

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 10/22/12; Decision Issued: 11/09/12; Agency: JMU; AHO; Lorin A. Costanzo, Esq.; Case No. 9942; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA  
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In the matter of: Grievance Case No. 9942**

**Hearing Date: October 22, 2012  
Decision Issued: November 9, 2012**

**PROCEDURAL HISTORY**

Grievant was issued a Group III Written Notice with termination on September 12, 2012 for Notice Offense Codes/Categories "36", and "32" (obscene or abusive language and violation of Policy 1.80 - *Workplace Violence*). The Written Notice stated:

On Friday, September 7, you were involved in an altercation involving 2 other [Agency] employees at [location redacted]. During this altercation, you caused property damage to another [Agency] employee's vehicle; and you physically attacked 2 [Agency] employees. This behavior is unacceptable. You are being separated from your employment at [Agency] effective September 12, 2012.

On September 17, 2012 Grievant timely grieved the issuance of the Group III Written Notice with termination. The matter was qualified for a hearing and on October 15, 2012 a hearing officer was appointed by the Department of Human Resources Management.

Hearing was held on October 22, 2012. By agreement of the parties, exhibits were admitted *en-masse* and Agency Policy 1371 (revision November, 2011) was admitted as HO-1 and Policy 1.80 was admitted as HO-2.

**APPEARANCES**

Grievant  
Agency's Advocate who also was Agency Party Designee  
Witnesses: Officer #1  
                Officer #2  
                Sergeant  
                Head of Investigations  
                Supervisor  
                Chief

**ISSUES**

Whether the issuance of a Group III Written Notice with termination was warranted and appropriate under the 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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.<sup>1</sup>

Section 5.8 of the *Grievance Procedure Manual*, provides that the employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant was employed as a housekeeper by Agency and has worked for Agency for approximately 11 years. Her husband was also employed by Agency.<sup>2</sup>

On September 7, 2012 Grievant called dispatcher and indicated that she was in route to Agency's President's House and she was, "probably going to kill two people" at this location.<sup>3</sup> Grievant's husband worked at Agency's President's House and Grievant believed her husband and another woman were engaging in a relationship and meeting at such location.<sup>4</sup> Upon receipt of this call, law enforcement officers were dispatched to the location.

Grievant arrived at Agency's President's House and found her husband and another woman in an out-building there. Other woman was also employed by Agency. Grievant told them to open the door or she was going to "f--k" her van up. Grievant broke out the rearview window of the other woman's van and broke the right side mirror of the van. Subsequently, Officers arrived at the scene. After Officers arrived, Grievant pull the other woman's hair and hit her about the head and face.<sup>5</sup>

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

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<sup>1</sup> Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

<sup>2</sup> Testimony.

<sup>3</sup> Agency Exhibit III and testimony.

<sup>4</sup> Agency Exhibit II.

<sup>5</sup> Agency Exhibit III and testimony.

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints ... . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

**Policy 1317 ... Standards of Conduct:**

Agency has adopted and promulgated Agency Policy Number 1317 entitled, *Standards of Conduct and Performance for Classified Employees ("Standards of Conduct")*, date of current revision: November, 2011.

The *Standards of Conduct* serve to establish guidelines for positive employee behaviors, establish a fair and objective process for correcting or treating unacceptable conduct or work performance, and distinguish between less serious and more serious acts of misconduct. The *Standards of Conduct* provide corrective actions accordingly and limit corrective action to employee conduct occurring only when employees are at work or otherwise representing Agency.

Offenses are organized into three groups according to the severity of their behavior, with Group I being the least severe. Group III offenses include acts and behavior of such a severe nature that a first occurrence should normally warrant removal.

Examples of Group III offenses set forth in the *Standards of Conduct* include:

- willfully or negligently damaging or defacing state records, state property or property of other persons (including, but not limited to, employees, patients, students, supervisors and visitors)
- fighting and/or other acts of physical violence
- threatening or coercing persons associated with any state agency (including, but not limited to, employees, patients, students, supervisors and visitors)<sup>6</sup>

Examples of offenses set forth in the *Standards of Conduct* are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any action which in the judgment of the agency, undermines the effectiveness of the agency's activities, may be considered unacceptable and treated in a manner consistent with the provisions of the standards of conduct.<sup>7</sup>

**1.80 - Workplace Violence:**

Department of Human Resource Management Policy Number 1.80 entitled *Workplace Violence* (effective date: 5/01/02) prohibits violence in the workplace. This policy further provides employees violating Policy 1.80 will be subject to disciplinary action up to and including termination.

