

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 03/22/13; Decision Issued: 04/11/13; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No. 10042; Outcome: Partial Relief;  
**Administrative Review: EDR Ruling Request received 04/23/13; EDR Ruling No. 2013-3595 issued 05/24/13; Outcome: AHO's decision affirmed.**

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 10042**

**Hearing Date: February 22, 2013**

**Decision Issued: April 11, 2013**

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### **SUMMARY OF DECISION**

The Agency had found Grievant violated its workplace violence policy. The Agency then issued Grievant a Group III Written Notice and terminated him. The Hearing Officer determined that Grievant engaged in the conduct alleged, it was misconduct, and the Agency's discipline was consistent with policy. However, the Hearing Officer found that the discipline was unreasonable as the Agency engaged in disparate treatment. Thus, the Hearing Officer amended the discipline to a Group III Written Notice with 30 days suspension. Grievant is reinstated with applicable back pay and benefits.

### **HISTORY**

On January 10, 2013, the Agency issued Grievant a Group III Written Notice with termination for violating the workplace violence policy. On February 26, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A prehearing conference ("PHC") was held on February 28, 2013, and then a scheduling order was issued on March 4, 2013, that set the hearing date for March 22, 2013.

At the request of Grievant, 14 witness orders were issued on March 4, 2013, for the appearance of individuals to testify on behalf of Grievant. The evidence shows that all but one of these witnesses were and remain current employees of the Agency. In her scheduling order, the Hearing Officer directed the Agency under GPM §5.3 to make available for the hearing any employees of the Agency to which witness orders were issued on behalf of Grievant.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. Initially, a number of the witnesses subpoenaed on behalf of the Grievant who were employed by the Agency, were not made available by the Agency to testify at the hearing. Thus, the Hearing Officer recessed the hearing for approximately 30 minutes for the Agency to make arrangements for those witnesses to testify. All witnesses that Grievant deemed necessary to testify were then made available either by telephone or in person during the course of the hearing. Moreover, the Agency had listed its warden as a witness on behalf of the Agency. This witness was not available due to an unexpected meeting being called for all prison wardens. In his stead, the assistant warden appeared and testified on behalf

of the Agency. Grievant did not object to this testimony.<sup>1</sup>

Moreover, Grievant had requested the production of a document regarding the “Healing Environment of the Agency.” It was determined that this document did not exist.

The hearing officer also admitted the Agency’s Exhibits 1 through 6, Grievant’s Exhibits 1 through 7, and Hearing Officer’s Exhibits 1 through 9, to which no objections were made.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant represented herself.

### **APPEARANCES**

Advocate for Agency  
Witnesses for the Agency (4 witnesses)  
Grievant  
Witnesses for Grievant (7 witnesses)  
Dual Witnesses (2 witnesses)

### **ISSUE**

Was the discipline warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person, the Hearing Officer makes the following findings of fact:

1. Before his termination, Grievant was employed as a correctional officer with the

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<sup>1</sup> Although, Grievant initially insisted on the Warden testifying. He eventually represented that the Warden was not a necessary witness. Moreover, Grievant had not disclosed the Warden as one of his witnesses.

Agency, a correctional facility operating under the Virginia Department of Corrections. (Dual Witness 2).

2. On or about December 23, 2012, in the Agency's break room and before several employees awaiting a meeting for the ongoing shift, Grievant (believing someone had stolen gifts cards of his) loudly and angrily stated words to the effect of "[i]f I find out who stole them, I will punch them in their face." "And the new Sergeant better not say anything, he is a snitch, if he says anything I will punch him in his face (G Exh. 5; A Exh 1 ; Testimonies of Agency Witnesses 1 and 2 and Dual Witnesses 1 and 2). Some of employees in the break room felt threatened by Grievant's remarks. (Testimonies of Testimonies of Agency Witnesses 1 and 2 and Grievant Witness 3).

3. Agency Witness 1 and Dual Witness 2 then reported the incident to the senior sergeant (Grievant Witness 6) on duty on December 23, 2012. Those reporting the incident were informed they had the right to submit an incident report. Grievant Witness 6 counseled Grievant and instructed Grievant to apologize to all employees in the break room who heard the comments of Grievant. Grievant did apologize immediately as instructed and the matter was considered resolved. (Testimony of Dual Witness 2). No incident reports were submitted on December 23, 2012. (Testimony of Grievant Witness 6; A Exh. 3).

