

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 03/22/16; Decision Issued: 04/11/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10768; 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: 10768

Hearing Date: March 22, 2016

Decision Issued: April 11, 2016

PROCEDURAL HISTORY

On January 20, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On January 28, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 16, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 22, 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 Corrections employed Grievant as a Corrections Officer at one of its facilities. He began working for the Agency on October 24, 2011. Grievant had prior active disciplinary action consisting of a Group II Written Notice with a two workday suspension issued on August 19, 2015.

Corrections officers working at the Facility often use radios to communicate with other employees at the Facility.

On January 8, 2016 at approximately 6:30 p.m., Officer J went to the Facility parking lot. He started his car to warm up the engine. He stood outside his car and spoke on his cell phone. Officer J turned and noticed that Grievant was standing ten feet away and staring at him. Officer J ended his cell phone conversation and Grievant approached Officer J. Grievant stood approximately three feet away. Officer J said "What's up?" Grievant asked, "Why you playing games on the radio?" Grievant believed that Officer J had been demeaning toward him while speaking over the radio during their work shift. Officer J tried to explain that his radio was malfunctioning. Grievant said, "I got a child." Officer J said he had a child too. Officer J said Grievant was a young child. Officer J asked Grievant who was "pumping him up" (getting him mad and aggressive.) Grievant moved close to Officer J and used his chest to bump into Officer J's chest pushing Officer J backwards. Grievant was cursing calling Officer J "bi-ches" and "mother fu-kers".

Officer E was standing nearby. He moved between Grievant and Officer J and said, "Chill out!" Officer E pushed Grievant and Officer J away from each other.

Grievant then turned and started to walk away. After walking a few steps, he stopped, took his coat off, and threw it on the ground. Grievant said he "knew people." Grievant said he was "going to smoke his [race] ass!" referring to Officer J. In that context, "smoke" meant to kill. Officer J understood Grievant to be threatening to kill him.

Officer J did not follow Grievant. Grievant went to his vehicle and sat inside. After the other employees left the parking lot, Officer J walked to Grievant's vehicle and asked "Is there is anything you want to talk to me about?" Grievant cursed and drove his vehicle out of the parking lot.

Throughout much of the interaction, Officer J kept his hands in his pocket and did not make any threatening gestures towards Grievant.

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."¹ 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 warrant removal."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

"Threatening or coercing persons associated with any state agency, including but not limited to employees, supervisors, patients, visitors, and students" is a Group III Offense.⁴ On January 8, 2016, Grievant was angry and approached Officer J. Grievant yelled, cursed, and bumped his chest against Officer J's chest. Grievant said he was going to kill Officer J. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for threatening another employee. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁴ DOC Operating Procedure 135.1(V)(D)(I).

Grievant did not testify or present any facts to counter the Agency's assertion regarding what happened on January 8, 2016. Much of the Agency's evidence is un-rebutted.

Grievant argued that he approached Officer J in a professional manner. He asked Officer J why he was "playing games on the radio." The evidence showed that Grievant approached Officer J for the purpose of confronting Officer J and then threatened Officer J justifying the issuance of disciplinary action.

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"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.

Grievant presented evidence suggesting the Agency inconsistently applied disciplinary action. A corrections officer testified she was approached by a Sergeant away from the Facility. When she and the Sergeant were working at the Facility on another day, she told the Sergeant it was not appropriate for him to approach her because her boyfriend who also worked at the Facility might perceive his actions unfavorably. The Sergeant told the corrections officer that he had two 45 pistols waiting for the boyfriend. Grievant contends his disciplinary action should be mitigated because no disciplinary action was taken against the Sergeant.

The Hearing Officer cannot conclude that Grievant was singled out for disciplinary action. The female corrections officer reported the matter to a supervisor but merely wrote in an email that "His comment to me was that he has two 45 pistols." She expressed no concern of being threatened or that her boyfriend's safety might be in jeopardy. It is unclear whether the supervisor to whom she reported her concern actually reported the incident to the Former Warden and that the Former Warden elected not to take disciplinary action against the Sergeant. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

⁵ *Va. Code § 2.2-3005.*

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 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.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 EDR before filing a notice of appeal.