

Issue: Group III Written Notice (workplace violence); Hearing Date: 08/08/13;
Decision Issued: 08/14/13; Agency: DBHDS; AHO: Jane E. Schroeder, Esq.; Case
No. 10135; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution
DIVISION OF HEARINGS

DECISION OF THE HEARING OFFICER

In the matter of Case Number 10135

Hearing Date: August 8, 2013

Decision Issued: August 14, 2013

PROCEDURAL HISTORY

The Grievant was employed as a Health Information Manager at the agency. On March 22, 2013, the Grievant was issued a Group III Written Notice for Offense Code 32: Violation of Policy 1.80: Workplace Violence, stemming from an incident alleged to occur on March 6, 2013. Grievant initiated the Employee Grievance Procedure to dispute the allegations. The grievance was not resolved during the management resolution steps and the grievance was subsequently qualified for hearing on June 18, 2013. On July 10, 2013, the hearing officer was assigned to hear the case.

The Hearing Officer contacted the Grievant on July 10, 2013 to set up the pre-hearing conference. The Grievant indicated that she would call the Hearing Officer back after she worked some things out. She also indicated that she would be represented by an attorney, but did not name the attorney. Since the Hearing Officer did not hear back from the Grievant or her attorney by July 12, 2013, the Hearing Officer contacted the Agency Advocate and, at a brief pre-hearing conference, set the hearing for August 7, 2013. Subsequently, the Hearing Officer received an email from the Agency Advocate indicating that his witnesses were not available on August 7 and requesting the date for hearing be changed to August 8.

Since the Hearing Officer was unsuccessful in contacting the Grievant by phone or email, on July 22, 2013, the Hearing Officer sent the Grievant a registered letter informing her of the change of the date of the hearing to August 8, 2013, and reminding the Grievant that a copy of her exhibits and a list of her witnesses should be sent to the Agency Advocate and the Hearing Officer by August 1, 2013. The Grievant called the Hearing Officer the next day to say that she had received the letter, that the change of date was fine, and that her attorney would be contacting the Hearing Officer. When asked the name of her attorney, the Grievant refused to disclose it.

The Grievant did not send the list of witness or a copy of any exhibits to the Hearing Officer. On August 6, 2013, the Hearing Officer received a call from Neil McPhee, an attorney who said that he was representing the Grievant on a matter with the EEOC. Mr. McPhee said he

was not representing the Grievant for the Grievance Hearing. He asked for a continuance for the August 8th Grievance Hearing. The Hearing Officer informed him that, since he was not representing the Grievant in this matter, he could not request a continuance on her behalf. Mr. McPhee said he would prepare a motion for a continuance and have the Grievant sign it. On August 7, 2013, in the late afternoon, the Hearing Officer received, by email, a pleading entitled, "AGREED MOTION/ORDER CONTINUING GRIEVANCE HEARING." It was signed by the Grievant, but the copy received by the Hearing Officer did not have the Agency Advocate's signature. The motion did not delineate a clear nexus between the EEOC case and the EDR hearing. The Hearing Officer immediately sent an email to both parties informing them that the motion was insufficient and was not granted.

The hearing was held on August 8, 2013. The Grievant did not appear. The Agency Advocate provided the Hearing Officer with a copy of the motion for continuance that had his signature on it. The Hearing Officer confirmed that the motion was not granted. The Agency Advocate then began his case with an opening statement. Three witnesses testified. The agency's exhibits, identified as Agency's Exhibits A-K were entered into evidence. The one-hour hearing was recorded on a digital recorder and stored on one compact disk.

APPEARANCES

Agency's Advocate

Witnesses for Agency: #1 Health Information Management (HIM) Director
 #2 Facility Director
 #3 Human Resource Analyst

Witness for Grievant: none

The Grievant did not appear.

