Issues: Group III Written Notice (threatening conduct) and Termination; Hearing Date: 07/18/13; Decision Issued: 07/22/13; Agency: VCU; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10129; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Office of Employment Dispute Resolution

Department of Human Resource Management

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 10129

Hearing Date: July 18, 2013
Decision Issued: July 22, 2013

PROCEDURAL HISTORY

Grievant was a carpenter for Virginia Commonwealth University ("the Agency"), with over thirty-two years service with the state, most recently five years with the maintenance department. On May 20, 2013, the Grievant was charged with a Group III Written Notice, with job termination, for threatening conduct occurring on May 9, 2013. The Grievant had no prior disciplinary notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action and he requested a hearing. On June 24, 2013, the Office of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. Through pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, July 18, 2013, on which date the grievance hearing was held at the Agency's facility.

Both parties submitted documents for exhibits that were, without objection, accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, accordingly.

APPEARANCES

Grievant
Advocate for Grievant
Agency Representative
Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group III Written Notice, reinstatement and applicable relief.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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.

The Agency relied on the state *Standards of Conduct*, DHRM Policy 1.60, which defines Group III offenses to include acts of misconduct of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 7. Examples of a Group III offense include acts that endanger others in the workplace, disruption of the workplace, or other serious violations of policies, procedures, or laws.

More specifically, the Agency relied on DHRM Policy 1.80, *Workplace Violence*. Workplace violence is defined as

> Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Agency Exh. 6. Under the policy, prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subject another individual to extreme emotional distress;
- threatening to injure an individual or to damage property;

The policy provides that employees violating this policy will be subject to disciplinary action under the Standards of Conduct, up to and including termination, based on the situation. Agency Exh. 6. The Agency's policy on Threat Assessment and Violence Prevention echoes DHRM Policy 1.80, and provides that violations will be subject to disciplinary action, up to and including termination. Agency Exh. 6.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a carpenter, with approximately thirty-two years of service with the state, most recently five years with the maintenance department.

As for the Group III Written Notice, it states:

> Offenses of the Workplace Policy #1[.]80, the VCU Threat Assessment and Violence Prevention Policy and the State's Standard[s] of Conduct policy 1.60, which include physical touching, threatening and provoking an individual, failure to follow instructions and policy, inappropriate behavior and unsatisfactory work performance. Specifically you are charged with threatening to injure an individual, engaging in behavior that creates a reasonable fear of injury to another person or subjects another individual to extreme emotional distress.
>
> On May 9, 2013, I received a complaint which stated that you were involved in a disagreement with [H] which ultimately led to your getting into his face and patting his cheeks asking him what he was going to do about it. Per your written statement you acknowledged touching [H] during a heated disagreement.

Agency Exh. 1.

The Grievant asserts that his co-worker, H, was the instigator of the quarrel and that he (the Grievant) was merely defending himself from H's threatening behavior. The Grievant testified consistently with his written accounts, the details of which were adopted by the Agency. Agency Exh. 2. On May 9, 2013, the Grievant was discussing a particular work order with his supervisor, and a co-worker, H, interjected himself into the Grievant's conversation with their supervisor. This developed into a heated verbal exchange between the Grievant and H. H ultimately made a complaint to the supervisor that the Grievant touched him. Based on the complaint, the Agency made inquiry and levied discipline on both employees. The Grievant was issued the Group III Written Notice with termination, and H was issued a Group III Written Notice without suspension or termination. Grievant Exh. 3.

The Grievant wrote an account of the incident, including the following:

> In summary, I was in no way attempting to be threatening or had any intentions of doing any physical harm to my co-worker. When he made the first move to me with his verbal comments regarding my attitude, and then with getting directly in my face with the statement of "beating my old ass," I reacted with placing my hands lightly on his cheeks and replying "I don't think so." And when he then continued to reference being sick of my attitude, I tried to remove myself from the situation and refer him to [], our supervisor.

Agency Exh. 2. This account describes the extent of the touching. H did not testify at the grievance hearing. In his written statement, H wrote that he knew the Grievant "meant it as a threat." Agency Exh. 2. H did not appear at the grievance hearing and he was not subject to cross-examination. The hearing officer had no opportunity to observe H's demeanor or make a credibility determination.

The Grievant testified that the touching had no force; it was just a spontaneous gesture in response to H's hostile outburst toward him.

The supervisor testified that the Agency considered the Grievant's touching an "assault" and, thus, justified the Group III and termination. The supervisor testified that the Grievant was terminated because he took the incident to a higher level and because H used the term "assault" to describe the Grievant's touch. The supervisor testified that the Grievant has been honest throughout the disciplinary process and his employment relationship.

A co-worker, C, testified that he observed and heard the verbal exchange between the Grievant and H, and that H was the aggressor in the incident. C corroborated H's verbal threat against the Grievant and added that that H repeatedly used the "F-word" toward the Grievant in a threatening manner. C recorded his observations in writing and in an email to Agency administration, albeit after the Written Notice was issued to the Grievant, but before the Written Notice was issued to H. Agency Exh. 4.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette v. Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The elements of assault are not statutorily defined, so we look to the common law definition. "At common law, assault was both a crime and a tort." *Carter v. Commonwealth*, 269 Va. 44, 46, 606 S.E.2d 839, 841 (2005). Specifically,

> [t]he common law crime of assault required an attempt or offer committed with an intent to inflict bodily harm coupled with the present ability to inflict such harm. The common law tort of assault could be completed if the tortfeasor engaged in actions intended to place the victim in fear of bodily harm and created a well-founded fear in the victim.

