

Issue: Group III Written Notice with termination (inappropriate physical contact with another employee without permission); Hearing Date: 09/16/10; Decision Issued: 09/17/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9402; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9402

Hearing Date: September 16, 2010
Decision Issued: September 17, 2010

PROCEDURAL HISTORY

On May 4, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for hugging and kissing an employee against her will.

On May 4, 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 August 17, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 16, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Corrections employed Grievant as a Corrections Officer until his removal. His post was at a Hospital where inmates were taken and remained for treatment. As part of his duties he would encounter Hospital employees providing services to patients. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Ms. S was an employee of the Hospital. On April 25, 2010 at approximately 4:40 p.m., Ms. S entered the Inmate Patient's room to give him his dinner tray. As she entered the room, Grievant said "Oh, I've been waiting for you to come in." He moved closer to Ms. S. She placed the Inmate Patient's tray on the bedside table and tried to wake him up so that he would be able to eat. Grievant said "Don't wake him up. He's been sleeping since I've got here." Ms. S said, "Okay" and began to walk to the door. Grievant stopped her by moving into her path. She asked if Grievant could move because she had another patient to serve. Grievant then grabbed her and gave her a hug. She told him to stop but Grievant would not stop. She became angry and closed her eyes because Grievant was too close to her face. Grievant kissed Ms. S. She pushed way from him and "cursed him out." She then walk up the hallway and told another employee what had just happened. Ms. S was upset by Grievant's behavior and could not tolerate being around Grievant again.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”¹ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, “[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense.”⁴

Grievant was responsible for interacting with Ms. S when she worked at the Hospital and provided services to inmates who were patients at the Hospital. Grievant's behavior was so intrusive and offensive to Ms. S that she could not tolerate to see Grievant again. Grievant undermined his effectiveness as an employee with the Agency. Grievant's behavior is consistent with a Group III offense such as "threatening others" under the *Standards of Conduct*. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Noticed, an agency may remove an employee. Grievant's removal must be upheld.

Grievant contends that the matter is one of "he said -- she said". There are several reasons why the Agency's version of the events is to be believed as true. First, Grievant provided at least four different versions of what occurred. Grievant told the Assistant Warden that he had not ever hugged, bumped, or kissed Ms. S. Within an hour later, Grievant admitted that he had hugged Ms. S but that the hug occurred two months prior to April 25, 2010. Grievant later told a Police Officer that he accidentally had bumped Ms. S on April 25, 2010. On the same day, Grievant admitted to the Police Officer that he had accidentally bumped and hugged Ms. S. Grievant's initial claim that he had not hugged, bumped, or kissed Ms. S is not credible. Second, when Ms. S learned that Grievant had initially denied the interaction, she contacted the local police and filed a criminal complaint against him. By escalating the matter from an administrative one to a criminal one, Ms. S demonstrated that she considered Grievant's

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁴ The Agency did not rely upon DHRM policy governing workplace violence. The Agency referenced other policies but did not present them as exhibits.

actions to be serious. Third, Ms. S appeared at the criminal trial of Grievant but refused to testify against him. The Agency Investigator spoke with Ms. S in the Commonwealth Attorney's office. Ms. S was distraught and shaking. She told the Agency Investigator that she would not testify because she did not wish to see Grievant. Fourth, Grievant's criminal defense attorney admitted to the court that there was sufficient evidence to obtain a conviction for simple assault. He asked the court to take the matter under advisement. The court took the matter under advisement for six months but required Grievant to perform 100 hours of community service, submit to a psychological evaluation and, refrain from contacting the victim.

Grievant argued that the Agency's Investigator used his personal relationship with Grievant in order to obtain information from Grievant. Grievant did not present any policy that would have prohibited the Agency's Investigator from utilizing his personal relationship with Grievant to obtain information from Grievant. There is no basis to alter the outcome of this grievance because of the actions of the Agency's Investigator.

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. 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:

⁵ Va. Code § 2.2-3005.

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 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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.