

Issue: Group III Written Notice with termination (threatening behavior); Hearing Date: 08/31/10; Decision Issued: 09/01/10; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 9380; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9380

Hearing Date: August 31, 2010
Decision Issued: September 1, 2010

PROCEDURAL HISTORY

On June 3, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for disruptive and threatening behavior.

On June 5, 2010, 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 he requested a hearing. On July 26, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing a decision in this case due to the unavailability of the parties. On August 31, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 University of Virginia employed Grievant as a Recycling Tech. He had been employed by the Agency for approximately 3 years prior to his removal effective June 3, 2010. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On May 5, 2010 at approximately 3:30 p.m., Grievant walked into the Human Resource Office and walked directly to the office of Ms. M. He asked her some questions about an incident that he had previously asked her to investigate. She responded to Grievant that his supervisor already should have spoken to him about her findings. Grievant did not like this response. He made several loud comments indicating that management was showing favoritism and not being truthful and how "this was a bunch of sh-t" as he left the department.

A few minutes later, Grievant returned with a coworker, Mr. S. Grievant barged into Ms. M's office. The Human Resource Director was standing near Ms. M's door and noticed that she was using the telephone. The Human Resource Director asked Grievant to "please have a seat". A seat was located a few feet outside of Ms. M's door. Grievant said that he did not have to leave her office because he and Ms. M "were on speaking terms". The Human Resource Director repeated that Ms. M was on the telephone and that with his loud talking, Ms. M could not hear the telephone call. Ms. M had placed her finger in one of her ears to try to better hear the caller with her other ear.

The Human Resource Director told Grievant that he was being rude and that if he just had a seat that he could see Ms. M in a few minutes. Grievant moved out of Ms. M's office and the Human Resource Director closed the door. Grievant then told the Human Resource Director that he was not going to sit down and that the Human Resource Director was being rude. The Human Resource Director explained that Grievant did not have an appointment and by asking him to wait and have a seat she was not being rude. Grievant was very loud. He was speaking in an angry tone and pacing back and forth in an agitated manner. He picked up his backpack and said that the Human Resource Director was rude because she was in his personal space. The Human Resource Director backed up and went behind the counter area of Ms. T's desk thereby putting the counter between her and Grievant. Mr. S had moved to a corner to be as far away from Grievant as he could move. The Human Resource Director walked away and went inside of her office. Grievant made a comment as though he was speaking to Mr. S. Grievant said "the damn infrastructure". The Human Resource Director turned around and told Grievant that he needed to watch his language because he was cursing. Grievant denied the allegation and said that he was talking about the dam that holds water down the street. The Human Resource Director told him that she did not believe that was what he meant at all. Suddenly, Ms. M opened her office door and said that she was ready to see Grievant. The Human Resource Director told her that she was handling this matter and asked her to return to her office and closed the door. The Human Resource Director was concerned that Ms. S may be entering circumstances in which her safety would be in jeopardy. The Human Resource Director returned to standing behind the counter and said to Grievant that he was being loud and disruptive. She identified herself as the Human Resource Director and said that she was "directing him to leave the department". Grievant refused. The Human Resource Director stated her name and that she was the Human Resource Director and that she was giving him a direct order to leave the department. Grievant said that he had the right to be there and then asked her for her business card to which she replied that she did not have any because she was "fresh out". Grievant walked towards the counter pointing at the Human Resource Director and demanding for her to write down her name and phone number. The Human Resource Director said her name and title again and that he knew how to get in touch with her.

Because Grievant would not leave, the Human Resource Director went into her office and called the Sustainability Manager who oversees the Recycling Department in which Grievant was employed. She told him to come up immediately to assist in removing an employee who was being very loud and disruptive and refused to leave the Human Resource Department. The Sustainability Manager ran from his office about a block away to the Human Resource Office. He moved Grievant into the hall. Mr. S also walked into the hall. The Human Resource Director was told by another employee that Ms. T was crying. The Human Resource Director went to see Ms. T. Ms. T had tears running down her cheeks and told the Human Resource Director that she was frightened that something was going to happen and that she was personally in danger from Grievant and unable to get away.

The Sustainability Manager first observed Grievant while he was inside the Human Resource department. Grievant was loud and out of control. He was fidgety and almost shaking. The tone of his voice was angry and he was pacing back and forth in the area immediately in front Ms. T's desk. Even after the Sustainability Manager arrived, Grievant continued to loudly state that his department was providing "preferential treatment and padding timesheets" as well as "allowing an employee to work without supervision". The Sustainability Manager moved Grievant into the hallway and then into a conference room. Mr. S was also in the conference room. The Sustainability Manager called the Recycling Superintendent, Mr. B to join them. Grievant sat in a chair with his leg shaking at a fast pace and he was very loud. The Sustainability Manager asked Grievant to calm down but he did not calm down. At some point, the Sustainability Manager concluded that their discussion would not be productive so he asked Grievant and Mr. S to leave for the day. The conversation ended at 3:52 p.m.

