

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 12/05/13; Decision Issued: 12/23/13; Agency: NSU; AHO: Ternon Galloway Lee, Esq.; Case No. 10216; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10216

Hearing Date: December 5, 2013

Decision Issued: December 23, 2013

SUMMARY OF DECISION

The Agency had found Grievant engaged in workplace violence. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found Grievant engaged in the conduct alleged, that it was misconduct, and that the Agency's discipline was consistent with law and policy. Thus, the Hearing Officer upheld the discipline.

HISTORY

On September 30, 2013, the Agency issued Grievant a Group III Written Notice with termination for workplace violence. On or about October 29, 2013, Grievant timely filed his grievance to challenge the Agency's action. On November 12, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on November 19, 2013,¹ and a scheduling order was issued the same date setting the hearing for December 5, 2013.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. None were presented. The Hearing Officer admitted, without objection, Agency Exhibits 1 through 20, and Hearing Officer Exhibits 1 through 3. Grievant was given an opportunity to submit exhibits. He declined to do so stating he would rely on the Agency Exhibits.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate/attorney and the Grievant was represented by his advocate.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (7 witnesses)
Advocate for Grievant

¹ This was the first date that the parties were available.

Grievant
Witnesses for Grievant (1, Grievant)

ISSUE

Was the Group III Written Notice with termination warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) §5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is an institution of higher learning. Grievant had been employed by the Agency as a housekeeper for about six years until management terminated him on September 30, 2013, for workplace violence. (A Exhs. 1, 3).

I. Policies

2. Agency Policy 1.80 notes that workplace violence is prohibited. The policy defines workplace violence as follows:

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.

(A Exh. 15, p. 1).

3. Also, the policy prohibits, among other acts, engaging in behavior that creates a reasonable fear of injury to another person; engaging in behavior that subjects another individual to extreme emotional distress, threatening to injure an individual or to damage property. (A Exh. 15, p. 1).

4. Employees engaging in workplace violence are subject to disciplinary action under policy 1. 60 Standards of Conduct which may include termination based on the situation. (A Exh. 15, p. 2; A Exh. 16).

II. September 20, 2013 Incident

5. On September 20, 2013, Grievant was in the break-room seated when he received a call on his cellular telephone (cell phone). He placed his dust mop on the table near where he was seated and exited the room to answer the call. (Testimony of Agency Witnesses 2 and 3).

6. While Grievant was out of the break-room, Agency Witness 1 entered it and took a seat. Unbeknownst to her, she sat in the chair Grievant had just previously occupied. (Testimonies of Agency Witnesses 1, 2, and 3). The chairs in the break-room are not assigned. (Testimony of Agency Witnesses 1 and 2).

7. Soon after, Grievant returned to the break-room. There were vacant seats available upon his return. Even so, Grievant approached Agency Witness 1 and stated words to the effect of "You are sitting in my seat." Agency Witness 1 replied that the chair she was sitting in did not have Grievant's name on it. (Testimonies of Agency Witness 1, 2, and 3).

8. Grievant then placed his hands on the chair that Agency Witness 1 was seated in, spun it around while Agency Witness 1 occupied it, and attempted to dump Agency Witness 1 out of the chair. Agency Witness 1 became very upset and she and Grievant argued. During the course of the argument, Grievant referred to Agency Witness 1 as a "Bitch" several times. Agency Witness 1 repeatedly told Grievant to leave her alone. She did not swear or call Grievant names and she did nothing inappropriate. (Agency Witnesses 1, 2, and 3).

9. Agency Witnesses 2 and 3 were also present in the break-room and observed the entire incident. During the incident, they instructed Grievant to find another seat. (Testimonies of Agency Witnesses 1, 2, and 3).

10. Agency Witness 1 was so troubled by the incident that she considered reporting the matter to the police/human resource. (Testimonies of Agency Witness 1 and Housekeeping Manager).

11. Several offices are located down the hallway from the break-room. Housekeeping Supervisor and Housekeeping Manager were meeting in one of those offices. Even though the office they were meeting in is not adjacent to the break-room, the September 20, 2013 confrontation was so loud, they heard it. Immediately they went to the break-room to determine what was occurring. Housekeeping Manager and Housekeeping Supervisor found Grievant and Agency Witness 1 arguing. (Testimonies of Agency Witnesses 1, Housekeeping Manager, and Housekeeping Supervisor).

12. Housekeeping Manager sent Grievant and Agency Witness 1 to his office. While discussing the incident there, Grievant apologized to Agency Witness 1. The apology was not accepted by Agency Witness 1 and she insisted that management take action regarding Grievant's behavior. (Testimony of Housekeeping Manager).

13. Management investigated the matter which included obtaining written statements from eye witnesses to the incident. Upon completing its investigation, management determined Grievant had violated its workplace violence policy. It then issued Grievant a Group III Written Notice with termination for his behavior on September 20, 2013. (A Exh. 1).