4. On the night of the incident, a co-worker informed Grievant Witness 4 of it. Grievant Witness 4 believed further action was required. Thus, she reported the incident to the Captain, Agency Witness 3, the next day. (Testimony of Grievant Witness 4).

5. The Captain, Agency Witness 3, was on vacation the day of incident. Once she learned of the event and returned to work, she investigated the matter instructing each employee who were present during the event to submit an incident report. Those reports were submitted between December 26, 2012, and January 6, 2013. No incident report was obtained from Grievant. (A Exh. 3). At the conclusion of the investigation, management issued Grievant a Group III Written Notice with termination for violation of the Agency's Workplace Violence Policy 130.3. The group notice described the workplace violence offense as the comments made by Grievant and referenced above in "Findings of Fact" # 2. (A Exhs. 1, 3).

6. Agency Policy 130.3 on workplace violence provides in pertinent part the following:

**Workplace Violence** - 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, attempted rape, psychological trauma such as threats, obscene phone calls and/or electronic communications, and intimidating presence, and harassment of any nature such as stalking, shouting, or abusive language.

(G Exh. 3).

7. Violation of the workplace violence policy is considered a serious offence. (G Exh. 3).

8. Other incidents had occurred at the Agency that were akin to workplace violence, and involving unwanted touching or threatening gesturing, but employees had not been terminated.

(i) On one occasion in 2008, a supervisor pointed at the chest of his subordinate, Grievant Witness 2. As described by Grievant Witness 2, in making this gesture, the supervisor made contact with Grievant Witness 2's chest which was unwelcomed and offensive to Grievant Witness 2.<sup>2</sup> Grievant Witness 2 reported the incident as workplace violence. The Agency's warden informed Grievant Witness 2 that the gesture/physical touching by the supervisor was not workplace violence as the supervisor was giving Grievant Witness 2 an instruction. The supervisor was not disciplined. (Testimony of Grievant Witness 2).

(ii) On another occasion on or about May 11, 2011, Grievant Witness 2 was involved in another workplace violence incident. Concerning this incident, another correctional officer had volunteered to work on the night shift that Grievant Witness 2 was assigned. This correctional officer was sleeping on the post. When he was informed by Grievant Witness 2 that he was not allowed to sleep, the correctional officer punched Grievant Witness 2 in the face. The correctional officer was escorted out of the building by Grievant who happened to be working that shift. Several days later Grievant Witness 2 submitted a report of the incident. The matter was not investigated. Further, the correctional officer who was on probation at the time of the physical assault was not terminated for it. (Testimony of Grievant Witness 2, A Exh. 2).

(iii) Moreover, a third incident involved Grievant Witness 2 and an immediate supervisor, a sergeant - Grievant Witness 7. On one particular day, a faulty inmate count occurred prior to Grievant Witness 2's shift. During his shift Grievant Witness 2 was questioned about it by the captain on his shift. Grievant Witness 2 was hesitant to respond to the Captain's inquiry because he wanted to avoid reporting (or "snitching") on the work performance of one of his co-workers. Grievant Witness 2 was also sick and agitated at the time. Grievant Witness 2's immediate supervisor, Grievant Witness 7, commenced demanding responses from Grievant Witness 2. An altercation ensued which led to Grievant Witness 2 standing up and pointing at his immediate supervisor. Grievant Witness 7 described Grievant Witness 2 as "blowing up."<sup>3</sup> This incident occurred in the presence of others. Grievant Witness 2 was not removed from his duty

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<sup>2</sup> When testifying about the incident, Grievant Witness 2 described it in pertinent part by stating "a supervisor had pointed at me on my chest." The Hearing Officer finds it is reasonable to conclude that the phrase "on my chest" means the supervisor made contact with Grievant Witness 2's chest.

<sup>3</sup> The Hearing Officer finds that a reasonable person could interpret Witness 7's phrase "blowing up" as Witness 2 uttering heated words also.

post as a result of the incident. However, incident reports were submitted by several who witnessed the event. Grievant Witnesses 2 and 7 then met with the watch commander. What followed was Grievant Witness 2 received a written group notice. As a result, a group notice for disruptive behavior remains active on his disciplinary record. Whether this group notice initially described the offense as workplace violence is not clear. However an exchange of questioning and testimony at the hearing suggests such was the case.<sup>4</sup> Grievant Witness 2 was not terminated.

9. Grievant's 2011-2012 annual performance evaluation indicated he was a contributor at work. (A Exh. 4).

10. Grievant's superiors described him as worker respectful of management, dependable worker who took on a lot of responsibility and performed all tasks requested of him by his superiors. (Testimony of Dual Witnesses 2 and 3).

