

Issue: Group III Written Notice with Termination (failure to report workplace violence);
Hearing Date: 07/15/11; Decision Issued: 07/20/11; Agency: DJJ; AHO: William
S. Davidson, Esq.; Case No. 9630; Outcome: Partial Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9630

Hearing Date: July 15, 2011
Decision Issued: July 20, 2011

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on April 19, 2011 for:

On April 10, 2011, you were assigned as the administrator on call. On April 10, 2011, you were notified and made aware of an incident where an officer made verbal threats in the workplace that included the threat of bodily harm. You failed to report the incident until after the officer returned to work on April 13, 2011. This is a violation of the agency's Administrative Directive # 05-008 Workplace Violence which states that supervisors who witness or are informed of an incident or threat of workplace violence must immediately report this information to the organizational unit head. ¹

Pursuant to the Group III Written Notice, the Grievant was terminated. ² On April 29, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. ³ On June 13, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On July 15, 2011, a hearing was held at the Agency's location.

APPEARANCES

Advocate for the Agency
Attorney for the Grievant
Grievant
Witnesses

ISSUE

1. Did the Grievant violate Administrative Directive # 05-008, Workplace Violence, by failing to immediately report a threat of workplace violence to the Organizational Unit Head?
2. Was the Grievant's punishment comparable to that given by this Agency to another employee for the same offense?

¹ Agency Exhibit 1, Tab 1, Page 4

² Agency Exhibit 1, Tab 1, Page 4

³ Agency Exhibit 1, Tab 1, Page 2

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

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 Agency provided the Hearing Officer with a notebook containing twenty-one (21) tabbed sections. Prior to the commencement of the hearing, the attorney for the Grievant asked that Attachment "A": Examples of Offenses Grouped by Level, be attached to Agency Exhibit 1, Tab 2. There was no objection from the Agency and, accordingly, Attachment "A" was inserted into the Agency's notebook at the end of Exhibit 1, Tab 2 and became a part of Agency Exhibit

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

1, Tab 2. With this addition, the Agency's notebook was accepted without objection as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing eleven (11) tabbed sections and that notebook was accepted without objection as Grievant Exhibit 1.

The essential facts in this matter are undisputed. On April 10, 2011, at approximately 6:12 p.m., during a shift change, Officer K made several threatening statements within the presence of other officers and Lieutenant M. Officer K's statements included that he, "was going to get his gun and shoot somebody." Officer K was addressed by Lieutenant M and verbally told to discontinue such behavior. Officer K continued to be belligerent and made threats about shooting somebody. The shift ended and Officer K, Lieutenant M and all fellow officers who heard the threats departed the Agency.

Lieutenant M, while driving home, called the Grievant and informed him of this situation. The Grievant told Lieutenant M that he had other disciplinary matters pending regarding Officer K and he would deal with them on April 13, 2011, the next day that Officer K would return to the Agency to begin his next shift.⁷

On April 13, 2011, while the Grievant and Lieutenant M were conferring about the incident that occurred on April 10, 2011, the Grievant's immediate superior, the Assistant Superintendent of Operations, told him to cease working on this matter. The Assistant Superintendent of Operations provided the Grievant with a Memorandum, which was dated April 13, 2011 and was delivered on April 14, 2011, indicating that the Grievant was now the subject of an Administrative Investigation regarding the events of April 10, 2011, and his failure to report the April 10th incident to the Assistant Superintendent of Operations.⁸

The Agency, in its Written Notice, clearly states that the Grievant's failure to notify his superior, on or about April 10, 2011, of the incident that was reported to him by Lieutenant M is a violation. The Agency states that:

...this is a violation of the agency's Administrative Directive #05-008 Workplace Violence which states that supervisors who witness or are informed of an incident or threat of workplace violence must immediately report this information to the organizational unit head."⁹

Administrative Directive #05-008 at paragraph F, states in pertinent part as follows:

...**Any supervisor** who witnesses or is informed of an incident or threat of workplace violence must immediately report this information to his or her organizational unit head. The organizational unit head will be responsible for assessing the immediacy and severity of any reported threat and for implementing actions to minimize any risk to employees...As soon as is practicable, and after ensuring the provisions of any needed medical care,

⁷ Agency Exhibit 1, Tab 11, Page 1

⁸ Grievant Exhibit 1, Tab 9, Page 1

⁹ Agency Exhibit 1, Tab 1, Page 4

the organizational unit head shall report any incident of workplace violence to the appropriate Deputy Director and to the Inspector General.¹⁰ (Emphasis added)

The only witness who testified personally before the Hearing Officer was the Assistant Superintendent of Operations for the Agency. While early in his testimony there was some belief by him that the Grievant was serving as the “Organizational Unit Head” on the evening of April 10, 2011, he graciously conceded that the Grievant was not the Organizational Unit Head. The Organizational Unit Head was this witness’ superior and, in the absence of his superior, it would be him and if both of them were absent, then it would have been the Grievant. The Grievant in this matter, was serving in the capacity of Administrator on Call.

As the Administrator on Call, the Grievant did have a duty to notify his superior when he had been notified of the incident by Lieutenant M. However, Administrative Directive #05-008 clearly states that, “**any supervisor** must immediately report a threat of workplace violence to the organizational unit head.” In this matter, Lieutenant M did not comply with that requirement. She merely informed the next person higher than her in the chain of command. This is a clear violation of Administrative Directive #05-008. Both the Grievant and Lieutenant M failed to immediately notify the Organizational Unit Head.

The Assistant Director of Operations quite honestly stated that he did not know why Lieutenant M did not report this matter to the Organizational Unit Head and he was not certain as to why she was not disciplined for that failure.

The Grievant, by counsel, entered into a stipulation as to what Lieutenant M would have testified to had she been present at the hearing. That stipulation is what has been set forth in this fact pattern. The Grievant testified that he was aware of Officer K’s tendency to become agitated and say things that he did not intend to follow through on and, as Officer K would not return to work until April 13, 2011, the Grievant felt that the matter could wait until the beginning of that shift and he would deal with it at that time.

The Agency presented the Hearing Officer with many policy statements other than the one under which they charged the Grievant. All of these policy statements dealt with violence, threats of violence and the need to report such matters on a timely basis.

The Grievant testified that he was unaware of all of the contents of Administrative Directive #05-008. His counsel acknowledged that the Grievant should have been aware of the contents of this Directive. However, the Hearing Officer notes that on May 3, 2011, the Assistant Superintendent of Operations sent out a memorandum to all staff containing a copy of Administrative Directive #05-008 and inquired that all staff print and sign a roster acknowledging receipt. This action took place approximately two (2) weeks after the Grievant was terminated. It would appear that there was some concern that Administrative Directive #05-008 was not fully understood by the staff members of this Agency. Further, Lieutenant M filed an affidavit¹¹ and Lieutenant D filed an affidavit¹² both stating that they were unaware of the contents of this policy.

¹⁰ Agency Exhibit 1, Tab 9, Page 2

¹¹ Grievant Exhibit 1, Tab 11, Page 1

¹² Grievant Exhibit 1, Tab 11, Page 2

On April 27, 2011, approximately eight (8) days after the Grievant was terminated, Lieutenant M received a Group I Written Notice for failure to properly document the incident that took place on April 10, 2011.¹³ Lieutenant M received no punishment other than the issuance of the Group I Written Notice. When Lieutenant M did file the incident report on April 13, 2011, she mistakenly set forth that a death had occurred. Accordingly, not only was her report late, but it alleged that someone had died, perhaps as great an error as could be included in the report. Because she failed to timely file an incident report, she received a Group I Written Notice with no other discipline. However, it is clear that she also violated the mandates of Administrative Directive # 05-008 in that she did not immediately notify the Organizational Unit Head. This is the exact same allegation made against the Grievant for which he was summarily terminated.

In the course of his testimony and pursuant to argument, this Grievant alleges that there was disparate treatment between the punishment that he received and that which was received by Lieutenant M. The Hearing Officer finds that the Grievant has borne the burden of proof in showing that, where Lieutenant M merely received a Group I Written Notice for failure to notify the Organizational Unit Head and for failure to timely file an incident report, the Grievant, however, was terminated. This is the definition of disparate treatment.

Policy 1.60 sets forth the Standards of Conduct that apply to this Agency. That policy, under General Principals, provides in part as follows:

...Management should apply corrective actions consistently, while taking into consideration the specific circumstances of each individual case.¹⁴

Lieutenant M received a Group I Written notice with no further discipline and the Grievant was terminated. Both of them committed the exact same violation. Both are supervisors for the Agency.

