Many of the remaining numbered paragraphs seem to have nothing to do with any action that would lead to a charge of Workplace Violence. By way of example: sequestering herself in the areas of the building where she worked for long periods of time, hardly seems to rise to the level of a physical threat or intimidating presence or harassment. Likewise, stating that she was not in possession of patient's files, when, in fact, she may have been, directing a co-worker to get more birth control pills from a pharmacy, preparing deviled eggs at work, repeatedly questioning co-workers about procedures and policies, spending excessive time on non-urgent matters or failing to respond to someone when they speak to her do not seem to fall within the definition of physical assault, intimidating presence or harassment.

Numbers 17 and 18 of that complaint are merely personal opinions stated by the people who were interviewed for that exhibit and such evidence was not presented by the witnesses who testified for the Agency before the Hearing Officer.

The testimony that was presented to the Hearing Officer by Agency witnesses indicated that the Grievant used her personal cell phone nonstop for family member's phone calls, slammed a cart into a wall, threw charts on the floor because she did not have time to work on them, kept issues alive and would not let them drop, prepared deviled eggs during work hours, saw one patient out of the order of how the patients came to the clinic, told everyone to leave her alone and, if they did not, she would call her mother (her mother shot her husband's girlfriend), sometimes would put her hand out and say to someone that she did not have time to discuss the matter further, and finally, that she hung up on one of her superiors. Of all of these, the Hearing Officer finds that the only two (2) issues that possibly reach the level of Workplace Violence as defined in Policy 1.80 are the incidents of thrusting the open hand out to say that she would not continue the conversation and the statement that she would call her mother and the follow up statement that her mother shot her husband's girlfriend.

The Grievant produced several witnesses, all of whom worked for the Agency and some of whom indicated that the Agency witnesses had a reputation for not always telling the truth. However, the Grievant's witnesses contradicted themselves. For instance, one of the Grievant's witnesses testified that a particular Agency witness was known to not be truthful and that there was a vendetta to have the Grievant removed from the Agency. Another Agency employee who testified for the Grievant testified to the exact opposite, indicating that this particular Agency witness was known to be truthful and that there was no vendetta.

The Grievant testified that, when she put her arm out with her palm facing up, she was simply trying to cut off a conversation and had no intent of intimidating anyone. She further

⁴ Agency Exhibit 1, Tab 3, Pages 1-10

testified that her mother was approximately 75 years old, had cancer and, while her mother did in fact shoot her husband's girlfriend, that statement was made as a joke, with no intent to intimidate.

The Hearing Officer finds that the purported joke regarding her mother and the hand movements in telling people that she no longer wished to discuss a conversation could rise to a level where the actions/comments intimidated employees. The Hearing Officer heard several Agency employees testify that they were, in fact, intimidated. Intimidation is determined by the person who feels intimidated so long as it is possible that a reasonable person **could** be intimidated in the specific situation. The Hearing Officer finds that the Agency acted within its authority to deem that the Grievant has violated Policy 1.80, because of Workplace Violence through intimidation.

Regarding the second allegation in the Written Notice that the Grievant's continuing and repeated inappropriate behavior was also a violation of her Manager's repeated instructions about inappropriate behavior in the workplace, the Hearing Officer finds that there was evidence offered by the Agency regarding this allegation. Such evidence did not reach a level to justify a Group III Written Notice and termination. However, because of the Hearing Officer's finding on the prior allegation, the Hearing Officer need not go further into this allegation.

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..."⁵ Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. The Agency considered the mitigation of the Group III offense, but it was determined there were not sufficient mitigating factors present to mitigate the termination of the Grievant to a lesser punishment. The Grievant had been counseled in writing regarding her tone of voice.⁶ The Grievant had been put on notice that she was inflexible and difficult to work with.⁷ The Hearing Officer does not find any facts sufficient to mitigate the termination of the Grievant.

DECISION

⁵Va. Code § 2.2-3005

⁶ Agency Exhibit 1, Tab 7, Page 1

⁷ Agency Exhibit 1, Tab 7, Page 16

For reasons stated herein, the Hearing Officer finds that the Grievant did violate policy and that a Group III Written Notice with termination was appropriate. The Hearing Officer finds that the Agency properly mitigated this matter and that the Agency has properly handled this matter. Accordingly, the Hearing Officer finds that the Agency's actions are appropriate.

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 14th Street, 12th 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 Street, 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 a copy of your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁸ 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.⁹

⁸An 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).

[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]

William S. Davidson
Hearing Officer

⁹Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.