

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 01/29/16; Decision Issued: 02/01/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10739; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10739

Hearing Date: January 29, 2016

Decision Issued: February 1, 2016

PROCEDURAL HISTORY

On October 9, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On November 19, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 14, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 29, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Behavioral Health and Development Services employed Grievant as a FMHT at one of its facilities. Grievant had prior active disciplinary action. On March 1, 2012, Grievant received a Group III Written Notice with a 15 day work suspension.

On May 20, 2015, a co-worker, Ms. H, approached Grievant to borrow approximately \$1,200. Grievant told her she did not have the money to lend to her but would contact her social club to attempt to find funds to assist Ms. H.

Grievant parked her vehicle in the Agency's parking lot. The vehicle was unable to be locked. While Grievant was working inside the Facility, Ms. H approached Grievant's vehicle and likely removed items from the vehicle.

Grievant discovered items were missing from her vehicle and presumed that Ms. H had removed them. Grievant became angry. Grievant began speaking with Ms. W. about Ms. H. Grievant was irate. She was yelling and cursing. She called Ms. H a bitch and was screaming that Ms. H took something from her car.

A supervisor, Ms. S, was notified by another employee that Grievant was out in the entrance "going off." Ms. S walked to the entrance and observed that Grievant was irate and yelling and cursing about Ms. H. Ms. S said that Grievant could not accuse someone of taking anything unless she observed that person taking items. Grievant said she would "beat her ass" if she found out Ms. H took anything from her. Ms. S

asked Grievant to calm down and to come to Ms. S's office. While in Ms. S's office, Grievant explained that her truck stayed unlocked and that only two people knew this. Ms. H was one of the two people who knew the vehicle was unlocked. Grievant said she did not give anyone permission to enter her truck. Grievant said that if she found out Ms. H entered Grievant's truck, Grievant would "beat her ass and rip her to shreds." Ms. S told Grievant she could not making such threats because workplace violence was not tolerated at the Facility and it could be grounds for termination. Grievant said she did not care and that if Ms. H took Grievant's property, Grievant would not have a job because Grievant was going to "shred her ass to pieces." On the following day, Grievant told Ms. S that if she saw Ms. H at work she did not know what she would do. Ms. S sent Grievant home early from work.

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."¹ 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."

"[T]hreatening others" is a Group III Offense.² On May 20, 2015, Grievant threatened to physically harm Ms. S because she would "beat her ass and rip her to shreds." The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that it was wrong for Ms. H to have stolen her property. Grievant argued that she did not threaten Ms. H but rather was upset and that she worked with Ms. H for over 30 days after May 20, 2015 without incident. The fact that Ms. H likely entered Grievant's truck and removed Grievant's property does not form a basis to excuse Grievant's threat. The Agency established that Grievant threatened Ms. H. It is not necessary for the Agency to show that Grievant carried out her threat when given the opportunity to do so. Grievant's failure to carry out the threat, does not minimize the significance of the threat.

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 Human Resource Management"³ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

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 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 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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.