

Issue: Group III Written Notice with Termination (threatening behavior); Hearing Date: 07/21/11; Decision Issued: 07/25/11; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9643; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9643

Hearing Date: July 21, 2011
Decision Issued: July 25, 2011

PROCEDURAL HISTORY

On April 19, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence and threats or coercion.

On April 26, 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 June 27, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 21, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant Counsel
Agency Party Designee
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 Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its Facilities until his removal effective April 19, 2011. He began working at the Facility in 2005. As part of his orientation, he received a copy of DHRM Policy 1.60, Standards of Conduct and the Agency's Administrative Directive 05-008, Workplace Violence. The purpose of his position was:

Provide juveniles with a safe environment by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform. Facilitate work skills and/or training prior to release from the JCC or from parole supervision. Address crimeogenic factors associated with recidivism by facilitating delivery of appropriate treatment services that will assist juvenile's reentry to the community. Provide assistance as needed to facilitate the juvenile's plan for reentry to the community that addresses the transitioning of work, school, housing, and treatment needs. Improve relationships with our local and state government partners to ensure maximum services for youth.¹

On April 10, 2011, Grievant was about to leave the Facility at the end of his shift when he walked by the Control Room and talked to Officer E. She told him that "[Mr. R]

¹ Agency Exhibit 9.

said you left something in the toilet for me". Grievant felt humiliated and offended by Officer E's comment. The comment also made him extremely angry.

Grievant walked near the time clock where Officer S and a group of officers were getting ready to exit the Facility. Officer S heard Grievant mumbling something to the Lieutenant and heard the Lieutenant advised Grievant that he could not make inappropriate comments. She heard Grievant state, "People keep talking s--t to me and I'm going to get my gun and shoot somebody." The Lieutenant said "Excuse me?" Grievant replied "I'm going to get my gun and shoot somebody" and "People just can't talk to me in any way they want to." Officer S felt threatened by Grievant's comment. She observed Grievant shaking his head left to right and walked to his locker. Grievant threw his coat to the ground near his locker. Grievant's comments made Officer S fearful for her safety. Officer S had observed Grievant lose his temper before and "vent," but she believed Grievant's comments on April 10, 2011 were an "escalation" and "beyond venting".

Officer E also overheard Grievant's comments. She became concerned for her safety. She took Grievant's threats seriously and began watching him closely to observe his behavior. Officer Sy overheard Grievant's comments. Initially, she laughed but Grievant's comments made her feel uneasy. She took his threat seriously. She knew that Grievant could be "explosive at times" but she had never seen him so upset.

Officer D overheard a portion of Grievant's comments. He did not pay much attention to Grievant's comments and was not concerned for his safety. He did not feel threatened by Grievant. He felt Grievant was "venting or blowing off steam".

The Lieutenant did not fear for her safety. When she heard Grievant's comments, she said out loud, "Let him vent." Grievant went to the time clock by the administrator's office. The Lieutenant asked Grievant what was wrong. Grievant said, "People need to be careful what they say." The Lieutenant said "I agree."

Grievant wrote a statement on April 18, 2011 in which he stated that on April 10, 2011 he said, "Someone is going to get shot."

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."² 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

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

warrant removal.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

Agency Administrative Directive 05-008 defines workplace violence as:

any act that results in threatened or actual harm to persons or property. This includes not only physical assaults, but also verbal or written communication or gestures intended to threaten or intimidate others, or which conveys a direct or indirect threat of harm to oneself or others.

Examples of prohibited conduct include, “threatening to harm, or encouraging others to harm, any individual.” Employees found to have violated the Directive “will be subject to disciplinary action up to and including dismissal from employment.”

Under Attachment A of the DHRM Policy 1.60, Standards of Conduct, “threatening others” is a Group III offense.

Grievant engaged in workplace violence contrary to the Agency’s Directive. Grievant threatened others contrary to DHRM Policy 1.60. On April 10, 2011, Grievant was angry and stated, “I am going to get my gun and shoot somebody”. His words were a threat to harm others. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly Grievant’s removal must be upheld.

Grievant argues that he did not intend to hurt anyone. He points out that he took no aggressive action toward any individual. Other than throwing his coat to the ground near his locker, Grievant did not physically confront any other employee or raise his fist or make any threatening gesture. It is not necessary for the Agency to establish that Grievant actually intended to hurt anyone.

Grievant argued that his comments were not directed at any one person and, thus, did not form a basis for disciplinary action. Grievant’s argument fails. As Officer S testified, she was “somebody” at the Facility. A threat to shoot somebody could have included Officer S or any other employee at the Facility. It is not necessary for the Agency to identify a particular person being threatened in order to show that there is a threat to others.

Grievant argued that he was merely “venting”. He points out that the Lieutenant recognized that he was “venting” and did not actually intend to harm anyone. The Lieutenant did not feel threatened by Grievant’s comments. Officer D also did not feel threatened by Grievant’s comments. Although it is clear that Grievant was “venting”, his

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

method of venting inappropriately included threatening others. Employees are free to vent to their supervisors regarding their frustrations. They are not free to do so in a manner that serves to threaten others. Several employees feared for their safety after hearing Grievant's comments. Their fear was reasonable based on the context in which Grievant's comments were made and the demeanor he displayed on April 10, 2011.

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:

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

⁵ Va. Code § 2.2-3005.

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.