

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 01/23/17; Decision Issued: 02/13/17; Agency: College of William & Mary; AHO: Carl Wilson Schmidt, Esq.; Case No. 10913; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR and Policy Review Rulings requested 02/23/17; EDR Ruling No. 2017-4504 and Policy Review Ruling issued 03/17/17; Outcome: AHO’s decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10913**

Hearing Date: January 23, 2017  
Decision Issued: February 13, 2017

#### **PROCEDURAL HISTORY**

On October 21, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On October 24, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 14, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 23, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representatives  
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 College of William and Mary employed Grievant as a Locksmith. He had been employed for approximately 22 years. No evidence of prior active disciplinary action was introduced during the hearing.

On September 6, 2016 at approximately 7:20 a.m. or 7:25 a.m., Grievant was driving behind Mr. M while they were both on their way to work. Grievant was driving his vehicle too close to the back of Mr. M's vehicle. Mr. M turned onto G Street which became a one-way street. Mr. M was driving approximately ten to fifteen miles per hour. G Street was wide enough for two small cars to drive side by side but was typically used by only one vehicle. A portion of G Street had parking spaces on the left and right sides in front of buildings on each side.

Mr. M tapped his brake to "brake check" Grievant and hoped Grievant would stop following so closely. Grievant continued to follow Mr. M too closely. Mr. M "brake checked" again but Grievant continued to follow Mr. M too closely. This annoyed Mr. M.

Once he reached the one-way portion of G Street, Mr. M moved his vehicle to the left side of G Street and close to the parking spaces. Grievant also moved to his left and parked approximately six to twelve inches directly behind Mr. M. Mr. M got out of his vehicle and turned to his left and began walking towards Grievant's vehicle. Grievant got out of his vehicle and began approaching Mr. M. Mr. M was annoyed and gesturing with his arms. Mr. M demanded to know why Grievant was tailgating him and

why Grievant always tailgated Mr. M. Mr. M yelled at Grievant. Grievant yelled at Mr. M.

Grievant moved close to Mr. M as Mr. M walked towards Grievant. Grievant placed his hands chest level and with his palms outward quickly moved his hands towards Mr. M. Grievant's palms touched Mr. M on his chest as Grievant pushed Mr. M backwards. As Mr. M moved backwards, his feet caught on a curb and he fell backwards and to the ground. Mr. M got up and went to his vehicle. He entered his vehicle and continued driving on G Street until he reached the parking lot. He parked his vehicle and went to work.

Grievant returned to his vehicle. He had a brief conversation with another employee who observed part of the conflict between Grievant and Mr. M. Grievant drove on G Street until he reached the parking lot. He parked his vehicle and went to 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."<sup>1</sup> 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."

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 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;

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

- 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.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

“[P]hysical violence” is a Group III offense.<sup>2</sup>

On September 6, 2016, Grievant engaged in workplace violence by “physically assaulting” Mr. M. Grievant pushed Mr. M backwards with sufficient force to cause him to trip over a curb and fall to the ground. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III offense, an employee may be removed. Accordingly, Grievant’s removal must be upheld.

Grievant argued that Mr. M put his hand outside of his window and gave Grievant “the finger”. Grievant wrote in his statement that he believed Mr. M was “joking”. Grievant, however, testified he felt threatened when Mr. M was “flipping [him] the bird.” Grievant argued that Mr. M slammed on his brakes, jumped out of his car and started coming at Grievant while displaying erratic behavior. Grievant claimed he shoved Mr. M when Mr. M was within 1 to 2 feet of Grievant to keep him away.

These arguments are insufficient to justify Grievant’s decision to push Mr. M. Grievant had many opportunities to avoid the incident. He could have continued to drive his vehicle past Mr. M after Mr. M stopped his vehicle to the side of the street. Grievant could have remained in his vehicle. If Mr. M became too close to Grievant, Grievant could have moved backwards. If Grievant did not want to move backwards, he could have raised his arms to block Mr. M’s advance without pushing Mr. M. Instead, Grievant pushed Mr. M without Mr. M having touched Grievant.

Grievant argued that the conflict did not occur on Agency property and, thus, was not workplace violence. Grievant pushed Mr. M onto grass that was most likely part of

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<sup>2</sup> Attachment A, DHRM Policy 1.60.

the Agency's property because it was within a few feet of an Agency building. DHRM Policy 1.80 defines workplace to include buildings and surrounding perimeters. Even if the Hearing Officer assumes for the sake of argument that the conflict did not occur on Agency property, workplace violence occurred. Mr. M and Grievant were co-workers on their way to work. There is a sufficient connection between Grievant's behavior and the Agency to conclude that the workplace violence policy should be applied.

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 ...."<sup>3</sup> 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 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>3</sup> Va. Code § 2.2-3005.

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>4</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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