

Issue: Group III Written Notice with suspension (workplace violence); Hearing Date: 03/15/12; Decision Issued: 03/16/12; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 9773; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9773

Hearing Date: March 15, 2012
Decision Issued: March 16, 2012

PROCEDURAL HISTORY

On November 14, 2011, Grievant was issued a Group III Written Notice of disciplinary action with a fifteen workday suspension for workplace violence.

On December 12, 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 she requested a hearing. On February 15, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 15, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 Virginia Department of Health employs Grievant as a Human Resource Analyst I. She has been employed by the Agency for approximately 28 years without receiving disciplinary action. Except with respect to the facts giving rise to this grievance, Grievant's work performance was satisfactory to the Agency.

Ms. M worked as the receptionist at the Facility. She was responsible for responding to visitors of the Agency who rang the bell at office entry. On October 25, 2011, a visitor rang the bell several times and Ms. M did not respond. Grievant noticed that Ms. M had not responded. Another employee asked Grievant if Ms. M was at her desk and Grievant responded "no" and that the bell had rung three times. Grievant returned to her office. Ms. M approached Grievant and said that she did not appreciate the remark Grievant made that Ms. M was not at her desk and had not responded to the door. Grievant said that Ms. M was not at her desk and that the bell rang three times. Ms. M wanted to step into Grievant's office to discuss the matter. Grievant said "no, let's discuss it at your desk." Ms. M went to her desk in the reception area and sat down. Grievant stood near the entry door to Ms. M's cubical and approximately two or three feet from Ms. M. They began to argue. Their voices continued to get louder. Ms. W worked near Ms. M's desk and heard the loud conversation. She walked to Grievant and Ms. M and said both of them needed to calm down. Ms. CT worked in an office approximately 50 feet away from Ms. M and Grievant. She overheard the yelling and walked towards the two women. Grievant was pointing at Ms. M as she argued with Ms. M. Grievant and Ms. M began yelling and screaming at each other. Ms. CT

observed Grievant pointing her finger in an intimidating manner at Ms. M. Ms. M stood up and slapped Grievant's left hand. Grievant's "normal reflex" was to hit back but Ms. CT grabbed Grievant's arm. Grievant yelled, "You hit me! You hit me!" Ms. M responded, "you had your finger in my face."¹ Ms. CT escorted Grievant back into Grievant's office. Ms. M continued to move in Grievant's direction so Mr. B stepped in front of Ms. M and backed Ms. M into her cubical. Ms. M told Mr. B that Grievant had "gone off" on her about not answering the door after three rings of the door bell. Ms. M told Mr. B that Grievant put "her finger in my face" and then demonstrated Grievant's behavior by pointing her right index finger and extending her arm so the fingertip was within inches of Mr. B's nose. Ms. M told Mr. B that "I slapped her hand away because nobody puts their finger in my face at work."²

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."³ 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;
- engaging in behavior that creates a reasonable fear of injury to another person;

¹ Agency Exhibit 3, p. 46.

² Agency Exhibit 3, p. 45.

³ 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 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.

On October 25, 2011, Grievant engaged in workplace violence contrary to DHRM Policy 1.80. She began a discussion with Ms. M but instead of removing herself from the conflict, she argued with Ms. M and raised her voice louder and louder as the argument continued. Grievant began shouting at Ms. M. Grievant yelled and screamed at Ms. M. Grievant demonstrated an intimidating presence as she spoke with Ms. M by pointing her finger at Ms. M in "an intimidating manner". Upon the issuance of a Group III Written Notice, an agency may remove an employee. In lieu of removal, an agency may suspend an employee for up to 30 workdays. Accordingly, the Agency's 15 workday suspension must be upheld.

Grievant argued that Ms. M struck her and that she was the victim of workplace violence. She argued she raised her arm to block Ms. M's blow. When an employee acts in self-defense in response to an attack from another person, that employee has not engaged in workplace violence. The Agency, however, did not take disciplinary action against Grievant because she exercised a right of self-defense. Prior to being hit by Ms. M, Grievant engaged in screaming and created an intimidating presence. As the confrontation continued to escalate, Grievant could have walked away.

Grievant argued that she should be granted relief because of the Agency's failure to properly discipline Ms. M for Ms. M's workplace violence in June 2011. It is clear that in June 2011, Grievant and Ms. M had a confrontation and that Grievant reported the matter to a supervisor. The Agency Division Head failed to investigate Grievant's allegations and take any action against Ms. M. It is unfortunate that the Agency failed to properly investigate Grievant's claim against Ms. M. The Agency's failure to investigate, however, is not a basis to alter the outcome of this case. It is speculative what action the Agency would have taken in June 2011 had it been able to timely investigate the confrontation. Grievant was responsible for refraining from workplace violence at all times and independently of any Agency investigation.

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.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension 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 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

⁴ Va. Code § 2.2-3005.

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.