### **DETERMINATIONS AND OPINION**

The General Assembly enacted the *Virginia Personnel Act, VA. Code §2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within 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/her 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, 656 (1989).

*Va. Code § 2.2-3000 (A)* sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

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<sup>4</sup> That exchange is as noted below:

Question by Grievant: "When they downgraded your workplace violence from workplace violence to disruptive behavior what was your demeanor then?"

Answer of Grievant Witness 2: "I was really upset. I got written up for what they felt like was justifiable that I pointed at a supervisor's face, and they wouldn't tolerate that. But in the situation at the officer, when I got punched in the face, they didn't have the decency to say this situation didn't happen or it did happen, we're going to assure you it doesn't happen again. No consideration whatsoever."

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>5</sup>

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.<sup>6</sup>

These standards provide that Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence.<sup>7</sup> When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.

Agency management issued the Grievant a Group III Written Notice with termination on January 10, 2013. That notice described the nature of the offense and evidence as previously mentioned here. The Hearing Officer examines the evidence to determine if the Agency's discipline was warranted and appropriate under the circumstances.

## **I. Analysis of Issue before the Hearing Officer**

### **Issue: Whether the discipline was warranted and appropriate under the circumstances?**

#### **A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?**

The undisputed facts demonstrate that Grievant was agitated because he believed someone had stolen his gift cards and engaged in the alleged conduct. Thus, the Hearing Officer so finds.

Next, the Hearing Officer examines if the behavior was misconduct. Agency Policy 130.3 defines workplace violence as follows:

**Workplace Violence** - 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, attempted rape, psychological trauma such as threats, obscene phone calls and/or electronic communications, and intimidating presence, and harassment of any nature such as stalking, shouting, or abusive language.

The evidence shows that Grievant made the comments loudly and in anger.

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<sup>5</sup> Grievance Procedural Manual §5.8

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1 I.

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.XII (A).

Further, several employees reported feeling threatened by Grievant's comments. In fact, one witness testified that if someone had challenged Grievant at the time he made the comments, he believed there would have been an altercation of some sort. Thus, the Hearing Officer finds Grievant's conduct constituted workplace violence within the Agency's definition.

**B. Was the discipline consistent with policy and law?**

Agency policy 135.1 classifies workplace violence as a Group III Offense. Further, the policy notes that serious misconduct even when it is a first occurrence normally warrants removal.<sup>8</sup> The evidence shows that Grievant engaged in the described conduct, a Group III offense. Thus, the Agency's discipline is consistent with policy.

**II. Mitigation.**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”<sup>9</sup> EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>10</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>11</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found Grievant engaged in the behavior described in a written notice and that the behavior was misconduct. Also, the hearing officer has found the Agency's discipline was consistent with law and policy.

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<sup>8</sup> Virginia Department of Corrections Operating Procedure 135.1V(D).

<sup>9</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>10</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>11</sup> *Rules for Conducting Grievance Hearings* VI(B)

Next the hearing officer determines if the discipline exceeds the limits of reasonableness. Disparate treatment may be a sufficient basis for finding the Agency's discipline is not reasonable and mitigation is therefore appropriate.<sup>12</sup> In that vein, the Hearing Officer now considers Grievant's claim that the Agency's discipline was inconsistent.

Grievant provided evidence of several incidents to support this claim by the testimonies of Grievant Witnesses 2 and 7.

For one, Grievant Witness 2 testified that he was involved in an incident at the Agency in 2008 where the supervisor of Grievant Witness 2 pointed at the chest of Grievant Witness 1. As described by this witness, in making this gesture, the supervisor made contact with Grievant Witness 2's chest which was unwelcomed and offensive to Grievant Witness 2. Grievant Witness 2 testified that he reported the incident as workplace violence. The Agency's warden informed Grievant Witness 2 that the gesture/physical touching by the supervisor was not workplace violence as the supervisor was giving Grievant Witness 2 an instruction. Thus, the supervisor, to Grievant Witness 2's dismay, was not disciplined.

In addition, Grievant Witness 2 testified that he was involved in another workplace violence incident on or about May 11, 2011 in what he described as "a control group" environment. Regarding this incident, another correctional officer had volunteered to work on the night shift that Grievant Witness 2 was assigned. This correctional officer was sleeping on the post. When he was informed by Grievant Witness 2 that he was not allowed to sleep, the correctional officer punched Grievant Witness 2 in the face. The correctional officer was escorted out of the building by Grievant who happened to be working that shift. Several days later Grievant Witness 2 testified that he submitted a report of the incident. The evidence shows that Grievant Witness 2 does not recall the matter being investigated. Further, the correctional officer who was on probation at the time of the physical assault and was not terminated for the battery.