Further, under General Principals, the Standards of Conduct states as follows:

...Prior to taking any corrective action it is suggested that management consider the following:

- Previous counseling, whether informal or formal that addressed the same or similar misconduct or performance
- Previous disciplinary actions that address the same or similar misconduct or performance
- **How issues with similarly situated employees have been addressed**
- Mitigating factors that would compel a reduction in the disciplinary action to promote the interest of fairness in objectivity

¹³ Grievant Exhibit 1, Tab 5, Page 1

¹⁴ Agency Exhibit 1, Tab 2, Page 5

- If the corrective action is appropriate for the specific offense (Emphasis added)¹⁵

It is certainly clear from the evidence that this Grievant had no prior counseling for this misconduct or similar misconduct, as it appears that he has never had any misconduct whatsoever. Further, he has obviously had no prior disciplinary action(s) of similar misconduct and it is also obvious that the Agency did not consider how it dealt with this Grievant in relationship to how it dealt with Lieutenant M. The Hearing Officer seriously questions whether any mitigating circumstances were considered by this Agency.

MITIGATION

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...”¹⁶ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Agency indicated that it considered mitigating factors but it does not set forth what those mitigating factors might have been.¹⁷ While the Hearing Officer is aware that it is extremely rare for mitigating factors to negate a termination, the Hearing Officer does point out that this Grievant had nearly a thirty-one (31) year work history with this Agency with no prior issues that were brought forward by the Agency to the Hearing Officer. The Grievant was rated a Contributor or Major Contributor over a number of recent years.¹⁸ Indeed, the Agency’s own witness indicated that he hoped the Grievant would apply to become an Assistant Superintendent.¹⁹

Further, under the *Rules for Conducting Grievance Hearings*, inconsistent discipline issued to similarly situated employees can be viewed as a mitigating circumstance.²⁰ If one employee receives a Written Notice for a founded complaint of misconduct and a second employee receives only a counseling memorandum, or nothing at all, for the same confirmed

¹⁵ Agency Exhibit 1, Tab 2, Page 5

¹⁶ Va. Code § 2.2-3005

¹⁷ Agency Exhibit 1, Tab 1, Page 4

¹⁸ Grievant Exhibit 1, Tab 6, Pages 1 through 23

¹⁹ Grievant Exhibit 1, Tab 6, Page 9

²⁰ Administrative Review of Director, Ruling No. 2010-2376

misconduct, a hearing office may consider the disparity in the discipline as a potential mitigating circumstance.²¹ The key is that the misconduct be of the same character.²²

In EDR Ruling No. 2010-2376, [the Director of EDR] explained that if one employee receives a Written Notice for a founded complaint of misconduct and a second employee receives only a counseling memorandum or nothing at all for the same confirmed misconduct, a hearing officer may consider the disparity in the discipline as a potential mitigating circumstance.²³ As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors.²⁴

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has borne its burden of proof in this matter in that the Grievant violated Administrative Directive #05-008 by failing to immediately report a threat of workplace violence to the Organizational Unit Head. However, the Hearing Officer also finds that the Grievant has borne his burden of proof in this matter in that he has established that the Agency, for the exact same incident and for the exact same violation, disparately punished him in relationship to Lieutenant M. Accordingly, the Hearing Officer directs that the Agency mitigate the Group III Written Notice to a Group I Written Notice with the identical consequences that were placed on Lieutenant M. Further, the Hearing Officer orders that the Agency reinstate the Grievant to his former position or, if occupied, to an objectively similar position. The Hearing Officer orders that the Agency award full back pay, from which interim earnings must be deducted, to the Grievant and that he have a restoration of full benefits and seniority. The Hearing Officer does not order that attorney's fees be paid in this matter.

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 14th Street, 12th Floor

²¹ Administrative Review of Director, Ruling No. 2010-2376

²² Administrative Review of Director, Ruling No. 2010-2376

²³ Administrative Review of Director, Ruling No. 2011-2823, 2011-2833

²⁴ Administrative Review of Director, Ruling No. 2011-2823, 2011-2833

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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.²⁵ 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.²⁶

[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]

William S. Davidson
Hearing Officer

²⁵ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.