

Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 02/12/15; Decision Issued: 02/27/15; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10523; 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: 10523

Hearing Date: February 12, 2015

Decision Issued: February 27, 2015

PROCEDURAL HISTORY

On November 10, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for making threats or coercion.

On December 5, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 16, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 12, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
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 Corrections employed Grievant as a Building and Grounds Superintendent A at one of its facilities. He had been employed by the Agency for approximately 24 years. Grievant had prior active disciplinary action. On September 8, 2014, Grievant received a Group II Written Notice for failure to follow instructions.

On August 7, 2014, the Supervisor assigned Grievant responsibility for a task. The Supervisor believed that Grievant had refused his instruction. Grievant believed he had complied with the instruction. The Supervisor told Grievant that Grievant might be subject to disciplinary action. Grievant did not wish to be disciplined and became upset that he faced possible disciplinary action.

On August 8, 2014, Grievant was at his home. He began to "drink heavily and at some point decided to call [the Supervisor] to see if we could work something out."¹ Grievant called the Supervisor to persuade the Supervisor to refrain from issuing disciplinary action against Grievant. Grievant was agitated, upset, and unstable. He offered some apologies and asked the Supervisor to reconsider issuing disciplinary action against him. Their telephone conversation lasted for over 15 minutes. During that conversation Grievant made several threats. Grievant said he would probably be out for six or eight weeks and that would be time enough for Mr. W to "be gone." Grievant said:

"I will throw all the load on you."
"I will show you another world, f—k you."

¹ Agency Exhibit 1.

“If I lose my job it will get real bad, you live in [locality] right?”
“I am going to slow the hell up, you are going to suffer.”
“When you serve me the paper, I will drop the bomb²; I will harass the f—k out of you.”

Grievant said he had documented what had gone on in the department and threatened to expose everything if he was written up. Grievant gave the Supervisor a deadline of 5 p.m. on August 9, 2014 to call him at home to tell him that the Supervisor had changed his mind about issuing disciplinary action otherwise Grievant would call his people to get the ball rolling.

The conversation took place near the end of the Supervisor’s shift. He left the facility immediately following his conversation with Grievant.

Based on Grievant’s comments, the Supervisor was fearful for his safety. Because Grievant tried to confirm where the Supervisor lived, the Supervisor feared for the safety of his family. He discussed Grievant’s comments with his wife and told her to look out for people she did not recognize. The Supervisor asked to be excused from work on the day the Agency intended to inform Grievant of its intention to take disciplinary action against him.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”³ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

Group III offenses include, “[t]hreatening or coercing persons associated with any state agency, including but not limited to employees, supervisors, patients, visitors, and students.”⁶ On August 8, 2014, Grievant made inappropriate threats to the Supervisor. He threatened to reduce his work effort. He threatened to harass the Supervisor. Grievant intimated that if he lost his job, he would go to the Supervisor’s home and “it would get real bad.” The Agency has presented sufficient evidence to support the

² Dropping the bomb is prison slang for implementing a plan of retaliation.

³ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁶ See, DOC Operating Procedure 135.1(V)(D)(2)(I).

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 he did not make many of the statements to the Supervisor that the Agency contends were threatening. The Supervisor's testimony was credible and consistent with his prior accounts of the telephone conversation. The Agency has presented sufficient evidence to support the issuance of disciplinary action.

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"⁷ 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.⁸

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

⁷ Va. Code § 2.2-3005.

⁸ Grievant denied threatening the Supervisor. He did not claim that his "heavy drinking" caused him to make inappropriate threats.

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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.