

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 01/31/17; Decision Issued: 02/01/17; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10925; 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: 10925

Hearing Date: January 31, 2017

Decision Issued: February 1, 2017

PROCEDURAL HISTORY

On October 28, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On November 19, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 12, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 31, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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 Virginia Community College System employed Grievant as a Floor Tech Supervisor at one of its Colleges. He was responsible for stripping and waxing floors and supervising staff. He had been employed by the Agency for approximately 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

On October 25, 2016, the Supervisor and Coworker were in the Manager's office. The Manager was addressing a concern with the Coworker.

Grievant entered the Building and walked to the Manager's office. Grievant began cursing and complaining to the Supervisor and to the Manager. Grievant said "bi—h, punk a--, ni—er, You don't know what you are doing! F—k this!

The Supervisor said, "Come on man, calm down." Grievant continued to shout. Grievant called the Supervisor a mother f—ker and said, "I'm going to get you, man."

The Manager told Grievant to go into the conference room. Grievant did not comply with the Manager's instruction but continued to argue loudly.

Grievant "got in the face" of the Supervisor. Grievant yelled and cursed at the Supervisor. Grievant pointed his finger in the Supervisor's face and at one point touched the Supervisor's nose. The Supervisor's head moved backwards.

Grievant continued to challenge the Supervisor by asking, "What you gonna do! What you gonna do!" The Supervisor perceived Grievant's behavior as baiting him to fight.

The Manager told Grievant to go home. He said he would call the police. The Manager called the campus police. The Supervisor also called the campus police.

Grievant left the Manager's office and walked outside of the Building.

While Grievant was in the Manager's office, the Coworker became so fearful of Grievant that she quickly placed herself behind the Manager for protection from Grievant.

When the Campus Police arrived, the Officer observed Grievant. Grievant remained upset. He claimed "they were playing mind games." Grievant was asked to provide a statement. Grievant wrote his statement and then he was escorted by the Police Officer off the campus.

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."¹ 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;

¹ 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 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.

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.

On October 25, 2016, Grievant engaged in workplace violence. He created an intimidating presence by shouting at the Supervisor and Manager. He “got in the face” of the Supervisor and pointed his finger at the Supervisor’s face. He attempted to provoke the Supervisor to fight him by yelling “what you gonna do.” He assaulted the Supervisor by pushing his finger against the Supervisor’s nose. He placed the Coworker in reasonable fear of injury. The Coworker had to quickly move away from Grievant and place herself behind the Manager to avoid Grievant. The Coworker acted out of fear that Grievant might harm her. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

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”² 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

² *Va. Code § 2.2-3005.*

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant admitted to being agitated and cursing. He apologized for his behavior during the hearing. He denied touching the Supervisor. He explained he had visited his brother's grave that day and was emotional. Grievant argued that his behavior on October 25, 2016 did not reflect his true character. He presented numerous letters of reference.

Grievant's evidence is not sufficient to mitigate the disciplinary action. Grievant's good work performance prior to October 25, 2016 is not sufficient to excuse his workplace violence. The Supervisor testified that Grievant pushed his finger against the Supervisor's nose. The Manager testified to the same. The Hearing Officer can assume for the sake of argument, however, that Grievant did not touch the Supervisor's nose. The outcome of this grievance would not change. Disciplinary action is not based on an employee's character; it is based on an employee's behavior. In this case, the Agency has presented sufficient evidence to show that Grievant's behavior justified the issuance of a Group III Written Notice. In light of the standard set forth in the Rules, 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 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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.