

Issue: Group III Written Notice with Suspension (workplace violence); Hearing Date: 06/22/16; Decision Issued: 06/23/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10796; 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: 10796

Hearing Date: June 22, 2016

Decision Issued: June 23, 2016

PROCEDURAL HISTORY

On December 29, 2015, Grievant was issued a Group III Written Notice of disciplinary action with a 15 workday suspension for workplace violence.¹

On January 28, 2016, 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 he requested a hearing. On April 18, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 22, 2016, a hearing was held at the Agency's office. Grievant appeared for a portion of the hearing.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

¹ The Agency mistakenly used on the Written Notice the code for inmate abuse rather than workplace violence.

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. Grievant had prior active disciplinary action. He received a Group II Written Notice with a one day suspension on October 24, 2013 for engaging in a vulgar conversation with an inmate. Grievant received a Group I Written Notice issued on September 17, 2015 for using abusive language in violation of workplace violence.

Inmates at the Facility are placed in the Segregation Unit for several reasons including for their own protection or as punishment for poor behavior while living among the general population of inmates. Inmates placed in segregation are held in single cells. To enter the cell, one must open a solid metal door with a small window and then open a bar grate. Corrections Officers including Grievant were instructed not to open the doors to the cells unless the inmates were being fed, going to recreation or showers, or harming themselves.

On September 2, 2015, Grievant was working at the Facility in the Segregation Unit. The Inmate resided in the Segregation Unit. The Inmate wanted Grievant to respond immediately to his request to receive items in his property. Grievant was performing other duties and could not attend to the Inmate immediately. The Inmate became angry and began cursing and calling Grievant names. Grievant became

annoyed with the Inmate and began walking towards the Inmate's cell. Grievant exclaimed to the Inmate that Grievant was "not the one to play with." Grievant opened the metal door and approached the Inmate. Grievant began arguing and yelling at the Inmate as the Inmate argued and yelled at Grievant. The Inmate made a sudden motion as if to spit on Grievant. Grievant reacted by striking the Inmate in the face with an open hand to change the direction of the Inmate's face.

The Agency investigated the incident.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

DOC Operating Procedure 130.3 governs Workplace Violence. Section III 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, attempted rape, psychological trauma such as threats, obscene phone calls, and/or electronic communications, an intimidating presence, and harassment of any nature such as stalking, shouting, or abusive language.

Grievant created an intimidating presence towards the Inmate. Grievant approached the Inmate and told him he was not one to be played with. Grievant's comment served as a challenge to or expression of contempt for the Inmate. Grievant opened the door contrary to the Facility's practice. Grievant approached the Inmate and argued with him. Grievant's response served to perpetuate the confrontation. Grievant hit the Inmate. This could have been avoided had he refrained from opening the metal door, positioning himself too close to the Inmate, and continued arguing with the Inmate.

DHRM Policy 1.80 governs Workplace Violence and provides:

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

Employees violating this policy will be subject to disciplinary action under Policy 1.60, Standards of Conduct up to and including termination, based on the situation.

Grievant engaged in workplace violence thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to 30 workdays in lieu of termination. Accordingly, Grievant's 15 work day suspension must be upheld.

Grievant argued that the Agency acted contrary to policy. For example, he claimed that the grievance hearing was required to be held within 35 days of the Hearing Officer's appointment. He relied on a letter from the Employee Relations Specialist stating, "The hearing should occur within 35 calendar days after the AHO is appointed." (Emphasis added). The policy governing grievance hearings is established by EDR and not any individual agency. The Rules for Conducting Grievance Hearings provides:

Generally, the hearing should occur within 35 calendar days after the hearing officer is appointed. However, the hearing officer in his or her discretion, may grant reasonable requests for extensions or other scheduling or deadline changes if no party objects to the request. If a party objects to the request, the hearing officer may only grant extensions of time [for] just cause – generally circumstances beyond a party's control. If any extensions are granted, the reasons for each extension should be stated in the written decision. (Emphasis added).

"Should" is a preference – not a mandate. Grievant's claim that the hearing had to be held within 35 days is not correct. Grievant did not participate in the pre-hearing telephone conference. Grievant could have made any objection he had to scheduling the hearing at that time. Furthermore, if the Hearing Officer assumes for the sake of argument that the hearing was held outside a prescribed time period, it would have no effect on the outcome of this grievance. Violations of unrelated policies rarely have an effect on whether an employee violated a specific policy. The matters are independent.

Grievant questioned why his statement was not taken on the day of the incident instead of him being removed from the Facility. Grievant's assertion does not affect the outcome of this case. Grievant drafted a statement on a later date. There is no reason to believe that Grievant would have offered a different statement had he been asked for one on the day of the incident.

Grievant questioned why the Agency took the Inmate's word over his. The evidence showed that the Agency did not give greater weight to the Inmate's statement than to Grievant's statement. Indeed, it appears the Agency took disciplinary action primarily based on Grievant's statement and disregarded most of the Inmate's statement.

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. 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 a 15 work day 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 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:

⁵ Va. Code § 2.2-3005.

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.