Id. (citation omitted). Like many jurisdictions, Virginia has merged the common law crime with the common law tort of assault. *Id.* at 47, 606 S.E.2d at 841. Combining the criminal and tort elements, the Virginia Supreme Court has held that a common law assault "occurs when an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm *or* engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim." *Id.* Regarding the common law crime of assault, the Supreme Court has stated that because assault requires an overt act, words alone are never sufficient to constitute an assault. *Harper v. Commonwealth*, 196 Va. 723, 733, 85 S.E.2d 249, 255 (1955); *see also Merritt v. Commonwealth*, 164 Va. 653, 658, 180 S.E. 395, 397 (1935). The uncontroverted facts presented here is that the Grievant was simply and spontaneously responding to a threat of violence directed to him with a pat on H's cheek that could only be viewed as an attempt to escalate the hostile situation if supported with H's credible testimony. Conceivably, the Grievant's pat led H to back down from his own escalation of the situation.

No testimony suggests that the Grievant's actions were violent, threatening, or injurious. Such an act of touching is analogous to a mere gesture to get someone's attention. The Agency has pointed to no policy that prohibits touching another or that converts all touching to the level

of an assault.[1] For example, there appears to be no policy that prohibits shaking hands, a greeting hug, or patting one another on the back as a show of support. Not all touching rises to the level of an assault. There must be a finding of more intent or force. Here, the Grievant credibly testified that, in defense of aggressive words and threats from H, he spontaneously patted H's face lightly without any intent of violence or threat. It was not a slap, punch, push, or shove. H must have positioned himself uncomfortably close to the Grievant for the Grievant to be able to pat H's cheeks. Granted, the Grievant's conduct was not analogous with shaking hands; rather, it may have been viewed by H as a derisive gesture. The Agency has a vested interest in promoting appropriate and professional conduct from its employees. Thus, a level of discipline is appropriate for both employees involved in the incident, and the analysis turns to the level of discipline.

I find that the Grievant did not engage in the behavior to the extent described in the Written Notice. I find that the level of discipline was not consistent with policy and the conduct was improperly characterized as a Group III offense—"threatening to injure an individual, engaging in behavior that creates a reasonable fear of injury to another person or subjects another individual to extreme emotional distress." The grievance hearing is a *de novo* hearing, and there was no testimony from H or corroborating witnesses that established a reasonable fear or extreme emotional distress. While the Agency apparently gave more weight to H's use of the word "assault," H did not testify at the grievance hearing for the hearing officer to assess his credibility and for the Grievant to cross-examine him. The hearing officer finds the Grievant's testimony, corroborated by a co-worker's testimony, credible, establishing that H was the aggressor and more threatening. Compared to H's unsworn written statement included in the grievance record, the *de novo* hearing allowed the fact finder to weigh the credibility of competing witnesses. A *de novo* review of the evidence and hearing testimony is favorable to the Grievant.

Given the circumstances, the credibility of the Grievant and the testimony presented at the hearing, the Grievant's conduct is more accurately described as disruptive conduct, meriting the lesser Group II level of discipline. The proven conduct does not rise to the level of violence or threatening. Thus, the Agency has not met its burden of proof that the level of discipline is properly a Group III. Assuming the Grievant's touching can be categorized as violent or threatening behavior under Policy 1.80, along the continuum of Group I to Group III, the conduct cannot be characterized as the most severe level of such conduct. The policy itself presumes violations along the continuum of discipline levels. H actually made a credible threat of violence against the Grievant, and there is no credible evidence that the Grievant's conduct exceeded or even matched the threatening nature of H's conduct. As pointed out by the Grievant, the applicable policies do not distinguish or elevate a touching from other conduct. Accordingly, the most severe discipline in this instance does not comply with applicable policy. A Group II Written Notice for disruptive behavior is appropriate.

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

[1] The analysis would be similar if considering a battery.

accordance with rules established by the Department of Human Resource Management …." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management." 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.

The Grievant asserts that the agency has not consistently applied discipline, specifically pointing to the lesser discipline levied on H, who received a Group III written notice without termination or suspension. Further, the Grievant asserts no policy notice that a mere act of touching rises to a level of misconduct exceeding a verbal threat of violence. Because the level of discipline is reduced to Group II pursuant to policy considerations, as described above, no further mitigation analysis is appropriate.

DECISION

For the reasons stated herein, the Hearing Officer finds that the Agency has not borne its burden of proving a Group III offense justifying termination. The Hearing Officer orders that the disciplinary action be reduced to a Group II Written Notice for disruptive conduct and that the Grievant be reinstated to his former position or, if occupied, to an equivalent position; that the Grievant be paid full back pay from the date of his termination to the date of his reinstatement; and that all of the Grievant's benefits and seniority be restored.

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.[2]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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