

Issues: Group III Written Notice with termination (workplace violence); Hearing Date: 09/23/09; Decision Issued: 09/25/09; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9164; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: EDR Ruling Request received 10/09/09; EDR Ruling #2010-2451 issued 01/27/10; Outcome: Remanded to AHO; Remand Decision issued 01/28/10; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9164

Hearing Date: September 23, 2009
Decision Issued: September 25, 2009

PROCEDURAL HISTORY

On March 25, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of DHRM Policy 1.80 governing workplace violence.

On April 17, 2009, 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 August 17, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 23, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUES

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:

The Department of Behavioral Health and Developmental Services employed Grievant as a Forensic Mental Health Technician at one of its Facilities. The purpose of her position was:

To provide competent nursing care to an adult population ranging from ages 18 to 64 in a Forensic/civil setting to maintain a safe, clean and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs.¹

No evidence of prior active disciplinary action against Grievant was introduced during the hearing. Other than the facts giving rise to this grievance, Grievant's work performance was satisfactory to the Agency.

On March 19, 2009, at approximately 3:40 a.m., Grievant was sitting in a chair in a hallway at one of the Facility's housing units. Patients were asleep on the hallway. Several chairs were located near the bathroom on the hallway. The chair Grievant was sitting in had a view of the bathroom and the hallway. Grievant was not feeling well. She had her head down resting on her hand as she sat in the chair. Ms. R approached Grievant and demanded Grievant get out of her chair so that Ms. R could sit there. Ms.

¹ Grievant Exhibit 5.

R wanted to assume the post on the hallway. Grievant said she was on break and indicated she would not get out of the chair.² Ms. R could have sat in one of the other chairs and successfully assumed her post, however, she insisted on taking Grievant's chair. Mr. J was also present. He began kicking Grievant's chair and demanding that she get out of the chair. Mr. J indicated he believed Grievant was pretending to be sick and Grievant responded she was not pretending. Ms. R began talking about an incident that occurred several weeks ago where someone had said something disparaging about her mother. Grievant said, "I ain't say nothing about your momma and I ain't thinking about your momma." Ms. R stood up and pushed Grievant while Grievant was still sitting. Grievant tried to stand up and Ms. R pushed Grievant again. At approximately 3:44 a.m., Grievant and Ms. R began pushing and pulling and fighting one another. Mr. J attempted to intervene. He placed himself between Grievant and Ms. R. He was facing Ms. R and trying to keep Ms. R away from Grievant. Ms. R was attempting to get around Mr. J and hit Grievant. Grievant was attempting to hit Ms. R by going overtop of and around Mr. J. After Mr. J was between Ms. R and Grievant, another male employee, Mr. H, attempted to separate the two women by grabbing Grievant. Mr. J was able to separate Ms. R and moved her into another room. A video of part of the fight shows Grievant attempting to hit Ms. R at least four times while Mr. J is intervening with at least two of those hits being while Mr. H also is attempting to pull her away. Once patient was awake at that time and observed some of the fighting.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."³ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

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, 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:

² Grievant was permitted to take her breaks and remain at her post.

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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.

Group III offenses include, "physical violence; threatening others".⁴ Grievant engaged in physical violence by fighting with Ms. R. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment. Grievant's removal must be upheld.

Grievant contends she was engaging in self-defense after Ms. R had started the fight. Grievant is correct with respect to the beginning of the fight. Initially, Grievant was hitting Ms. R in order to stop Ms. R from hitting Grievant. The Agency did not discipline Grievant for engaging in self-defense. Once Mr. J had positioned himself between Grievant and Ms. R, Grievant could have ended the fight simply by stopping her forward movement. Instead, Grievant continued to push against Mr. J in an attempt to reach and hit Ms. R. Mr. H attempted to intervene by grabbing Grievant and pulling her away. If Grievant had stopped moving towards Ms. R, the fight would have ended as Mr. H was attempting to hold Grievant. Instead, Grievant kept moving towards Ms. R and attempting to hit her. Some of Grievant's blows may have hit Mr. J instead of Ms.

⁴ See Attachment A to the DHRM Policy 1.60, *Standards of Conduct*.

R. Although Grievant engaged in self-defense, she also engaged in fighting that could have resulted in injury to Mr. J and Mr. H as well as herself.

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.

Grievant did not start the fight. Her desire to end the fight by beating Ms. R is understandable. The question is whether this a mitigating circumstance. Although the Hearing Officer may have reached a different conclusion, the Hearing Officer is not a super-personnel officer who can substitute his opinion regarding the appropriate discipline once the Agency has met its burden of proof. In this case, the Agency’s discipline does not exceed the limits of reasonableness because it is authorized by the DHRM Standards of Conduct.⁶ In light of the standard set for the in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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.

⁵ Va. Code § 2.2-3005.

⁶ Grievant’s illness does not appear sufficiently grave so as to have impaired her judgment or ability to fight with Ms. R.

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 St., 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
600 East Main St. STE 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 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.⁷

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9164-R

Reconsideration Decision Issued: January 28, 2010

RECONSIDERATION DECISION

On January 27, 2010, the EDR Director issued Ruling 2010-2451 remanding the grievance to the Hearing Officer. During the hearing, Grievant asserted that she was not provided the investigators report of the incident. The EDR Director stated:

Accordingly, the hearing officer is instructed to rule on the issue of the agency's purported non-compliance in its alleged failure to provide the grievant with a copy of the investigation report.

To the extent an investigation report existed, the report would not be material to the outcome of this case. The most significant evidence for this case was the video showing Grievant's response to another employee who started a fight with Grievant. Grievant viewed that video during the hearing. An investigation report would not change what was evident from the video. Accordingly, to the extent such an investigation report existed, the Agency's failure to produce the report would be harmless error.

For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer