

Issue: Group II Written Notice (inappropriate behavior); Hearing Date: 01/31/13;
Decision Issued: 02/01/13; Agency: GMU; AHO: Frank G. Aschmann, Esq.;
Case No.10008; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10008

Hearing Date: January 31, 2013
Decision Issued: February 1, 2013

PROCEDURAL ISSUE

No procedural issues raised.

APPEARANCES

Grievant
Agency Representative
Agency Presenter
Four Witnesses

ISSUE

Did the Grievant violate Agency policy by displaying threatening behavior towards a supervisor such as to warrant the issuance of a Group II Written Notice?

FINDINGS OF FACT

The Grievant is employed by the Agency as a HVAC Technician. The Grievant has been employed with the Agency for approximately two and one half years. On August 22, 2012, the Grievant and co-workers completed a job they had been working on at an Agency facility. The Grievant was in a good mood, being pleased to be finished with the job. The Grievant's second line supervisor and another supervisor arrived at the facility after receiving a complaint that there were work vehicles parked in the firelanes of the facility. The Grievant and his co-workers approached the supervisors when they arrived. The Grievant's second line supervisor advised the workers that he was there because the vehicles were in the firelanes and directed the workers to move their vehicles from the firelanes. The Grievant began to joke with his second line supervisor by contradicting his statement and making a comment to the effect that the supervisors had come to the area to look at girls rather than have the vehicles moved. The Grievant's comment was made in a public location and members of the public were passing by. The Grievant's second line supervisor was uncomfortable with the Grievant's comment because it was made where members of the public could hear it and he received an unpleasant look from the passers by. The Grievant's second line supervisor redirected the Grievant to the task, telling him he was serious and he was there to get the vehicles moved. He directed the Grievant to

move his vehicle again. The Grievant continued to be playful and grabbed his second line supervisor's security badge lanyard and pulled on it. The security card contained in the lanyard fell to the ground and the Grievant stepped on it. The card was scratched but remained functional. The Grievant pick up the card and gave it to his second line supervisor. At this point the Grievant recognized that his second line supervisor was serious and angry and left the area in his vehicle. The next day the Grievant reported to his second line supervisor and apologized for his actions. The Grievant conceded he had "crossed the line" and acted inappropriately when he pulled on the lanyard.

The Grievant's second line supervisor issued a Group III Written Notice with a five day suspension. In the first step of the resolution process the second line supervisor reduced the suspension to three days. During the second step of the resolution process the Agency reduced the sanction against the Grievant by removing the suspension. In the third step of the resolution process the Agency reduced the sanction against the Grievant by reducing the written notice to a Group II Written Notice. Thus, ultimately, the Agency issued a Group II Written Notice with no suspension, however, no change was made to the original written notice document. The Agency maintains that the reductions are made part of the Grievant's record through the attachments to the original written notice. The Grievant has requested a due process hearing on his grievance seeking a further reduction in the sanction. The Grievant has requested the Group II Written Notice be removed from his file and replaced with a verbal warning. Governor McDonnell has issued a directive that a bonus approved by the General Assembly is not to be paid to any employee receiving a written notice under the Standards of Conduct during the October 25, 2011 through October 24, 2012 performance cycle. This directive applies to the Grievant.

APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards of Conduct serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Agency uses these policies for its Standards of Conduct.

The Standards of Conduct define a Group I violation as offenses which have a relatively minor impact on agency business operations but still require management intervention and includes unsatisfactory performance as an example. The Standards of Conduct define a Group II violation as acts of misconduct of a more serious nature that significantly impact agency operations. Insubordination, an employee failing to follow a supervisor's instructions, or comply with written policy are examples of Group II offenses. The Standards of Conduct define a Group III offense as being of such a severe nature that a first occurrence normally should warrant termination. Examples of Group III offenses include physical violence and threatening others. The Standards of Conduct establish a system of progressive discipline which provides employees an opportunity to correct errors and improve performance in all but the most serious cases. Sanctions increase with continued violations of the Standards of Conduct.

The Grievant argues that the sanction of a Group II Written Notice is too severe under the circumstances because it will cause him to lose the bonus approved by the General Assembly. The Grievant's argument is unpersuasive because it does not address the facts of what occurred and how the behavior fits into the disciplinary scheme created by the Standards of Conduct. The directive of the Governor to deny bonuses to employees who receive written notices is a collateral consequence of the Grievant's action and not part of the disciplinary scheme created by Policy 1.60. The appropriate test is whether or not the Grievant violated an Agency policy as defined by the Standards of Conduct. That there may be collateral consequences is no defense to the disciplinary action if the Agency demonstrates a violation of policy.

The Agency has established a violation of policy. The Agency's evidence establishes that the Grievant, without provocation, grabbed his second line supervisor's lanyard and pulled on it with sufficient force to dislodge the security badge it held. The Agency's evidence demonstrated that the act occurred in public, in the presence of Agency personnel and members of the public. The act occurred after the Grievant had been told repeatedly to perform a work task which was needed to correct a safety violation, parking in a firelane. The Grievant does not contest these basic facts and only raised a dispute in regard to specific words that were said. The Grievant even concedes that he did not act appropriately towards his second line supervisor. These acts constitute an act of violence, threatening behavior and insubordination. The Agency has acted on its own to reduce the Group III Written Notice acknowledging that the incident began as horseplay which got out of hand. While the Grievant's behavior was violent and threatening the

second line supervisor states he did not become fearful. What is clear is that the Grievant's behavior was insubordinate and demeaning to his superior in the chain of command. The second line supervisor was embarrassed by the Grievant's lack of respect in a public setting with people watching. This behavior was inappropriate and constitutes an offense under the Standards of Conduct. The Agency has sustained its burden of proof to establish a violation of the Standards of Conduct.

The Grievant raises a second argument. He further argues that he was just joking around as he had done on past occasions and he should be given just a verbal warning for his conduct because it is a first time offense. Thus, the Grievant essentially argues he has been denied progressive discipline. The Standards of Conduct do provide for progressive discipline, however, this principal is not absolute. The Standards of Conduct enable Agencies to fairly and effectively discipline or terminate employees. Each case depends upon the specific circumstances of the matter. The Agency is permitted to impose a written notice when a violation is of a serious nature. In the present case the circumstances show that the act of the Grievant had the potential to undermine the authority of a superior. Such behavior is of a serious nature and could not be tolerated by the Agency. The Agency considered mitigating factors and determined that because the incident began as horseplay it would reduce the level of the written notice and not treat the incident as an act of violence which normally would call for termination. The Agency also gave consideration to prior similar incidents and acted consistently with those disciplinary actions. The Agency has acted in a manner consistent with the principals of the Standards of Conduct in issuing a Group II Written Notice without a prior verbal counseling.

The Agency has met its burden to demonstrate a violation of policy and has justified the level of discipline administered to the Grievant.

DECISION AND ORDER

The disciplinary action of the Agency is affirmed.

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 email.

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

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.

Frank G. Aschmann
Hearing Officer