

Issue: Group III Written Notice with Termination (criminal conviction); Hearing Date: 01/03/13; Decision Issued: 01/04/13; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 9987; 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: 9987

Hearing Date: January 3, 2013

Decision Issued: January 4, 2013

PROCEDURAL HISTORY

On November 9, 2012, Grievant was issued a revised¹ Group III Written Notice of disciplinary action with removal for conviction of illegal conduct relating to job performance and of a serious nature.

On October 27, 2012, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 26, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On January 3, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's Counsel

ISSUES

¹ The original Group III Written Notice was issued on October 1, 2012.

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 University of Virginia employed Grievant as a Laboratory and Research Specialist II. He had been employed by the Agency since 1996. No evidence of prior active disciplinary action was introduced during the hearing.

On August 11, 2012, Grievant had a violent encounter with his roommate. The Local Newspaper wrote:

Investigators say [Grievant] cut his 30-year-old roommate [Mr. T's] forehead with a knife after a verbal argument turned physical. Police say alcohol likely fueled the violence. [Grievant] was arrested and charged with malicious wounding and is being held at the [local jail.]

Although the newspaper article referenced Grievant as using a knife, Grievant used a meat cleaver and hit the roommate across the face with the weapon. Grievant was charged with felony malicious wounding. The charge was later amended to misdemeanor assault. Grievant was convicted by the local General District Court of misdemeanor assault and received a sentence of 60 days. The Agency removed Grievant from employment effective November 9, 2012.

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.”

Group III offenses include:

criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance or are of such a nature that to continue employees in their positions could constitute negligence in regard to agencies’ duties to the public or to other state employees.

DHRM Policy 1.80, Workplace Violence, provides:

Violent acts of employees occurring outside the workplace also may be grounds for disciplinary action, up to and including dismissal. In these situations, the agency must demonstrate in writing that the violent conduct committed has an adverse impact on the employee’s ability to perform the assigned duties and responsibilities or that it undermines the effectiveness of the agency’s activities.

The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice with removal. Grievant was convicted of misdemeanor assault on his roommate. The evidence showed that Grievant picked up a meat cleaver and struck his roommate in the face causing the roommate injury. Grievant had a history of using weapons to hit others. He was charged with malicious wounding in July 2011 but not convicted because the witnesses against him did not appear in court. Grievant had disagreements with employees working in his building. The Agency had to move Grievant several times because he had disagreements with co-workers. As part of Grievant’s work duties, he had access to utensils and tools that easily could be used as weapons in the event Grievant felt threatened by his co-workers and wished to strike them. Continuing Grievant in his employment would place other employees at risk of injury in the event Grievant became involved in a conflict at work.

Grievant argued that his actions were based on self-defense. He argued that he had been hit by the roommate several times and used the meat cleaver to prevent the roommate from further injuring him. This argument fails. Grievant was convicted of

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

assault because he hit the roommate with a meat cleaver. If Grievant had acted in self-defense, there would not have been any basis to convict him of a crime.

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”³ 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 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

³ Va. Code § 2.2-3005.

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.⁴

[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

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