

Issues: Group II Written Notice (failure to follow policy, abusive language, disruptive behavior, unauthorized use of State property), and Group III Written Notice with Termination (failure to follow policy and threatening behavior); Hearing Date: 05/08/14; Decision Issued: 05/29/14; Agency: VCU; AHO: John V. Robinson, Esq.; Case No. 10318; Outcome: Partial Relief.

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case No. 10318

Hearing Officer Appointment: April 3, 2014

Hearing Date: May 8, 2014

Decision Issued: May 29, 2014

PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group II and Group III Written Notice issued March 6, 2014 by the Virginia Commonwealth University ("VCU"), as described in the Grievance Form A dated March 7, 2014.

The Grievant's attorney, the Agency's advocate, and the hearing officer participated in a first pre-hearing conference call on April 15, 2014.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on April 15, 2014, which is incorporated herein by this reference.

At the hearing, the Grievant was represented by his attorney and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing<sup>1</sup>.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

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<sup>1</sup> References to the agency's exhibits will be designated AE followed by the exhibit number. References to the Grievant's exhibits will be designated GE followed by the exhibit number.

## APPEARANCES

Representative for Agency  
Grievant  
Witnesses

## FINDINGS OF FACT

1. On March 6, 2014, the Agency issued to the Grievant for various disciplinary offenses, two Written Notices: (a) a Group III Written Notice with termination for violation of the Agency's threat assessment and violence prevention policy and for failure to follow instructions and/or policy; and (b) a Group II Written Notice for failure to follow instructions and/or policy, for obscene or abusive language, for disruptive behavior and for unauthorized use of state property or records. AE 1.
2. The termination was effective March 6, 2014.
3. The Grievant concedes that the Group II Written Notice should stand with a suspension of up to 10 work days but the Grievant requests rescission of the Group III Written Notice.
4. On February 18, 2014, the Grievant went to a student housing building to talk to TR about accusations TR had made against the Grievant pertaining to the Grievant's work as a Quality Insurance Inspector. AE 3.
5. There is a checkered history between the Grievant and TR. The Grievant used to be a supervisor of TR when the Grievant and TR were both employees of the Agency. The Grievant had brought disciplinary charges against TR when TR was under his supervision.
6. Subsequently, both the Grievant and TR were laid off by the Agency when the Agency contracted out to a third party contractor its custodial maintenance.
7. Ultimately, the Grievant was rehired by the Agency as an employee and TR was employed by the custodial contractor. The Grievant was until his termination, employed by the Agency as a Quality Insurance Inspector to go behind the custodial contractor and score its performance based on the custodial contract.
8. On July 1, 2013, the Grievant began working with the Quality Assurance Inspector Supervisor (the "Supervisor") who issued both Written Notices. The Grievant has been a good employee with no prior disciplinary infractions and is rated at the highest level by the Supervisor concerning his work ethics. AE 4.

9. Because of the issues between the Grievant and TR on common buildings, the Supervisor reassigned the Grievant to buildings where TR did not work.
10. When on February 18, 2014, the Grievant went to "talk" to TR about TR's work accusations, the Grievant went to a building which was not assigned to him. The Grievant was also doing paperwork and preparing his lunch in the office of LB, an administrative assistant of the Agency, when he asked LB to call TR to her office.
11. When TR came to LB's office and asked LB about a work order, which LB also assumed was why TR had been summoned by the Grievant, the Grievant said that he was the one who wanted to speak to TR and that it was about the unwarranted work accusations made concerning the Grievant by TR.
12. TR denied he knew what the Grievant was talking about and the situation became overly loud, contentious, unruly, unprofessional, and disruptive, especially when the Grievant first made a comment that TR should go and call his wife, which inflamed TR.
13. While there were students in the vicinity who could have witnessed the loud disruptive episode, both LB and the Grievant testified that there was no behavior by the Grievant which could be deemed a violation of the Agency's threat assessment policy. Both LB and the Grievant vehemently denied the allegations of threats, finger pointing, etc. which TR charged in his Letter of Complaint dated February 18, 2014.
14. TR did not testify. TR has a 2012 conviction for misdemeanor assault in Hanover General District Court and has a bad reputation concerning veracity. GE C.
15. TR has lied concerning the Supervisor and the Grievant and the Supervisor represented at the hearing that, based on the evidence adduced at the hearing, the Supervisor could no longer support the issuance of the Group III Written Notice, which was no longer warranted on the evidence presented to the hearing officer.
16. However, the Grievant admits that his conduct was disruptive, unprofessional and a mistake. The Grievant admits that he called TR "a piece of shit" and testified convincingly that he is embarrassed and remorseful about his conduct.
17. The testimony of the Grievant and the Grievant's witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

## ADDITIONAL FINDINGS, APPLICABLE LAW, ANALYSIS AND DECISION

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 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 the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8. To make this assessment, the hearing officer must review the evidence *de novo* "to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or Group III offense.)

In this proceeding, the Agency has not shown upon a preponderance of the evidence that the Grievant engaged in a violation of the Agency's threat assessment policy, as admitted by the Supervisor who issued the Group III Written Notice.

The Agency has met its burden of proving upon a preponderance of the evidence that concerning the episode with TR on February 18, 2014, the Grievant engaged in disruptive behavior and obscene or abusive language and other inappropriate actions contrary to policy; such behavior constitutes misconduct and is properly characterized as a Group II offense.

The hearing officer denies the Grievant's request for attorney's fees because the hearing officer decides that such an award would be unjust under the special circumstances. Rules § VI (E). For example, the Grievant unnecessarily initiated the confrontation with TR when as he admits, he should have taken it to his Supervisor for redress. The Grievant should, based on his history with TR, reasonably have expected that the situation would escalate particularly when the Grievant made reference to TR's wife. Additionally, LB, students and others were not shown due regard and respect when the Grievant sought out and confronted TR in the unprofessional

manner adopted by the Grievant. In short, had the Grievant given even cursory thought to the matter, the whole episode should never have occurred in the first place.

### DECISION

For the reasons stated herein, the Group III is rescinded and the termination is reversed. The Agency is directed to reinstate the Grievant and to provide the Grievant with **back pay** for the full period permitted under Section VI(D) of the *Rules for Conducting Grievance Hearings*, (the "Rules") concerning the Grievant's suspension, less any interim earnings that the employee received during the and credit for annual and sick leave that the employee did not otherwise accrue. The hearing officer hereby denies the Grievant's request for attorneys' fees because the special circumstances specified above would make such an award unjust.

The hearing officer hereby upholds the Agency's Group II Written Notice as warranted and appropriate under the circumstances, as conceded by the Grievant.

### APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

- 1. A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
- 2. A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

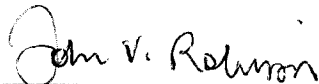
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 5 / 29 / 14



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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).