

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 03/24/14; Decision Issued: 03/25/14; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 10287; 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: 10287

Hearing Date: March 24, 2014

Decision Issued: March 25, 2014

PROCEDURAL HISTORY

On January 6, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On January 16, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 24, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 24, 2014, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

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:

The University of Virginia employed Grievant as a Security Officer. He had prior active disciplinary action consisting of a Group I Written Notice issued on June 11, 2012 for failing to report to work as scheduled and a Group II written notice with a five workday suspension issued on September 11, 2012 for failing to report to work.

On December 30, 2013 after midnight, Grievant, Officer A, Officer C, and the Sergeant were near two vehicles parked next to each other on the University's Grounds. Grievant owned one of the vehicles and Officer C owned a Jeep parked side-by-side with Grievant's vehicle. The employees' shifts had just ended. Officer C asked the Sergeant to look inside his Jeep because he suspected he had a water leak. The Sergeant was at the driver's side. Officer C said the leak was on the passenger's side and the Sergeant, Officer C, and Officer A walked from the driver's side to the passenger's side of Officer C's Jeep. Grievant was outside of his vehicle and believed his vehicle had been scratched. Grievant commanded that Officer A not touch his car. The Sergeant told Grievant they did not touch his car. Grievant began to scream that Officer A's coat zipper scratched Grievant's car. The Sergeant again told Grievant no one touched his car. Grievant continued yelling at Officer A. The Sergeant stepped between them and told Grievant to "knock it off." The Sergeant walked to the other side of the Jeep. Grievant and Officer A continued to argue. Officer A walked to the Sergeant and said that Grievant told him Grievant would whip his ass if Officer A told the Lieutenant about the incident. Grievant walked around the side of the Jeep and stood toe to toe with Officer A, bumping Officer A. Grievant pushed Officer A with sufficient force to move Officer A approximately five or six feet backwards. Officer A fell

to the floor on his rear end. Officer A got up and moved towards Grievant. The Sergeant tried to stop them again. Officer A punched Grievant in the head. The Sergeant finally separated them and they calmed down.

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.”¹ 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.”

“[P]hysical violence” is a Group III offense. On December 30, 2013, Grievant argued with Officer A, threatened Officer A, and then pushed Officer A backwards and to the ground. Grievant engaged in physical violence 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. The Agency’s decision to remove Grievant must be upheld.

In his grievance, Grievant argued the Agency could not take disciplinary action because the incident did not occur during work hours. The evidence showed that employees were obligated to comply with Agency’s procedures and performance standards when they were on the University grounds regardless of whether they were working. Grievant’s behavior occurred on the University’s grounds. Several employees remained in uniform.

Grievant claimed he was treated differently from two other officers of a different race who were permitted to resign. Grievant claimed he was not permitted to resign. The evidence showed that the two other officers resigned of their own initiative without having been offered the opportunity to resign in lieu of disciplinary action. The Agency did not take pre-disciplinary action prior to the resignations. Grievant did not resign or ask to resign prior to the issuance of disciplinary action. The Agency did not discriminate against Grievant because he is not similarly situated with the two other employees.

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”² Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² *Va. Code § 2.2-3005.*

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 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.³

[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

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.