

Issue: Group III Written Notice with Termination (disruptive behavior and failure to follow policy);
Hearing Date: 05/20/16; Decision Issued: 06/01/16; Agency: Virginia Tech; AHO: Thomas P.
Walk, Esq.; Case No. 10806; Outcome: No Relief - Agency Upheld; Administrative Review:
EDR Ruling Request received 06/06/16; EDR Ruling No. 2016-4367 issued 06/16/16; Outcome:
AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 06/06/16;
DHRM Ruling issued 06/21/16; Outcome: No policy violation identified. Request denied.

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: GRIEVANCE OF CASE NO. 10806

DECISION OF HEARING OFFICER

HEARING DATE: MAY 20, 2016

DECISION DATE: MAY ____, 2016

I. PROCEDURAL MATTERS

The grievant commenced this proceeding by filing his Form A on April 11, 2016. I was appointed as Hearing Officer on April 26, 2016. I conducted a prehearing conference by telephone on April 27, 2016. Counsel for the grievant filed an objection, by e-mail, to proposed Agency Exhibits 9 through 17. Those documents pertain to a prior Group III Written Notice issued the grievant. The argument was that the documents were not referenced in the pending Written Notice and that consideration of them by me would violate the due process rights of the grievant. On May 20 prior to the commencement of the evidentiary part of the hearing, I sustained the objection as to Exhibits 11 through 16, documents supporting the prior discipline. I found the documents inappropriate and unnecessary. I overruled the objection to Exhibits 9 and 10, the Forms A and B. They reflected the prior proceeding, the disposition of which constituted res judicata as to the issues raised in that proceeding. I took judicial notice of the prior discipline as I found the existence of the active prior discipline relevant on the question of possible mitigation of discipline. I also overruled the objection as to Exhibit 17. The hearing was held at the school on May 20 as scheduled. The hearing lasted approximately four hours.

II. APPEARANCES

The school was represented by legal counsel. A representative was present throughout

the hearing. The school presented seven witnesses. I accepted into evidence Exhibits 1 through 10, inclusive, and 18 through 20.

Legal counsel also represented the grievant. The grievant testified as his only witness. I accepted into evidence his Exhibits labeled A through EE.

III. ISSUE PRESENTED

Whether the actions and statements of the Defendant justified the issuance of the Group III Written Notice and the termination of the grievant from employment with the school?

IV. FINDINGS OF FACT

The grievant worked in the Maintenance Department for the school in March, 2016. He had worked for the school for approximately eleven years. During his career he had consistently received satisfactory evaluations. He received in 2015 a Service Recognition Program. Also in 2015, the grievant had been nominated for a Departmental Service Award. He was proficient in his job-related skills.

The agency involved in this grievance is a state institution of higher learning.

The relevant events in this grievance involve a co-worker of the grievant (referred to herein as "Employee A"). The co-worker worked in the same department as the grievant, although on a different shift. Employee A is somewhat hearing-impaired. He heavily relies on reading lips.

In the late afternoon on March 1, 2016 Employee A was sitting in a motorized, enclosed cart used in his job. He was smoking a cigarette. The grievant approached the cart and shook it

to get the attention of Employee A. The grievant told Employee A that he was there to collect money owed by Employee A to a third co-worker ("Employee B"). The grievant confronted Employee A because he was tired of hearing Employee B complain about the outstanding debt.

The grievant said to Employee A that he wanted either his money or his blood. Employee A responded that "you wouldn't want my blood if I had AIDS." Employee A told the grievant that the debt owed to Employee B was none of his business. The grievant then left the area, shaking the cart one more time as he walked away. The following day (March 2), at approximately 4:00 p.m. a number of departmental employees were present in a staff breakroom. This was near the end of one shift and the beginning of Employee A's shift.

Employee A entered the breakroom. The grievant was seated there at a desk. Upon observing Employee A entering the room, the grievant asked Employee A "do you have AIDS"? The grievant advised Employee A that he had been telling other employees that was the situation. A vigorous argument ensued between the grievant and Employee A. Employee A called the grievant an obscene name. The grievant stood up from his chair and began confronting the grievant face-to-face. They were in relatively close proximity to each other. Employee A again told the grievant that the debt to Employee B was none of his business. The grievant repeatedly told Employee A to "shut up." Both individuals were using raised voices.

When this verbal argument was heating up, all but one of the other employees in the breakroom quickly departed. One co-worker remained behind with the intent to intervene if the argument escalated into physical violence. No violence ensued before the grievant left the room. One additional employee entered the room at the tail end of the argument. After the grievant left, Employee A asked the co-worker his impression of what was going on with the grievant. This co-worker advised Employee A that he thought that the grievant was about to become

physically violent toward him.

The Department investigated these events after Employee A made an oral complaint on the evening of March 2. As a result of the investigation, the Departmental Supervisor made the decision to issue a Group III Written Notice and terminate the grievant from employment. The school had issued the grievant a separate Group III Written Notice in 2014. That discipline was grieved unsuccessfully and remained active at the time of the events in 2016. In addition to the 2014 events, the school had counseled the grievant on multiple occasions for actions considered to be disruptive, actions not similar to those in 2016. No formal written discipline was issued for those events.

V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

I will discuss these considerations in the order presented.

