

Issue: Group II Written Notice (workplace violence) and Termination (due to accumulation); Hearing Date: 03/16/11; Decision Issued: 03/21/11; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 9476; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 04/06/11; EDR Ruling No. 2011-2951 issued 04/08/11; Outcome: Untimely – request denied; Administrative Review: DHRM Ruling Request received 04/06/11; DHRM Ruling issued 04/08/11; Outcome: Untimely – request denied; Administrative Review: Reconsideration Request on EDR Ruling No. 2011-2951 received 04/11/11; EDR Ruling No. 2011-2952 issued 04/14/11; Outcome: Out of Compliance – Untimely – No Ruling.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9476

Hearing Date: March 16, 2011
Decision Issued: March 21, 2011

PROCEDURAL HISTORY

On October 8, 2010, Grievant was issued a Group II Written Notice of disciplinary action for violation of the Workplace Violence Policy 1.80. Grievant was removed from employment based upon the accumulation of disciplinary action.

On October 20, 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 December 7, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The time frame for issuing a decision was extended by the Grievant's request for a ruling from the Director of the Department of Employment Dispute Resolution. On March 16, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant Representative
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 Plumber/Steamfitter. Grievant reported to a supervisor who reported to the Associate Director. Grievant had prior active disciplinary action. On February 16, 2010, Grievant received a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions, violation of Policy 1.80, and use of obscene or abusive language.

On September 29, 2010, the Associate Director was standing in front of the entrance to the Shop greeting employees as they arrived to work. Grievant was a few minutes late to work. He got out of his personal vehicle with the objective of walking to his work truck. The entrance to the Shop was along Grievant's path. The Associate Director observed Grievant approaching. Grievant knew that he was a few minutes late and he expected the Associate Director to comment on his tardiness. As Grievant approached the Associate Director, the Associate Director said "Good morning". Grievant did not reply and ignored the Associate Director. The Associate Director said, "Is everything okay?" Grievant ignored the Associate Director and continued to walk. The Associate Director said "I need to speak with you." Grievant stopped. The Associate Director said, "I need to speak with you, I'm not finished yet." Grievant mentioned something about another employee not receiving discipline for inappropriate

behavior. The Associate Director said that Grievant would not know whether another employee was disciplined. Grievant turned and continued walking in the direction of his utility truck. The Associate Director began walking three or four feet behind Grievant and continued to indicate that he wanted to speak with Grievant. After the Associate Director walked behind the Grievant for approximately 35 feet, Grievant abruptly turned 180° to his right and faced the Associate Director. The Associate Director was startled by Grievant's movement and began moving backwards. If the Associate Director had not begun moving backwards, Grievant's extended arm would have hit the Associate Director. As Grievant faced the Associate Director, he told the Associate Director in an angry and elevated tone to "Get away from me!"¹ Grievant's facial expressions and demeanor reflected anger directed towards the Associate Director. For a brief moment, the Associate Director was concerned for his well-being because he feared that Grievant might harm him. To diffuse the conflict, the Associate Director said, "Let's go see [the Human Resource Director]." Grievant complied with the Associate Director's instruction.

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."² 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:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;

¹ One witness described Grievant's behavior as Grievant "getting in [the Associate Director's] face, yelling at him."

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

- 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.

Failure to follow policy is a Group II offense.³ Grievant violated DHRM Policy 1.80 because he displayed an intimidating presence causing the Associate Director to have a reasonable fear of injury. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has a prior active Group II Written Notice. Accordingly, Grievant's removal must be upheld.

Grievant argued that the Associate Director was untruthful. The Hearing Officer closely observed the Associate Director as he testified. The Hearing Officer concludes that the Associate Director was credible with respect to the material facts of the Agency's allegations against Grievant. Grievant suddenly turned towards the Associate Director, almost hitting the Associate Director. Grievant moved towards the Associate Director while displaying anger and aggression. The Associate Director responded by moving backwards with the reasonable belief that he was at risk of being harmed by Grievant.

Grievant argued that the Associate Director initiated the conflict by touching Grievant on the shoulder. The Associate Director denied doing so. If the Hearing Officer assumes for the sake of argument that the Associate Director touched Grievant on the shoulder, the outcome of this case would not change. The degree of aggression displayed by Grievant exceeded what would have been appropriate in response to an unwanted touching by the Associate Director.

³ See, Attachment A, DHRM Policy 1.60.

Grievant argued the Associate Director could not have felt threatened by Grievant because the Associate Director is larger than Grievant. This argument fails. Although the relative size of combatants may be an issue with respect to the outcome of a fight, it is not significant with respect to being fearful of being hit by another person. It is clear that the Associate Director briefly believed that he was at risk of being hit by Grievant.

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....”⁴ 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.

Grievant alleged that the Associate Director was harassing him and retaliating against him. No credible evidence was presented to support these allegations.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II 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.
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

⁴ *Va. Code § 2.2-3005.*

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

April 8, 2011

Grievant's Representative

RE: **Grievant v. University of Virginia**
Case No. 9476

Dear Representative:

On April 6, 2011, this Department received your request dated April 4, 2011, in which you requested the Department of Human Resource Management to conduct an administrative review on the hearing decision in the above referenced case. Please be advised that, in accordance with the Grievance Procedure Manual, all challenges to hearing decisions must be received by this Department within 15 calendar days of the date the hearing decisions are issued. We have determined that your appeal was due in this Department by the close of business on April 5, 2011, and we have no authority to waive that deadline. Because we deem that the receipt of your appeal by this Department was not timely, respectfully we must decline to honor your request.

Sincerely,

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services

c: Sara R. Wilson, Director, DHRM
Claudia T. Farr, Director, EDR