

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 07/05/13; Decision Issued: 07/26/13; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10112; 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: 10112**

Hearing Date: July 5, 2013  
Decision Issued: July 26, 2013

### **PROCEDURAL HISTORY**

On April 29, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for grabbing the arm of a coworker.

On May 21, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 5, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 5, 2013, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Agency 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 Behavioral Health and Developmental Service employed Grievant as an Acute Care Nurse at one of its facilities.

Grievant supervised the CNA. At approximately 6:50 a.m. on April 2, 2013, the CNA arrived at work. She immediately went to the Individual and placed the Individual in treatment with a machine. The CNA had to monitor the Individual every 30 minutes while the Individual used the machine to ensure the Individual's safety. The CNA usually placed her personal belongings in a cabinet but that day she placed them on the end of a table away from individuals. Between that room and the Individual's room was a bathroom.

At approximately 9 a.m., the CNA entered the room where her personal belongings were on the table. She needed to take her medication and sit down while she let the medication settle in her stomach. Grievant entered the room and observed the CNA sitting at the table. Grievant asked the CNA to take her break in the break room. The CNA said she would do so after she checked on the Individual. Grievant asked the CNA to please get up and said she just wanted the CNA to get up. The CNA recognized that Grievant was having a "bad day" and was getting anxious as she had done in the past. The CNA ignored Grievant. Grievant walked over to the CNA and said, "I told you, you need to get up! I do not want anyone to see you sitting here." Grievant approached the CNA from the CNA's left side and reached across her to grab the CNA's right forearm. Grievant then pulled the CNA's arm upward to force the CNA to stand up and move out of her seat. The CNA said to Grievant, "I can't believe you

just did that!" The CNA opened the door and walked out of the room and towards the conference room. Grievant followed the CNA as she walked down the hallway. Grievant was arguing with the CNA as she followed the CNA but the CNA had stopped paying attention to Grievant as the CNA was "in shock." The CNA entered the conference room and walked the farthest part away from Grievant. Grievant stood in the conference room doorway and spoke to the CNA who pleaded with Grievant to "just leave". Grievant walked to another area while the CNA cried and tried to recover from her interaction with Grievant.

## **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."<sup>1</sup> 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 April 2, 2013, Grievant was angry with the CNA for failing to comply with Grievant's instructions. Grievant approached the CNA, grabbed the CNA's arm, and pulled the CNA out of her chair to force the CNA to go to the break room. The CNA did not authorize Grievant to touch her and there was no business or other need for Grievant to touch the CNA. Grievant grabbed and pulled the CNA's arm in a violent manner in order to force the CNA to move to the break room. The Agency has presented sufficient evidence that 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. Accordingly, Grievant's removal must be upheld.

Grievant argued that the incident did not occur as claimed by the CNA but presented no credible evidence to counter the Agency's assertion that Grievant grabbed and pulled the CNA. Grievant argued that the CNA did not give any indication that she felt she had been improperly handled by Grievant. The Agency presented convincing evidence to show that the CNA objected immediately to Grievant's behavior.

Grievant argued that she was permitted to work with the CNA after the incident and that she was not offered counseling or mitigation of the disciplinary action. It is irrelevant how long and if the Agency permitted Grievant and the CNA to work on the same shift after the incident. The Agency was not obligated to counsel or mitigate disciplinary action given the severity of Grievant's behavior.

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State 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 ....”<sup>2</sup> 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.

### 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 14<sup>th</sup> St., 12<sup>th</sup> 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:

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<sup>2</sup> Va. Code § 2.2-3005.

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>3</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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