Other than suggesting that he was joking with Employee A, the grievant has not contested the statements and actions used by the school to support the issuance of the discipline. In his testimony he admitted that what he did was unwise. His suggestion of innocent intent is unsupported by the weight of the evidence. He rather, through his testimony and the argument of counsel, challenges whether the actions are sufficient to support the discipline and determination.

The Written Notice accuses the grievant of engaging in disruptive behavior and failure to follow instructions and/or policy. The Notice itself does not specify any particular instruction or policy violated by the grievant. During the hearing the school argued that the prior unwritten counseling given the grievant for disruptive behavior constituted the instructions he violated in March, 2016. The school introduced as an exhibit its “Statement of Business Conduct Standards.” That document does specify that “the University strives to provide a workplace where all employees...are treated with dignity and respect.” I do not find that reliance on these unspecified instructions and standards is sufficient to support the issuance of any discipline upon this particular Written Notice.

The allegation of disruptive behavior is a different matter. The school relies upon Policy 1.60 of the Department of Human Resource Management, the “Standards of Conduct”, in the issuance of this discipline and determination. Under Attachment A of Policy 1.60, disruptive

behavior is listed as a specific offense only in the Group I category. Group I offenses are defined as those “that have a relatively minor impact on agency business operations but still require management intervention.” The listing of types of offenses under each category is specifically stated not to be all inclusive. Group III offenses are defined as those “acts of misconduct of a most serious nature that severely impact agency operations.” The Attachment lists as an example of a Group III offense “threatening others.”

The school has treated the March 1 and March 2 events as a single offense, although occurring approximately 24 hours apart. The March 1 confrontation at the cart was not significantly disruptive. The only person impacted by it was Employee A. Although he felt threatened by it, he did not feel so threatened that he made any complaint about it that day.

Nevertheless, that event provides significant context for what happened in the breakroom the following day. The grievant attempts to argue that his choice of words, “your money or your blood,” was a mere rhetorical device and that he did not intend to threaten Employee A. Even if I accepted this explanation, the response of Employee A that afternoon and the events of the following day show that it was not taken as a rhetorical cliché. An objective observer of the events in the breakroom (such as the co-workers who exited and those who remained as peace-keepers) could reasonably view the grievant as threatening to do violence to Employee A.

Also, I do not find the explanation of the grievant to be credible. In his testimony he initially said he approached Employee A because he was tired of listening to Employee B complain about the debt. Later in his testimony he stated that Employee B had requested that he approach Employee A. Employee B did not testify and I draw from that fact the adverse inference that his testimony would have been unfavorable to the grievant. Furthermore, the grievant testified that he entered the breakroom on March 2 after Employee A. This is

inconsistent with the testimony of all other witnesses who were there that afternoon. These witnesses appeared to be credible and no effort was made to show any bias on their part.

The uncontradicted evidence from the two days supports a finding that Employee A reasonably felt threatened. The grievant shook the cart as he left Employee A on March 1, without any apparent innocent reason. The confrontation in the breakroom degenerated quickly into a shouting match and a face-to-face confrontation. The one co-worker who remained behind felt concerned enough that a fight could occur.

The actions of the grievant gave the clear impression that he was willing to injure Employee A, if not physically, in his reputation. By telling the co-workers that Employee A had said he suffered from AIDS, the grievant exhibited at least reckless indifference to the rights of Employee A.

Under Section VI(B)(1) of the *Rules for Conducting Grievance Hearings*, the decisions of a state agency are entitled to substantial deference from a hearing officer, so long as reasonable. I agree the school could have issued a lesser level of discipline for these acts. I do not find, however, that the decision to issue a Group III and terminate the grievant was unreasonable. Those decisions must be upheld.

The next inquiry to be made by me is whether the actions of the agency were consistent with any applicable law or policy. The grievant has not argued that he has been subject to unlawful discrimination or that any other policy has been violated.

The last inquiry I must make is whether the evidence shows appropriate circumstances to mitigate the punishment. The school stipulated that the grievant performed the technical aspects of his job in at least a satisfactory manner. This job performance was consistent over his time at the school. Lengthy, satisfactory job performance is not ordinarily sufficient grounds for

mitigation of punishment. Section VI (B)(2) of the Rules for Conducting Grievance Hearings provides that I should consider any aggravating circumstances shown by the evidence. Any assessment of those aggravating factors by the agency is to be given substantial deference by me. The school cites the active prior Group III Written Notice and the pattern of prior disruptive behavior by the grievant. The grievant explained the disruptive behavior cited by his Supervisor was consistent with the interests of the school. The Supervisor viewed the actions as the grievant inappropriately going beyond the bounds of his duties. Reasonable minds can differ as to the wisdom of the school's preferring employees in the Maintenance Department take a hands-off approach to parking or similar violations. That difference of opinion, however, does not make it is appropriate for me to second-guess that approach under these circumstances. I do not find that the discipline issued by the school should be mitigated.

VI. DECISION

For the reasons stated above, I sustain the issuance of the Group III Written Notice to the grievant and his termination from employment.

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.^a

[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].

ORDERED this June 1, 2016

Thomas P. Walk, Hearing Officer

H:\Attorneys\TPW\HEARING OFFICER\VIRGINIA TECH--(Grievance of Steven Myers) Case No. 10806 COVER SHEET & DECISION 29476 052316 (sam).docx