

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 12/19/16; Decision Issued: 01/09/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10900; Outcome: Partial Relief. **Attorney's Fee Addendum issued 02/07/17 awarding \$3,301.20.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10900

Hearing Date: December 19, 2016

Decision Issued: January 9, 2017

PROCEDURAL HISTORY

On October 7, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On October 12, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 1, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 19, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Developmental Services employed Grievant as a Registered Nurse Clinician at one of its facilities. She had been employed by the Agency for approximately eight years. No evidence of prior active disciplinary action was introduced during the hearing.

The Nurse¹ worked from 3 p.m. to 11 p.m. on September 23, 2016. The Nurse was sitting at a rectangular table with one side of the table against a wall in the nursing station. The table was approximately 4 feet wide and 6 to 8 feet long. The Nurse was seated at the opposite end of the table from where Grievant was standing.

The Agency has scheduling books to assign staff to positions on different floors of the Facility.

Grievant began her shift at approximately 11 p.m. At approximately 11:30 p.m., Grievant grabbed two staff scheduling books. Each binder was approximately two and a half inches thick with letter size paper. Grievant walked out of the nursing station because it was crowded to find another place to sit. Grievant stepped back into the nursing station. Grievant asked the Nurse, "Are you on night shift?" The Nurse said, "Yes". Grievant did not want to complete staff scheduling. She wanted the Nurse to do the scheduling. Grievant stepped towards the table. She held the books with two

¹ Grievant asserted the Nurse's testimony was not credible. The Hearing Officer finds that the Nurse's testimony was credible.

hands. The books were parallel with the table top but approximately six inches away from the table edge. Grievant moved her hands quickly away from her body to toss or fling the books towards the Nurse. The books landed on the table and slid from one end of the table to the other. The Nurse had her hands on the table. The books came close to the Nurse's hands but did not touch them. The Nurse did not have to move her hands to avoid being hit.

The Nurse smiled and picked up the books from the table. The Nurse felt that Grievant's behavior was unprofessional and going too far to physically harm her. The Nurse felt she was being harassed by Grievant. After the Nurse "settled down", she took the books and completed staff job descriptions for her shift.

No evidence was presented to show that Grievant's behavior was observed by any of the Agency's clients.

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."² 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."

Disruptive behavior is a Group I offense.³ Grievant's behavior on September 23, 2016 is best described as rude, disrespectful, and discourteous. Her behavior was not workplace violence. Grievant's behavior was disruptive because she upset and offended the Nurse. Grievant was expected to "[d]emonstrate respect for the agency and toward agency coworkers"⁴ but she failed to do so. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency argued that Grievant engaged in workplace violence.⁵ DHRM Policy 1.80 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

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

⁴ See, DHRM Policy 1.60.

⁵ The Agency also alleged that Grievant refused to take shift reports from the Nurse. The Agency did not establish that Grievant's behavior rose to a level higher than a Group I offense.

to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

Grievant did not engage in a physical assault. She did not form an intimidating presence. Grievant did not threaten or injure the Nurse. The Nurse did not experience extreme emotional distress. There is no reason for the Hearing Officer to believe that Grievant intended to harm the Nurse. Grievant's objective was to transfer the books to the Nurse but in a disrespectful and condescending manner.

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"⁶ 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 further the disciplinary action.

⁶ *Va. Code § 2.2-3005.*

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, “In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. There are no special circumstances making an award of attorneys' fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group I Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10900-A

Addendum Issued: February 7, 2017

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁸ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁹

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Attorney submitted a petition showing work in the amount of 25.2 hours. At an hourly aware of \$131, this amounts to \$3,301.20.

AWARD

Grievant is awarded attorneys' fees in the amount of \$3,301.20. The Agency may pay this sum directly to Grievant's attorney.

⁸ Va. Code § 2.2-3005.1(A).

⁹ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer