

Issues: Group II Written Notice (disruptive behavior and failure to follow policy), Group III Written Notice (workplace violence), and Suspension; Hearing Date: 02/05/15; Decision Issued: 04/14/15; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10512; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 04/27/15; DHRM Ruling issued 05/15/15; 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: 10512

Hearing Date: February 5, 2015
Decision Issued: April 14, 2015

PROCEDURAL HISTORY

On September 29, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy and disruptive behavior. On September 29, 2014, Grievant was issued a Group III Written Notice with a ten work day suspension for violation of policy 1.80 governing Workplace Violence.

On October 28, 2014, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 8, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 5, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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:

Virginia Commonwealth University employs Grievant as a Groundswoker Senior. He has been employed by the Agency for over five years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to Mr. H. Grievant was criticized by Mr. H during a staff meeting.

On September 5, 2014, Mr. B and Mr. S were working in a parking lot on the VCU campus. Mr. B was a student worker and not a classified employee. Mr. S had a leaf blower.¹ Grievant and Mr. N were in a vehicle and they drove into the parking lot where Mr. B and Mr. S were working. Grievant wanted to obtain the leaf blower that had been assigned to Mr. S so that Grievant could better perform his duties at another location. Exchanging equipment was not an unusual occurrence among grounds workers. Mr. N parked the truck. Grievant and Mr. N got out of the truck. Grievant approached Mr. S and asked if he could have the leaf blower. Mr. S said okay.

Mr. B walked several paces from his work area and approached Grievant. Mr. B began making fun of Grievant suggesting that Grievant would cry whenever Mr. H said something to him. Grievant and Mr. B began a heated and loud argument. Both men

¹ It may be the case that Mr. B intended to use the leaf blower after Mr. S finished using it.

were standing close to each other arguing and neither retreated. It is unclear who initiated first physical contact but at some point, Mr. B pulled his right arm back and punched Grievant in Grievant's left ear causing Grievant's ear to bleed. Grievant was knocked to the ground on his right side. Grievant realized that if he fought Mr. B, he would lose his job so Grievant did not escalate the conflict. Grievant started to stand up. Mr. B stood over Grievant and grabbed his head to begin twisting Grievant's head. Grievant grabbed Mr. B's wrists to prevent Mr. B from harming him further. Mr. N told Mr. B to stop and Mr. B stopped. Grievant stood up and the physical conflict ended.

Grievant had a laceration to his left ear. Grievant had blood on his shirt and was holding a rag against his left ear. Grievant refused medical treatment.

The Agency ended Mr. B's employment immediately following the incident.

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 II Written Notice

The Group II Written Notice and the Group III Written Notice were issued based on the same facts. The language used by the notices is largely similar. Both notices cite the Standards of Conduct, VCU Threat Assessment and Prevention of Violence policy, VCU Code of Conduct and the Code of Ethics as a basis for disciplinary action. The two written notices are not materially different. The Group II Written Notice must be rescinded because it serves to duplicate the Group III Written Notice and is not a separate violation of policy justifying disciplinary action.

Group III Written Notice

The incident on September 5, 2014 can be described as a verbal conflict that escalated into a physical conflict.

Verbal conflict. There is no right of "verbal self-defense" in the workplace. Simply because one employee is being verbally abusive and causing an argument, does not justify another employee to respond in kind. Grievant actively participated in the verbal conflict by yelling at Mr. B even though Mr. B initiated the conflict. Grievant's

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

behavior was disruptive because he distracted other employees from their duties. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

Physical conflict. An employee who has been physically attacked by another employee has the right to use reasonable force to defend him or herself.³ Simply because an employee hit another employee who attacked first, does not necessarily form a basis for disciplinary action against the employee who hit second. Whether the Agency can establish a basis for a Group III offense depends on whether it can establish who initiated the physical conflict. Mr. B claimed that Grievant was the first one to initiate physical contact by pushing Mr. B. Mr. B did not testify at the hearing. Grievant claimed Mr. B initiated the physical conflict. Although the Hearing Officer could not detect untruthfulness in Grievant's testimony, it is not unusual for someone involved in a physical conflict to not realize or remember every aspect of the conflict. In other words, the perspective (or motive) of someone involved in a fight may be different from someone observing a fight.

Mr. S was the only person who observed the initiation of the physical conflict. He testified that Mr. B initiated the physical conflict. Substantial portions of his testimony were not credible. The Hearing Officer must disregard Mr. S's testimony as unreliable. The question becomes what to make of Mr. S's account of the events. The Grounds Superintendent conducted a detailed investigation of the incident. He testified that Mr. S's accounts to him were reliable and showed that Grievant initiated the physical conflict. In other words, the Agency asserts that Mr. S was telling the truth to the Grounds Superintendent when they spoke in private regardless of Mr. S's testimony at the hearing.

It is not clear how reliable were the statements made by Mr. S to the Grounds Superintendent. On September 5, 2014, Mr. S wrote that Mr. B pushed Grievant first. On September 9, 2014, Mr. S wrote that Mr. B "moved his chest towards [Grievant] and [Grievant] push[ed] [Mr. B] back"⁴ On September 9, 2014, the Grounds Superintendent wrote, "Next, I spoke with [Mr. S] and asked for his written statement. [Mr. S] struggled to articulate in writing what he saw and heard and I had to ask him more than once to provide more written detail that reflected his verbal statements to me."⁵ Although it is clear that the Grounds Superintendent believed Mr. S's verbal statements reflected the truth, the Hearing Officer cannot rely on the Grounds Superintendent's conclusion given that Mr. S "struggled to articulate in writing what he saw and heard." The evidence is insufficient for the Hearing Officer to conclude that Grievant initiated the first blow.

³ See, *Diffendal v. Commonwealth*, 8 Va. App. 417, 421 (1989).

⁴ Agency Exhibit 13.

⁵ Agency Exhibit 3.

Mitigation

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”⁶ 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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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.

⁶ Va. Code § 2.2-3005.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.