Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 12/28/12; Decision Issued: 12/31/12; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9988; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9988

Hearing Date: December 28, 2012
Decision Issued: December 31, 2012

PROCEDURAL HISTORY

Grievant was a safety and security technician ("SST") for the Department of Behavioral Health and Development Services ("the Agency"), serving [facility]. On October 25, 2012, the Grievant was charged with a Group III Written Notice for workplace violence on October 16, 2012. The discipline was job termination, based on this and her prior record of notices of improvement needed.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the outcome of the resolution steps was not satisfactory to the Grievant and the grievance qualified for a hearing. On November 26, 2012, the Office of Employment Dispute Resolution, Department of Human Resource Management, ("EDR") appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for December 28, 2012, on which date the grievance hearing was held, at the Agency's facility.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Representative for Agency
Advocate for Agency
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?

Through her grievance filings, the Grievant requested rescission of the Group III Written Notice, reinstatement, and back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

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. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> 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 employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. Agency Exh. 7.

Agency Policy HR-36, *Workplace Violence*, at III.B., states:

> Workplace Violence: Any physical assault, threatening behavior or verbal abuse occurring at the workplace. 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, bullying and harassment of any nature such as stalking, shouting or swearing.

Agency Exh. 7. DHRM Policy, 1.80, *Workplace Violence*, similarly defines workplace violence. Agency Exh. 7. The Agency's employee handbook states, at p. 58, a "zero tolerance for violence or threats of violence. If an employee displays any violence in the workplace or threatens violence in the workplace, the employee is subject to immediate discipline, up to and including termination and criminal charges." Agency Exh. 7.

Va. Code § 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 § 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 determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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."

The Offense

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

The Agency employed Grievant as a SST, and the Grievant had prior notices of improvement needed in 2009, 2010, and 2011 (two for verbal altercations with co-workers and one for insubordination). Agency Exh. 3.

The current written notice charged:

> On 10/16/12, you were engaged in a fight or physical assault with a co-worker in the entrance of Building 39.

Agency Exh 2.

The Agency's witnesses testified consistently with the charge in the Written Notice and presented camera video of the incident in question. The facility director testified regarding the Agency's application of policies against workplace violence. The director stated that self-defense is permitted but that employees are expected to react without exerting additional violence. This policy applies regardless of whether residents, staff, or others are involved. The director conceded that the other employee, B, was the initial aggressor, but the camera video showed that during the episode the Grievant became a mutual aggressor. The director testified that the zero tolerance aspect of the policy requires discipline for every occurrence, not necessarily termination (depending on circumstances and mitigation). The Agency expects staff members to react similarly with patients as well as other staff, and escalation of the violence is not tolerated. The director testified that the Grievant's record of multiple notices of improvement needed weighed against mitigation of the offense to less than termination.

Other security personnel testified that by the time they saw the episode the Grievant was exerting some aggression. What is clear from the video is that the other worker, B, was the initial and primary aggressor in the altercation. B is unquestionably taller and larger than the Grievant. The video showed what was mostly defensive behavior by the Grievant, but there are instances of mutual combat by pushing and shoving. The Agency alleges that the Grievant bit B's arm in the altercation, but the Grievant denies she did so. A picture of an abrasion on B's arm is alleged to be a bite mark. No specific evidence established the type or source of the mark. Because of this altercation, B was similarly disciplined and discharged.

The Grievant testified consistently with the video record, that B was the initial aggressor and that the Grievant exerted self-defense. There was, however, some continuing provocation between the two that led to at least some expansion of the altercation. The Grievant testified that she would not allow someone to assault her without some response. This reaction may be human nature, but it is against the Agency's policy against workplace violence.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. What is clear from the evidence is that B was the instigator and by far the principal aggressor. The Agency puts forth its position that the Grievant's conduct exceeded mere self-defense and rose to the level of mutual combatant. While I find that B was responsible for the instigating behavior and most of the aggression, there is evidence of mutual culpability. Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offense and level of discipline—Group III.

Mitigation

The Agency had leeway to impose discipline along the continuum less than Group III with termination. However, the Agency expressed its inability to mitigate the discipline to less than termination because the Agency has exercised progressive discipline with prior counseling memos. The Grievant asserts, reasonably, that her relative culpability, when compared to B's, should mitigate against termination. The level of discipline in this situation is fairly debatable. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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.

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

On the issue of mitigation, EDR has ruled:

> Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather, mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to

> meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

> When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

The Agency expressed its position that the prior notices of improvement needed are aggravating circumstances more so than any mitigating circumstances. The Agency presents a position in advance of its role as guardian of public and institutional integrity regarding the security of the facility. The Grievant's level of contribution to the altercation, even though decidedly less than the principal aggressor, warrants the disciplinary action. The hearing officer accepts, recognizes, and upholds the Agency's important role in safeguarding the public and residents in its charge, as well as the valid public policies promoted by the Agency and its policies. The applicable standards of conduct provide stringent expectations of security staff.

Termination is the normal disciplinary action for a Group III offense unless mitigation weighs in favor of a reduction of discipline. There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that termination was its only option. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group III Written Notice with termination outside the bounds of reasonableness. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness. In this case, the Agency's action of imposing discipline of termination is within the limits of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, I uphold the Agency's Group III discipline and termination.

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 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

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

   Office of Employment Dispute Resolution
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.[1]

[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer