

Issues: Group III Written Notice (workplace violence) and Termination; Hearing Date: 04/24/09; Decision Issued: 04/30/09; Agency: DSS; AHO: William S. Davidson, Esq.; Case No. 9051; 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: 9051

Hearing Date: April 24, 2009
Decision Issued: April 30, 2009

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on December 31, 2008 for:

The issuance of this Group III Written Notice with termination is based on the incident that took place on December 22, 2008, where your belligerence and threats of violence were displayed in the workplace. Reference attached copy of Notice of Intent to Terminate.¹

The Intent to Terminate letter was dated December 22, 2008 and the Grievant provided her Response to the Notice of Intent to Terminate Employment on December 29, 2008.²

Pursuant to the Group III Written Notice, the Grievant was terminated on December 31, 2008. On January 16, 2009, the Grievant timely filed a grievance to challenge the Agency's actions. On March 11, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On April 24, 2009, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Advocate for Agency
Grievant
Counsel for Grievant
Witnesses

¹ Agency Exhibit 1, Tab 1, Page 1

² Agency Exhibit 1, Tab 1, Page 2

ISSUE

1. Did the Grievant's actions rise to the level of threats of violence and, as such, warrant a Group III Written Notice with 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 shall 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 seven (7) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing four (4) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

Policy 1.60, The Standards of Conduct, sets forth that a Group III offense is as follows:

Offenses in this category include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures or laws.³

DHRM Policy 1.80, Workplace Violence, defines workplace violence as follows:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes...psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.⁴

Prohibited actions are defined to include but not be limited to:

1) Engaging in behavior that creates a reasonable fear of injury to another person, 2) Engaging in behavior that subjects another individual to extreme emotional distress, 3) Threatening to injure an individual...⁵

The Assistant Director of the Agency testified that the Grievant had missed time from work. Because of time missed, on Friday December 19, 2009, she called the Grievant's home trying to reach the Grievant. She spoke with the Grievant and informed her that she would need to bring a doctor's note with her for the most recent absences when she returned to work. Subsequently, this witness went to lunch and, when she returned from lunch, there were three (3) messages left on her Blackberry by the Grievant. These messages from the Grievant used abusive language and also there was a threat to the employee's life as well as that of her family. This witness testified that the Grievant made the following statements: "when your sister is blind and your dog is dead"; "if [the Grievant] had the Ebola virus, [she] would cough on her and kill her"; and, "I hope when you are sick, you have an f***ing boss just like you."

Pursuant to the content of these messages, the Assistant Director and the Director of Public Affairs placed a call to the Grievant's sister, who was the listed emergency contact person. The Assistant Director testified that she told the Grievant's sister that she had not seen her that day and that she had heard from her and that she did not sound like herself and that perhaps she would like to call the Grievant to be sure that the Grievant was alright.

³ Agency Exhibit 1, Tab 6, Page 9

⁴ Agency Exhibit 1, Tab 5, Page 1

⁵ Agency Exhibit 1, Tab 5, Page 1

Subsequently that same day, the Grievant called the Assistant Director while the Director of Public Affairs and another Agency employee were in the Assistant Director's office. The Assistant Director and the Director of Public Affairs both testified that the Grievant was loud and belligerent, using foul language, in this phone call and that she was finally told to come to work on Monday and that, "we will see you on Monday." Both of these witnesses testified that the Grievant responded by saying, "Not if I see you first." They both interpreted this to be a threat.⁶

The Agency, through this witness, attempted to introduce the tape recording of the messages left on the employee's Blackberry. Counsel for the Grievant objected to introduction of this tape, arguing that it had not been provided to him when parties exchanged evidence. Neither counsel nor Grievant denied that messages were left on the Blackberry.

On Monday, December 22, 2008, the Grievant came to work. Several Agency witnesses testified as to what took place that morning. One witness testified that she could hear the Grievant's voice when this witness stepped off of the elevator on the floor where they worked. This witness, who is one of the Grievant's supervisors, went back to where the Grievant and another employee were talking and told them to be quiet and to go to work. The Grievant came to this supervisor's office and was highly agitated. At one point, she fell to her knees as she talked to her supervisor. The witness described, at another point in the conversation, "[the Grievant] got in [the employee's] face."

Shortly thereafter, the head of this Agency, having been called to come to this area, approached the Grievant and another employee with whom the Grievant was having an animated discussion, and asked if he could be of assistance. At this point, the Grievant looked at him and said, "I have been here for one and a half years and you do not even know my f***ing name."

Another witness testified that on the morning of December 22, 2008, she heard the Grievant say that she should have brought her gun to work. Soon thereafter, the Grievant was swearing at this witness and was close enough to her and was agitated enough that spittle was coming from the Grievant and landing on this witness. This witness also testified that she heard the Grievant say that she was going to throw a chair out of the window and then she was going to throw one of the Agency's employees out of the window and then jump out after her.

