

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 01/14/13; Decision Issued: 01/23/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9994; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 02/07/13; DHRM Ruling issued 03/05/13; 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: 9994**

Hearing Date: January 14, 2013

Decision Issued: January 23, 2013

#### **PROCEDURAL HISTORY**

On October 25, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On November 20, 2012, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 10, 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 due to the unavailability of a party. On January 14, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
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 Department of Behavioral Health and Developmental Services employed Grievant as a Security Officer at one of its facilities. She had been employed by the Agency for approximately three years prior to her removal effective October 25, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

In order to gain entry into a secured area, employees must pass through a security checkpoint. Employees must remove items from their pockets and then pass through a metal detector. If the detector "beeps" employees must be checked individually using a "wand". If several employees are attempting to pass into the secured area at the same time, they often have to wait until the employee in front of them passes through the metal detector.

On October 16, 2012, Officer W was responsible for performing the security check on each individual attempting to pass through the security checkpoint. A male security officer was in line in front of Grievant. When he passed through the metal detector it "beeped" and he walked forward so that Officer W could check him with the wand. Grievant was impatient and removed items from her pockets and jacket and placed them in binds on a table next to the metal detector. She walked through the metal detector while Officer W was still checking the male security officer. After finishing with the male security officer, Officer W spoke with Grievant and told Grievant that she had to go through the metal detector again because Officer W did not witness

Grievant pass through the metal detector. This annoyed Grievant. Grievant repeated the procedure for her to pass through the metal detector with Officer W watching. After Grievant passed through the metal detector, she walked behind Officer W who was checking Grievant's items in the binds on the table. Grievant reached toward an item on the table and bumped Officer W into the table. This angered Officer W who turned and pushed Grievant. Grievant was taller and heavier than Officer W. Grievant began pushing and punching Officer W and Officer W moved backwards while attempting to hit Grievant. Grievant wrote in an incident report, "I lost it." After the altercation began, it continued with what can be described best as mutual combat. Grievant took numerous offensive and defensive actions towards Officer W. Eventually, other employees separated Grievant and Officer W and the conflict ended.

Security staff including Grievant received training called Therapeutic Options of Virginia which addressed how to respond to combative patients. The Agency expected Grievant to apply those principles to other employees as well. Employees are taught to respond to a combative patient using particular physical techniques. They are also taught that they should de-escalate the conflict which would include running away from the conflict, if necessary. They are not taught to respond with mutual combat and sustain that combat.

### **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:

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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.

- injuring another person physically;
- 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. Under the Agency's workplace violence policy, the Agency discloses that it has a zero tolerance for workplace violence.

On October 16, 2012, Grievant engaged in workplace violence. She repeatedly punched Officer W. 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.

Grievant argued that she engaged in self-defense. It is not clear from the video whether Grievant's initial "bumping" of Officer W was intentional or accidental. If the Hearing Officer assumes for the sake of argument that Grievant's action was unintentional, Officer W was the first person to intentionally hit the other. Grievant had the right of self-defense when hit by Officer W. That right, however, was not unlimited. Grievant's right of self defense was limited to stopping Officer W from further hitting Grievant. It is not clear that Officer intended to continue hitting Grievant. To the extent Officer W continued to hit Grievant, it was in response to Grievant hitting her. It was unnecessary for Grievant to continue hitting Officer W to prevent further injury to Grievant. Grievant could have walked away from the conflict yet Grievant continued to fight Officer W.

Grievant argued that her behavior that day was out of character for her and resulted from unusual stress in her life. While this would explain why Grievant reacted as she did, it would not excuse Grievant's behavior under the Agency's policy. The Agency's policy establishes a zero tolerance for workplace violence. The Agency provided Grievant with training regarding how to respond to physical conflicts and included instruction that she should attempt to de-escalate conflict whenever possible.

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>2</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

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

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<sup>2</sup> 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 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>3</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>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Behavioral Health  
and Developmental Services

March 5, 2013

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9994. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed, in part, the following in the PROCEDURAL HISTORY of this case:

On October 25, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

The relevant facts of this case are as follows:

After reviewing the evidence presented and observing the demeanor of witnesses, the Hearing Officer makes the following findings of fact: The Department of Behavioral Health and Developmental Services employed Grievant as a Security Officer at one of its facilities. She had been employed by the Agency for approximately three years prior to her removal effective October 25, 2012. No evidence of prior active disciplinary action was introduced during the hearing.

In order to gain entry into a secured area, employees must pass through a security checkpoint. Employees must remove items from their pockets and then pass through a metal detector. If the detector "beeps" employees must be checked individually using a "wand". If several employees are attempting to pass into the secured area at the same time, they often have to wait until the employee in front of them passes through the metal detector.

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This angered Officer W who turned and pushed Grievant. Grievant was taller and heavier than Officer W. Grievant began pushing and punching Officer W and Officer W moved backwards while attempting to hit Grievant. Grievant wrote in an incident report, "I lost it." After the altercation began, it continued with what can be described best as mutual combat. Grievant took numerous offensive and defensive actions towards Officer W. Eventually, other employees separated Grievant and Officer W and the conflict ended.

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### *CONCLUSIONS*

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." 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."

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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. Under the Agency's workplace violence policy, the Agency discloses that it has a zero tolerance for workplace violence.

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## *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**.

## **DISCUSSION**

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In her request for an administrative review, the grievant contends that the hearing officer inconsistently applied the provisions of DHRM Policy No. 1.60 in that she was treated differently than the other person involved in the altercation as related to disciplinary action. This Department observes that the hearing officer drew his conclusion based on his assessment of the evidence and the credibility of the parties involved. We cannot evaluate whether or not the other employee (Officer W) was treated differently than the grievant because that would require this Department to assess the evidence, an evidentiary matter and beyond the authority of this Department. Thus, we conclude that the grievant is contesting the evidence the hearing officer considered, how he assessed that evidence, and the resulting decision. We have no authority to interfere with the application of this decision.

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Ernest G. Spratley  
Assistant Director  
Office of Equal Employment Services