

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 02/27/15; Decision Issued: 03/19/15; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 10544; 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: 10544

Hearing Date: February 27, 2015
Decision Issued: March 19, 2015

PROCEDURAL HISTORY

On January 6, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On January 14, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On January 26, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 27, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the University'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 University 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 Director of Player Development for its football team. Grievant began working for the University in 2009. He did not have coaching responsibilities during football games but often stood on the sidelines to provide support as necessary. No evidence of prior active disciplinary action was introduced during the hearing.

The Graduate Student had been at the University for approximately 5 years. He had been working as the equipment room manager for the football team for three years. On game days, he was responsible for setting up the team's locker room and sidelines. During football games, he would hand footballs to the referees as needed when the University was on offense. The Graduate Student's reputation was for having a strong work ethic and knowing well his job duties.

Grievant is approximately 5 feet 8 inches tall. The Graduate Student is approximately 5 feet 4 inches tall.

On Friday November 28, 2014, the University of Virginia football team played the Opponent Team at the Opponent Team's location. The game was played at night and the outside temperature was cold enough that many staff including Grievant wore thick coats, gloves, hats, and face coverings.

With approximately 12 minutes remaining in the third quarter, the Opposing Team was on offense¹ at the Opposing Team's 20 yard line. Grievant was standing at the 25 yard line approximately five or six feet away from the sideline. He was facing the field watching the game. The Graduate Student was standing at the 22 yard line approximately five to six feet away from the sideline. He was watching the game with two other students who were wearing vests with a large orange "X" across the front of the vest. The "X" on the vest identified the wearer to the referees as a person holding extra footballs for use when Virginia was on offense.² The Graduate Student was not wearing his vest as he watched the game. He wanted to get to his position on the field and to wear his vest which was located towards the middle of the field. He began walking down the sideline looking forward and to his left onto the field. The Graduate Student passed in front of Grievant's position. Grievant rapidly extended his right arm with a closed fist to punch the Graduate Student on the right side of his mouth. The Graduate Student did not see Grievant's punch before it hit him. The Graduate Student's face recoiled in response to the punch. The punch was hard enough to cause the Graduate Student's lip to begin bleeding. The Graduate Student turned to face Grievant said, "Yo, you punched me in my lip!" Grievant responded, "I didn't punch you. I don't know what you are talking about." The Graduate Student moved within a few inches of Grievant's space and said, "If you do that again, I will beat your ass!" Grievant said, "You have three seconds to get out of my face." Grievant began counting. Student R was also on the sideline and noticed the conflict. He moved quickly to Grievant's location and pushed the Graduate Student away from Grievant. The Graduate Student told Mr. R that Grievant had punched him. Another student on the sidelines, Mr. W, pulled the Graduate Student away from Grievant. As the Graduate Student was being held away from Grievant, the Graduate Student swung his arms in an attempt to strike Grievant.

Although the football game was televised, neither party was able to present a video showing the moment that the Graduate Student was hit in the face.

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."³ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

¹ The Opposing Team had just converted a third down to continue its offensive drive. It was not a time when UVA team members and coaches would be jumping, cheering, and clapping in celebration of a favorable play.

² Since the Opposing Team was on offense, the students remained inactive and watched the game.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

The parties did not dispute that the Graduate Student’s lip was hit by Grievant. The factual dispute to be resolved in this hearing is whether Grievant intentionally punched the Graduate Student or accidentally hit him as Grievant’s arms and hands moved upward.

The University has presented sufficient evidence to show that Grievant punched the Graduate Student thereby causing an abrasion to the Graduate Student’s lip. This conclusion is supported by several reasons. First, the appearance of the injury to the Graduate Student’s lip is consistent with the Graduate Student being punched. Second, Mr. C observed Grievant’s arm extended and touching the Graduate Student’s face. Mr. C was standing at approximately the 23 yard line and relied on his peripheral vision to see Grievant’s action. Third, Mr. K saw Grievant’s arm extended with a clinched fist in what appeared to be the conclusion of a punch. He did not see the initial contact but saw the Graduate Student’s head recoil and then observed the Graduate Student touching his lip. Mr. K was approximately seven yards from Grievant’s location and was looking down the field in Grievant’s location. He could see Grievant’s extended arm using the peripheral vision of his left eye. The most likely factual scenario was that Grievant punched the Graduate Student in the mouth without provocation.

“[P]hysical violence” is a Group III offense.⁴ The University has presented sufficient evidence to support the issuance of a Group III Written Notice for physical violence. 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 was standing on the sideline during the football game when suddenly and without warning he was startled and struck in the stomach by the Graduate Student. Grievant claimed that the Graduate Student walked to Grievant’s side and said “Hey” and Grievant’s initials and then punched Grievant in the stomach. The Graduate Student’s punch, however, was “pulled” because the Graduate Student was attempting horseplay rather than intending to actually harm Grievant. Grievant claimed he was startled, flinched, and raised his arms from his sides upward toward the Graduate Student’s head. As Grievant’s hand moved past the Graduate Student’s face, Grievant’s hand hit the Graduate Student, explained Grievant.⁵ Grievant claimed his action was inadvertent and resulted from the Graduate Student’s horseplay.

Grievant’s assertion of what happened is not supported by the evidence for several reasons. First, Grievant was the only person who claimed that the Graduate Student initiated the incident with a “fake punch”. No one else witnessed the Graduate

⁴ See, Attachment A, DHRM Policy 1.60.

⁵ Grievant claimed he did not realize he may have hit the Graduate Student because he was wearing thick gloves.

Student punching Grievant in the stomach.⁶ Second, when the Graduate Student confronted Grievant, Grievant did not comment on or question why the Graduate Student punched Grievant in the stomach. Horseplay would have been inappropriate at that time of the game and, if it had happened, Grievant likely would have questioned the Graduate Student's behavior. Third, when the Graduate Student confronted Grievant, Grievant did not express regret or make any comment about accidentally hitting the Graduate Student. If Grievant's contact had been accidental, he had the opportunity to express his regret.

Grievant argued that the aggressive demeanor displayed by the Graduate Student after he was hit in the mouth, showed that the Graduate Student's recounting of the facts was unreliable. After being hit in the mouth, the Graduate Student confronted Grievant, threatened Grievant, and attempted to escalate the conflict into a fist fight. Two other people assisted in removing the Graduate Student from Grievant's location to prevent a fight. The Graduate Student went into the locker room where he punched a wall and chairs and cried on the floor because of the conflict. Although the Graduate Student's behavior after the punch was inappropriate and immature, his testimony during the hearing was credible. He denied taking a "fake punch" at Grievant as he walked down the sideline. His denial was credible.

Grievant argued he had no motive to punch the Graduate Student at that time. The game was nationally televised and the mood of the game was unfavorable to Virginia. Grievant argued that if he wanted to punch the Graduate Student he had numerous better opportunities to do so. Although the reason why Grievant punched the Graduate Student remains an enigma, it is not necessary for the University to establish a motive. The University has established (for whatever reason) that Grievant punched the Graduate Student.

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

⁶ Ms. P testified that she observed Grievant using his left hand to grab the Graduate Student's shoulder and then hold him. The Hearing Officer does not believe her assessment of the events is accurate.

⁷ *Va. Code § 2.2-3005.*

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.

Grievant argued that the disciplinary action was taken in retaliation for his filing of a complaint of harassment against a highly ranked administrator at the University. No credible evidence was presented to support this allegation.

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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.