Another Agency witness testified that on the morning of December 22, 2008, he heard the Grievant talking about killing the people who had called her sister and then about killing herself. He corroborated the testimony of the Commissioner in that he too heard the Grievant say to the Commissioner that, "you do not know who the f*** I am." This witness also testified that he heard the Grievant say, "I should have brought my gun."

⁶ Agency Exhibit 1, Tab 3, Page 3

When the Grievant testified, she said that she felt bad and was not a nice person at that time. She also testified that she probably said some things that she regretted. She testified that December is the worst month of the year for her as it is dark and dreary. She corroborated that she was upset and she did leave angry voice mails on the Blackberry. She also corroborated that she might have said that she was so angry at one particular employee that she wanted to kill her. She stated that she did not think she told the Commissioner that he, “did not f***ing know her,” but it was possible that she said that. The Grievant then testified that, regarding the statement about bringing a gun, what she said was, “if [she] wanted to hurt someone, [she] would have brought a gun.” Regarding the comment about throwing the chair through the window, again, she stated that her comment was that, “if [she] wanted to hurt someone, [she] would probably throw a chair out of the window.”

Counsel for the Grievant argued that on Monday, December 22, 2008, the Grievant was simply trying to bring the doctor’s notes that she had been told to bring in order to come back to work and that she wanted to discuss this matter with management. In his closing, counsel provided the Hearing Officer with an Opinion from a Circuit Court Judge of the City of Richmond dated April 17, 2009, involving the appeal of a Hearing Officer’s Decision in the matter of Commonwealth ex parte Science Museum of Virginia v. James Mahone. Grievant’s counsel in this case argues that the Grievant’s wish to discuss her matters with management was a protected activity.

Virginia Code Section 2.2-3000(A) states:

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 employment disputes that may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001.

The EDR Director has concluded as follows:

Under Virginia Code Section 2.2-3000, 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.

The EDR Director has broadly interpreted Virginia Code Section 2.2-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management. Thus, bringing a concern about the need to bring doctor’s notes to a supervisor would appear to be an act, “otherwise protected by law.”

In EDR Ruling 2009-2128, the EDR Director narrowed the protection as follows:

This protection, however is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful. (For instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness...

In the Science Museum of Virginia case provided to the Hearing Officer by the Grievant's counsel, the Circuit Court stated that an Agency may not take disciplinary action against employees for engaging in protected activities. However, it is important to note that the Court determined that the Hearing Officer found in that matter the Grievant did not, "threaten or suggest that he intended to engage in violence..." Further, the Court found that the Hearing Officer determined, "that the manner in which the Grievant complained to the Board was not beyond the limits of reasonableness."

Counsel for the Grievant argues that, on the morning of Monday, December 22, 2009, the Grievant was merely trying to present the doctor's excuses which she had been ordered to produce before she could return to work. He argues that this was a protected activity and that the Grievant wanted to further discuss the reasons for why she had to produce those doctor's notes. Even if the Hearing Officer assumes that the Grievant was provoked on Friday, December 19, 2008, by her sister being called regarding her whereabouts, or pursuant to the Grievant's and the Grievant's sister's testimony that the Grievant's competency was questioned in that phone call, and assumes that she was further provoked in being told that she needed to bring a doctor's excuse with her to work, and further assumes that she had a protected activity in trying to discuss these matters with management on Monday, December 22, 2008, the Hearing Officer finds that the Grievant did in fact threaten Agency employees, did in fact verbally abuse Agency employees, did in fact engage in behavior that would create a reasonable fear of injury to another person, and did in fact engage in behavior that would subject another individual to extreme emotional distress and did in fact threaten to injure an individual or to damage property.

Counsel for the Grievant argued that the Group III Written Notice only referenced the activities that took place on December 22, 2008. The Hearing Officer finds that that Notice referenced and had attached to it the Notice of Intent to Terminate which set forth the activities of December 19, 2008 as well. While the Hearing Officer believes that reference and attachment to the original Group III Written Notice brings in to play the activities of December 19, 2008, even if the Hearing Officer disregards the messages left on the Blackberry on December 19, 2008, the Hearing Officer still finds that the language used and the threats made on Monday, December 22, 2008 fully justify the Group III Written Notice and termination.

Accordingly, the Hearing Officer finds that the Agency has borne its burden of proof to establish that the Grievant engaged in workplace violence which does rise to the level of a Group III offense, which does justify immediate termination.

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...”⁷ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Hearing Officer has considered all of the delineated items in mitigation as set forth in this paragraph and, in addition, has considered the fact that the Grievant was upset that her sister was contacted, was upset that she needed to bring doctor’s excuses, and the Hearing Officer has also considered any and all other possible sources of mitigation which were raised by the Grievant at the hearing and the Hearing Officer finds that there are no grounds for mitigation in this matter.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof and that the Group III Written Notice was validly and properly issued and that termination was proper.

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:

⁷Va. Code § 2.2-3005

Director
Department of Employment Dispute Resolution
600 East Main Street, Suite 301
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

[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

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).

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