Moreover, a third incident involved Grievant Witness 2 and his immediate supervisor, a sergeant and Grievant Witness 7. The testimony of these two witnesses indicated that the situation was caused by a faulty inmate count that was conducted prior to Grievant Witness 2's shift. Grievant Witness 2 was questioned about it by the captain on his shift. Grievant Witness 2 testified that he was hesitant to respond to avoid reporting (or "snitching") on the work performance of one of his co-workers. Grievant Witness 2 was also sick and agitated at the time. Grievant Witness 2's immediate supervisor, Grievant Witness 7, commenced demanding responses from Grievant Witness 2. An altercation ensued where Grievant Witness 2 stood up and pointed at his immediate supervisor. Grievant Witness 7 described Grievant Witness 2 as "blowing up." This incident occurred in the presence of others. Grievant Witness 2 was not removed

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<sup>12</sup> *Id.*

from his duty post as a result of the incident. However, incident reports were submitted by several who witnessed the event. Grievant Witnesses 2 and 7 then met with the watch commander. What followed was Grievant Witness 2 received a written group notice. As a result, a group notice for disruptive behavior remains active on his disciplinary record. Whether this group notice initially described the offense as workplace violence is not clear. However an exchange of questioning and testimony at the hearing suggests such was the case.<sup>13</sup> Grievant Witness 2 was not terminated.

The Hearing Officer notes that she had an opportunity to observe the demeanor of Grievant Witnesses 2 and 7 and found them credible. Further, no evidence was offered contradicting their account of the three events noted above.

Considering the incidents noted above the Hearing Officer finds Grievant was similarly situated to the other individuals accused of workplace violence. And the other accusers' conduct were equally aggravating, if not more so, than Grievant. In the incident that occurred in 2008, the supervisor's threat - offensive pointing and touching - was condoned. In the second event, a co-worker on probation battered Grievant Witness 2 and was not terminated. In the third incident, Grievant Witness 2 was agitated (as Grievant was agitated) "blew up" at his immediate supervisor. Yet Grievant Witness 2 continues to be employed by the Virginia Department of Corrections.

Accordingly, the Hearing Officer finds the Grievant has met his burden of showing inconsistent discipline. Thus, the Agency's discipline was unreasonable and Mitigation is therefore appropriate.

Also, the Hearing Officer notes that the evidence shows Grievant was counseled and apologized for his outburst. He remained on the shift and others thought the matter was resolved. Further, his superiors testified he was a dependable worker and did all his supervisors asked.

Accordingly, having considered Grievant's claim of disparate treatment, the circumstances surrounding the incident that occurred on December 23, 2012, all other arguments and any evidence submitted to support them, as well as all other evidence, the Hearing Officer finds the Agency discipline as is cannot be upheld. It is amended as set forth below.

## **DECISION**

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<sup>13</sup> That exchange is as noted below:

Question by Grievant: "When they downgraded your workplace violence from workplace violence to disruptive behavior what was your demeanor and then?"

Answer of Grievant Witness 2: "I was really upset. I got written up for what they felt like was justifiable that I pointed at a supervisor's face, and they wouldn't tolerate that. But in the situation at the officer, when I got punched in the face, they didn't have the decency to say this situation didn't happen or it did happen, we're going to assure you it doesn't happen again. No consideration whatsoever."

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not. Having done so, for the reasons noted here, the Hearing Officer finds that Grievant violated the standards of conduct by his verbal outburst on December 23, 2012, in violation of the workplace violence policy and the Agency's discipline was consistent with law and policy. However, mitigation is appropriate because the Agency's discipline of similarly situated employees was inconsistent. Thus, the Hearing Officer modifies the discipline as set forth below:

1. The Group III Written Notice with termination is amended to a Group III Written Notice with 30 days of suspension without pay;
2. Full back pay for the period Grievant has been separated from his job excluding the 30 days of suspension without pay (back pay is to be offset by interim earnings);
3. Other benefits and seniority are to be appropriately restored;
4. The Agency is ordered to reinstate Grievant to his former position or, if occupied, to an equivalent position.

### **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  
Departmental of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> 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 N. 14th 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>14</sup>

Entered this 11<sup>th</sup> day of April 2013.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate  
Agency Representative  
Grievant  
Director of EDR

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<sup>14</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.