

Issue: Group III Written Notice with Termination (verbal abuse and threatening behavior); Hearing Date: 05/25/11; Decision Issued: 05/31/11; Agency: University of Virginia; AHO: Carl Wilson Schmidt, Esq.; Case No. 9602; Outcome: No Relief – Agency Upheld.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9602**

Hearing Date: May 25, 2011  
Decision Issued: May 31, 2011

**PROCEDURAL HISTORY**

On March 26, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for verbal abuse and threatening behavior along with physical assault.

On April 1, 2011, 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 May 11, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 25, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 Head Equipment Manager. He began working for the Agency in August 2004. Grievant's work performance was consistently rated as "highly effective". In December 2004, Grievant received a monetary bonus for exceptional performance. In 2005, he received an Acknowledgment of Extraordinary Contribution. Grievant was well regarded by other employees at the Agency. An Associate Head Coach wrote, "I have never worked with an equipment manager who was as efficient and conscientious as was [Grievant]". No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked with two other employees in a room inside one of the Agency's athletic centers. They shared a series of several desks that were connected with one side touching a wall. They sat on the other side of the desks facing the wall. When facing the wall, Mr. T sat to the far left, Mr. M sat in the middle, and Grievant sat on the right. Although all three employees reported to Mr. A, Grievant supervised the daily tasks of Mr. T and Mr. M. Grievant and Mr. M were coworkers and personal friends.

On March 21, 2011 at approximately 3:45 p.m., Grievant and Mr. T began discussing Mr. T's vacation schedule. Mr. M was seated in the middle chair and overheard the discussion and asserted that he was scheduled to be off from work on a day Mr. T asked for leave. Grievant indicated that Mr. M had not requested that day off. Mr. M indicated he had done so and an argument ensued. Grievant and Mr. M began

cursing at each other and yelling at each other. Grievant stood up to move away to help end the argument. Mr. M said “don’t talk to me like that”. Grievant replied “don’t talk to me like that.” They argued some more. Grievant stepped towards Mr. M and approached Mr. M from Mr. M’s right side. Grievant placed his left hand behind Mr. M’s back or the back of his chair. Grievant placed his right hand on Mr. M’s chest and grabbed his shirt and yelled at Mr. M. Grievant pushed Mr. M. to Mr. M’s left and into Mr. T’s chair with sufficient force to move Mr. T against the desk and push it a few inches closer to the wall. As Grievant released his grip of Mr. M, Grievant began walking towards the door. Mr. M. said “that hurt”. Grievant replied, “I apologize.” Grievant left the equipment room and walked down to the laundry room to work there and calm down. Grievant was upset with himself for his actions towards Mr. M. Grievant walked back to the equipment room and decided to inform the Supervisor of what had happened. Grievant knew that Mr. M would not report the incident to the Supervisor because of their friendship. Grievant wanted to ensure that Mr. M “had the means to handle the incident without the feeling of guilt of reporting it.” Grievant informed the Supervisor of what had happened.

At approximately 4:45 p.m., Grievant sent Mr. M a text message stating:

Not going to try and hash it out in text but wanted to apologize for treating you like that. Never should have touched you. I did let [the Supervisor] know we argued and I grabbed you. I understand if you file a complaint. The argument isn’t even relevant once I did that. Sorry again.

At 6:24 p.m., Mr. M asked Grievant to call him. At 7:05 p.m. Grievant called Mr. M and they talked for about 13 minutes about what had happened. Mr. M asked Grievant if he had done something that provoked Grievant’s response. Grievant told Mr. M that he had never responded to anything that way in his entire life and he did not know what happened in that instance. Mr. M told Grievant that he could always count on him to get things done. Grievant agreed with Mr. M. They both agreed that they would not let the incident affect their friendship. Mr. M told Grievant that he would never have filed a complaint. Grievant told Mr. M that he felt obligated to report it and had already done so.

During the Agency’s investigation of the matter, Grievant was truthful and responsive. Grievant’s testimony during the hearing was credible in all respects.

## **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.”<sup>1</sup> Group II offenses “include acts of misconduct of a more serious

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.”

“Physical violence” is a Group III offense.<sup>2</sup> DHRM Policy 1.80 defines workplace violence is defined 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.

Workplace violence subjects an employee to disciplinary action up to and including removal.

Grievant engaged in “physical violence” and “physical assault” while at work. Grievant grabbed Mr. M and pushed him into another employee. Mr. M stated “that hurt” in response to Grievant’s action. 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, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

*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....”<sup>3</sup> 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 argues that the disciplinary action against them should be mitigated to a level of disciplinary less than removal. He cites several reasons. First, Grievant has a consistently favorable performance history. He is well regarded by other Agency employees for his work performance. Second, Grievant immediately recognized his

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<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> *Va. Code § 2.2-3005.*

inappropriate behavior and apologized to Mr. M. Third, Grievant quickly reported his behavior to the Supervisor because he recognized his behavior was inappropriate and he knew that no one else would report him to the Supervisor. Forth, Grievant restored his relationship with Mr. M and would have little difficulty returning to work. Fifth, Grievant was honest throughout the Agency's investigation.

The Hearing Officer is not a "Super Personnel Officer" who can substitute his preference for that of the Agency's decision once the Agency has presented sufficient evidence to support the issuance of its disciplinary action. Although several of the factors cited by Grievant speak well of his character and his integrity, when they are considered as a whole they are insufficient to mitigate the disciplinary action under the EDR Director's standard. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

The Hearing Officer believes that Grievant deserves a second chance at employment with the Agency. The Hearing Officer recommends that the Agency permit Grievant to be eligible for rehire and make a notation in his personnel file to that effect.

### **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.
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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>4</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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