Policy No. 1.80 indicates 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;
- intentionally damaging property

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<sup>6</sup> HO Exhibit 1.

<sup>7</sup> HO Exhibit 1.

Policy No. 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.

Policy No. 1.80 defines *Workplace* as:

Any location, either permanent or temporary, where an employee performs any work-related duty. This includes, but is not limited to, the buildings and the surrounding perimeters, including the parking lots, field locations, alternate work locations, and travel into and from work assignments.<sup>8</sup>

Grievant, Grievant's Husband, and Other Woman were all employed by Agency. On September 7, 2012 Grievant's Husband and Other Woman met at an outbuilding at the Agency's President's House, where Grievant's Husband worked. On September 7, 2012, during working hours, Grievant went to this location and intentionally damaged another employee's vehicle and physically assaulted another employee by pulling her hair and hitting her.

Grievant does not contest that on September 7, 2012 she called and told the dispatcher she was in route to the Agency's President's House and she was, "probably going to kill two people". As a result of Grievant's call to dispatcher, about 11:32 A.M. on 9/7/12, dispatcher notified Officers of a possible domestic in progress at Agency's President's House.

Upon arriving at the location Officers observed Grievant's Husband holding Grievant with his arms wrapped around her from the back. Officer's report described them as fighting. Officers heard a woman screaming, "Let me go". An Officer ordered Grievant's Husband to release Grievant and he complied. Grievant then proceeded to go to the Other Woman and pulled her hair and hit her. Officers separated the two women. Additionally, Officers observed the rear window was broken out of a van parked at the scene and the vehicle's right outside mirror was also broken. This vehicle was the property of Other Woman.

Grievant believed her husband and the other woman were meeting at Agency's President's House to have relations. Grievant was upset. She went there and found her husband and the other woman in a storage building at that location. Grievant tried to enter the storage building but couldn't as it was locked. She told them to open the door or she was going to "f--k" her van up. Grievant then hit the rear window and mirror, damaging both, trying to get the two people to come out of the vehicle.<sup>9</sup> Officers found a "wooden broomstick like device with yellow and grey tape wrapped around the circumference" which Officers believed Grievant used to break the van's back window and mirror.<sup>10</sup>

Grievant does not contest and admitted that she broke the rear window and mirror of the other woman's vehicle, pulled the other woman's hair, and hit her.<sup>11</sup> Grievant expressed concerned over issues relating to the other woman, including her lunch hours, her dress, and her actions at work. Grievant

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<sup>8</sup> HO Ex. 2.

<sup>9</sup> Agency Exhibit III.

<sup>10</sup> Agency Exhibit III.

<sup>11</sup> Agency Exhibits III & IV and Testimony.

presented that she has, for several years, tried to go through her chain of command as matters related her husband and the other woman.

***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 the rules established by the Department of Human Resources Management ..." <sup>12</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."<sup>13</sup>

The Hearing Officer does not find that the agency's discipline exceeds the limits of reasonableness.

**CONCLUSION**

For the reasons stated above, based upon consideration of all the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action and Agency's discipline does not exceed the limits of reasonableness.

**DECISION**

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with termination was warranted and appropriate under the circumstances and the Agency's issuance of a Group III Written Notice with termination is **UPHELD**.

**APPEAL RIGHTS**

As the *Grievance Procedure Manual (effective date: July 1, 2012)* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**A. Administrative Review:**

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<sup>12</sup> Va. Code §2.2- 3005.

<sup>13</sup> Rules for Conducting Grievance Hearings § VI. B. 2.

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

**1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the DHRM Director.** This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

**2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR.** This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is [edr@dhrm.virginia.gov](mailto:edr@dhrm.virginia.gov)).

#### **B. Final Hearing Decisions:**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if Ordered by EDR or DHRM, the hearing officer has issued a revised decision.

#### **C. Judicial Review of Final Hearing Decision:**

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/Lorin A. Costanzo

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Lorin A. Costanzo, Hearing Officer