ISSUE

Whether the Group III Written Notice issued on March 22, 2013 to the Grievant for violation of Offense Code 32 (Violation of Police 1.80: Workplace Violence) for an incident on March 6, 2013, should be upheld, modified, or revoked. The Grievant was suspended for thirty days without pay. The Grievant has requested that the Written Notice be removed from her personnel file and that the pay she lost be reinstated.

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual)

FINDINGS OF FACT

1. On March 6, 2013, the Facility Director and the HIM Director went to the Grievant's office to discuss several work matters. After a few moments of discussion, the Facility Director left the room.¹
2. The HIM Director, who was the Grievant's supervisor, began a discussion with the Grievant about new assignments. The HIM Director testified that the Grievant became angry and said she would not agree to do the new assignments. The HIM Director placed a paper about the new assignments on the Grievant's desk. The Grievant stood up and told the HIM Director to "leave my office right now." The HIM Director stood up and went to retrieve the paper from the Grievant's desk. The Grievant then started walking toward the door to the office. In order to exit the office, the Grievant had to pass by the HIM Director. When she did so, she shoulder butted the HIM Director on the right shoulder. It was a contact that so strong that the HIM Director dropped her cell phone that was in her hand. The Grievant continued walking to the office door where she stopped and again said to the HIM Director "Leave my office now." The Grievant did not apologize for the physical contact. The HIM Director gathered her cell phone, folder and papers and left the office. The HIM Director testified that she was fearful of the Grievant after the incident. She did not seek medical attention.²
3. After leaving the office, the HIM Director went to Human Resources to report the incident. The Facility Director and the Human Resource Analyst who saw her there each testified that HIM Director was visibly shaken by the shoulder butting incident.³
4. The Grievant was subsequently issued a Group III Written Notice for workplace violence. In her statement to the Facility Director on March 7, 2013, the Grievant denied that she had "brushed against" the HIM Director.⁴

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code § 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia. It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 government interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653,656 (1989).

¹Testimony of Facility Director

²Testimony of HIM Director

³Testimonies of Facility Director and Human Resource Analyst

⁴Agency Exhibit J, page 5

VA Code § 2.2-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Department of Human Resource Management has produced a Policies and Procedures Manual which include policies 1.60 and 1.80:

Policy Number 1.60: Standards of Conduct.

Policy 1.60: Standards of Conduct provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section B.2.c. provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence would normally warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.⁵

Policy Number 1.80: Workplace Violence

Workplace Violence is defined in this policy 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, harassment of any nature such as stalking, shouting or swearing.”⁶

Additionally, The Agency has an Employee Handbook. Chapter 16 in this handbook is entitled, “Violence in the Workplace.” The first paragraph in this chapter has the heading, “**Zero Tolerance**” and states as follows:

[The Agency] has zero tolerance for violence or threats of violence. If an employee displays any violence in the workplace, or threatens violence in the workplace, the employee is subject to immediate discipline, up to and including termination and criminal charges.⁷

⁵Agency Exhibit A

⁶Agency Exhibit B

⁷Agency Exhibit C, p. 59.

In the present case, the Grievant was given a Group III Written Notice for violating agency policy and procedures by exhibiting violent behavior toward her supervisor. This hearing officer finds that, based on the evidence presented, the Grievant exhibited violence toward her supervisor when she hit the supervisor with her shoulder hard enough to knock the cell phone from the supervisor's hand. The Grievant offered no apology, and, in fact, denied that the incident occurred.

The Agency has shown by a preponderance of the evidence that the Grievant did exhibit violence toward her supervisor on March 6, 2013. The Agency followed the proper discipline procedures in issuing a Group III Written Notice. The Agency considered the Grievant's personnel file, years of service, and performance in mitigation before determining the disciplinary action of suspension of thirty days.

DECISION

The disciplinary action of the agency is upheld. The Hearing Officer finds that the mitigation considered by the agency in determining the disciplinary action was appropriate in this case. The Group III Written Notice issued to the Grievant on March 22, 2013 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.¹

[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].

August 14, 2013

Jane E. Schroeder, Hearing Officer

¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.