On May 10, 2010, the Sustainability Manager began a "predetermination" investigation into the incident on May 5, 2010. The Sustainability Manager interviewed Mr. S. Mr. S felt that Grievant was "hostile" while in the Human Resource Director's office and that Grievant's behavior was inappropriate. Mr. S felt that Grievant was very close to losing control and that his conduct was threatening.

The Sustainability Manager asked Grievant and the Recycling Manager to meet with them. On the way to the Sustainability Manager's office, Grievant yelled to another employee "don't go far, I might need some backup, seriously I might need some help!" Grievant then said that it "looks like I am going to the border -- got to get some green cards." Grievant was referring to the Sustainability Manager's Hispanic ethnicity.

When Grievant arrived at the Sustainability Manager's office, the Sustainability Manager explained to Grievant that it was a predetermination meeting to investigate the events of May 5, 2010. The Sustainability Manager asked Grievant regarding certain allegations of the Human Resource Director. He asked Grievant if Grievant had become loud. Grievant said that, "you all have yet to see me get loud, that would be my recommendation to you." Grievant said that telling him not to be loud "would be like putting handcuffs on a Jew and telling him not to make money". The Sustainability Manager was surprised and shocked by Grievant's comment and asked him to repeat what he had said. Grievant repeated the comment twice to make sure it was clear on what he was saying. The Sustainability Manager asked Grievant if he had been asked to leave the office. Grievant said "no, not directly." Grievant then became unruly and said "this is pretty much a joke. You might have a big fine job but it doesn't matter. If something comes of this I will resign. This is a joke." The Sustainability Manager asked Grievant "are you resigning?" Grievant responded "no." Grievant then said "if something comes of this, you will be approached down the road." The Sustainability Manager asked, "are you threatening me?" to which Grievant responded "no". Grievant then said that his neighbor's daughter was the former president of the University of Virginia. Grievant was trying to change his statement from the physical threat to a legal

threat. Grievant said, "I'm done dealing with this dumb crap" and walked out of the Sustainability Manager's office.

During his conversation with the Sustainability Manager on May 10, 2010, Grievant was loud, confrontational, and abrasive. His physical demeanor reflected agitation, anger, and hostility towards the Sustainability Manager. The Sustainability Manager felt threatened by Grievant's behavior and at various times was fearful regarding how Grievant would react in response to questions.

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."¹ 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."

"[T]hreatening others" is a Group III offense.² Grievant's behavior was so loud, continuous, abrasive, confrontational, and accusatory that it served as a threat to others. On May 5, 2010, Ms. T observed Grievant's behavior and became so fearful regarding what he might do that she felt trapped and began crying. Her fear was reasonable under the circumstances. On May 10, 2010, the Sustainability Manager observed Grievant's behavior and became fearful of and felt threatened by Grievant. Grievant told the Sustainability Manager that he would be "approached down the road" which the Sustainability Manager construed as a threat of a physical response. Grievant quickly attempted to mask that threat by suggesting he knew the daughter of the former president of the University of Virginia. When the facts of this case are considered as a whole, there is sufficient evidence to conclude that Grievant's words, demeanor, and actions established a threat to other employees thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal is upheld.

Grievant argued that several employees did not consider the Sustainability Manager and the Human Resource Director to be "good people" and that sometimes the Sustainability Manager cursed to his subordinates. Even if the Hearing Officer assumes for the sake of argument that these allegations are true, the outcome of this case does not change. Neither the Sustainability Manager nor the Human Resource Director engaged in any behavior approaching the misbehavior demonstrated by Grievant on May 5, 2010 and May 10, 2010.

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60. The Agency did not rely upon the Workplace Violence policy of DHRM. Because of this, the Hearing Officer will not consider that policy even though it is clearly relevant.

Grievant argued that his comments regarding ethnicity, etc. did not reflect his true character. If the Hearing Officer disregards Grievant's inappropriate comments about religion and ethnicity, the outcome of this case does not change. Grievant was disciplined for the degree of threat presented to other employees. His behavior represented an excessive level of conflict that he created a reasonable fear in his co-workers regarding their safety.

Grievant was attempting to have one of his concerns addressed by Agency managers. Although Grievant's desire to resolve his concerns with Agency managers may be a protected activity, the method by which he carried out that activity was inappropriate and exceeded the behavior tolerated under the Standards of Conduct.

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...."³ 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. In light of this standard, 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.

³ *Va. Code § 2.2-3005.*

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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.