

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 01/13/14; Decision Issued: 01/28/14; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10240; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 02/16/14; EDR Ruling No. 2014-3812 issued 02/28/14; 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: 10240**

Hearing Date: January 13, 2014

Decision Issued: January 28, 2014

#### **PROCEDURAL HISTORY**

On October 25, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On October 28, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 11, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 13, 2014, 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:

Old Dominion University employed Grievant as a Housekeeper. No evidence of prior active disciplinary action was introduced during the hearing.

The Manager held a staff meeting beginning at approximately 6:30 a.m. on October 16, 2013. Approximately ten to fifteen employees attended the meeting. Some staff were sitting around a rectangular table with the Manager standing at the head of the table. The Manager was standing with his back to the door. Grievant was seated at the table several feet away from the Manager. Several staff were sitting or standing against the walls of the room as they listened to the Manager speak. The Manager discussed various work items and then asked for comments from staff. Grievant said he wanted the days of his shift to change. He was speaking on behalf of himself and several other employees working the same shift. The Manager told Grievant that he would deny Grievant's request to change shifts but that an employee could always speak with an employee on another shift and then agree to switch shifts. The Manager said that there was a State policy supporting what he said. Grievant did not like the Manager's answer and continued to re-state his question. Grievant demanded "Show me the policy." The Manager said "We can go to the office after the meeting so I can look it up." Grievant continued to speak in a confrontational and disrespectful tone and said, "This was a meeting." The Manager said "We can meet in the office so I can look it up." The Manager did not like how he was being spoken to during the meeting so he said, "I am tired of being insulted when I am trying to help people." He offered some examples of changes he had initiated. Grievant continued to state his displeasure with the Manager's response. The Manager slapped his notebook on the table and said the

meeting was over. He picked up the notebook, put it under his arm and turned to leave the room. He walked out the door and into a vestibule between the meeting room and the hallway. Staff began standing up and leaving the room. Grievant continued to argue loudly with the Manager and asked why his concerns were not addressed. The Manager heard Grievant continuing to argue. The Manager was angry at and frustrated with Grievant. The Manager turned around and re-entered the room and said, "What is going on? Why are you acting like that? Let's go into the office and talk." Grievant was angry and said he was going to go to the Human Resource office. Grievant began moving in the direction of the Manager. Grievant displayed anger through his facial expressions and body movements. Several staff believed that Grievant was going to physically confront the Manager. The Housekeeping Supervisor stood up and positioned himself to protect the Manager and block Grievant's advance. The Housekeeping Manager told Grievant to "calm down." The Housekeeping Manager did not touch Grievant. Grievant told the Housekeeping Manager that he would punch the Housekeeping Manager in the face. Grievant told the Housekeeping Manager to shut up and that he meant it. The Housekeeping Manager became concerned that Grievant would harm him. Another employee, Mr. D, grabbed Grievant to block his advance towards the Manager. Mr. D pushed Grievant away from the Manager.

After the meeting ended, the Housekeeping Manager told the Manager that he wanted to file a complaint against Grievant because of Grievant's behavior.

### **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."

"[T]hreatening others" is a Group III offense.<sup>2</sup> On October 16, 2013, Grievant threatened to hit the Housekeeping Supervisor in the face. Grievant told the Housekeeping Supervisor to shut up and said that he meant it. Grievant threatened to physically injure the Housekeeping Supervisor thereby justifying 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 denied threatening the Housekeeping Supervisor. Grievant said that because of his age and exiting medical condition he was not capable of harming the

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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.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

Housekeeping Supervisor. The testimony of the Housekeeping Supervisor was credible and sufficient to support the issuance of the disciplinary action. Another employee whose testimony was credible heard Grievant threaten to hit the Housekeeping Supervisor.<sup>3</sup> Although some employees did not hear what Grievant said to the Housekeeping Supervisor, this does not establish that Grievant did not make a threat. When the Manager ended the meeting, people stood up and began talking as they left the room. Many employees were focused on leaving the room and not on what Grievant was doing. Whether Grievant was physically capable of carrying out the threat is not relevant regarding whether he made a threat.

Grievant argued that the Manager observed him at an ATM earlier in the morning and believed Grievant was performing personal errands instead of his assigned duties. Grievant was actually on his break and was authorized to perform personal tasks. The Manager observed Grievant and told Grievant's immediate supervisor what he had observed. The Manager's practice was to follow the chain of command with his concerns and let an employee's immediate supervisor know when he observed something out of the ordinary so that the immediate supervisor could address the issue. The evidence showed that the Manager was aggravated with Grievant because of his inappropriate tone and demeanor during the meeting and, thus, ended the meeting. Whether the Manager believed Grievant was performing personal tasks on during his work time had no bearing on whether Grievant threatened a co-worker and the outcome of this case.

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>4</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.<sup>5</sup>

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<sup>3</sup> One employee testified she heard Grievant say he would "pop" the Housekeeping Supervisor in the mouth instead of "punch" as the Housekeeping Supervisor heard. Although the words are different, the action described is the same. Grievant threatened to hit the Housekeeping Supervisor.

<sup>4</sup> Va. Code § 2.2-3005.

<sup>5</sup> The behavior of the Manager was not sufficient to justify Grievant's response to the Housekeeping Supervisor. Although the Manager was angry and responded to Grievant instead of continuing to walk away, the Manager's response was not so aggressive as to trigger an angry response in Grievant.

## 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 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>6</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>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.