On September 27, 2013, Grievant stated in writing that he took responsibility for his behavior on September 20, 2013. Further he apologized to his co-worker, staff, and management. (A Exh. 2). When Grievant appealed his discipline he requested, among other relief, reinstatement and a transfer to a different location. (A Exh. 3).

III. Other Discipline/Problems with Grievant Repeat behavior

(A) Transfers

14. Prior to the September 20, 2013, incident, Grievant had been transferred to a different work location three (3) times. The transfers occurred because Grievant could not get along with his supervisors and or because he had altercations with his co-workers at those work locations. Also, Grievant had been transferred because the Agency was attempting to assist him in being successful on the job. (Testimony of Housekeeping Manager).

(B) May 22, 2013 Incident

15. On June 11, 2013, Grievant was issued a Group II Written Notice for conduct he engaged in on May 22, 2013, that involved another employee. His conduct was disruptive and unprofessional behavior, use of obscene or abusive language, and failure to follow instructions and/or policy . Grievant was considered the instigator in the incident. He also agreed the Group II Written Notice was appropriate for his behavior. (A Exh. 4, pp. 1-2). (Testimony of Housekeeping Manager). The other employee involved in the incident received a Group I Written Notice because she was less culpable. (Testimonies of Agency Witness 4 and Director of Facilities Management).

When management became aware of the May 22, 2013 incident, Grievant was sent home pending the investigation's completion. (A Exh. 4, p. 5).

(C) February 28, 2013 Incident

16. Grievant was involved in an altercation with another housekeeping employee on February 28, 2013.

During this incident, Grievant requested work keys from another housekeeper employee. At the time Grievant asked for the keys, this housekeeping employee was on the telephone conferring with another employee of the Agency. While this housekeeping employee remained on the telephone, Grievant requested the keys again. The housekeeping employee was annoyed that Grievant insisted on her giving him the keys while she was engaged in assisting another employee on the telephone. At that point, the housekeeping employee threw the keys to Grievant while continuing her telephone conversation. Grievant believed he had been

disrespected and upon returning the keys he started an altercation with the housekeeping employee. Grievant approached the housekeeping employee, shouted at her, and pointed his finger in her face. The housekeeping employee tried walking away from the situation, but Grievant followed her. Then the argument got louder. Two professors were present at this time. They separated Grievant and the other housekeeping employee and requested Grievant leave the building.

The housekeeping employee expressed she was placed in fear by Grievant's behavior. She reported the matter to Housekeeping Manager who investigated the incident. The Housekeeping Manager determined Grievant was the instigator. He then recommended Grievant receive a Group III Written Notice with a 30 day suspension. He only recommended the other housekeeping employee receive a written counseling memorandum because he determined Grievant started the situation.

Agency records regarding the February 28, 2013 incident show Grievant did not receive the group notice recommended. Neither does it indicate the other housekeeping employee received counseling.

(A Exh. 5; Testimony of Housekeeping Manager).

(D) January 2012 Incidents

17. Grievant was recommended for a Group III Written Notice with 15 days suspension for Engaging in a verbal altercation with a co-worker on January 5, 2012, and another one with a student on January 24, 2012. Regarding both incidents, management's investigation revealed that Grievant was in the face of each person shouting obscenities and continuously stating words to instigate a fight. During the January 24, 2012 incident, the investigation reveals Grievant asked the student if he wanted to fight. Although the above-referenced Group III Written Notice with suspension was recommended for the January 2012 incidents, management gave Grievant a break and did not issue it. (Testimony of Housekeeping Manager; A Exhs. 7,9).

18. When management became aware of the January 24, 2012 incident, Grievant was sent home for safety reasons and so the matter could be investigated. (A Exh. 7).

IV Other

19. Prior to the above-mentioned incidents occurring in 2013, Grievant had participated in anger management counseling and completed it by August 2012. (Testimony of Grievant; A Exh. 5, p. 5 and A Exh. 9).

20. At the time of his termination, Grievant had been employed with the Agency for about six (6) years as a housekeeper. (Agency Exh. 14).

21. Management determined mitigation was not appropriate due to the number of chances it had previously afforded Grievant for similar misconduct, as well as the fact he had an active Group II Written Notice. (Testimony Director of Facilities Management).

22. Grievant's performance evaluations for 2008 through 2012 rated him as "a contributor." (A Exhs. 10, 14).

23. Grievant's October 2012 performance evaluation notes, among other things, that Grievant needs to get along with [his] supervisor, manager, and customers, and further, he needs to dress and speak professionally at all times. (A Exh. 10, p. 1)

DETERMINATIONS 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/her 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).

Va. Code § 2.2-3000 (A) 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 resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.²

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal 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.

Under the Standards of Conduct, Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence. When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so. See Standards of

² GPM §5.8

Conduct Policy 1.60(B)(3).

On September 30, 2013, management issued Grievant a Group III Written Notice with termination for the reason previously noted here. Accordingly, the Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

The Agency contends that Grievant violated Policy Number 1.80 referred to as the workplace violence policy. The policy defines work place violence as follows:

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.

(A Exh. 15).

Moreover Policy Number 1.80 prohibits, among other acts, the following:

- (i) engaging in behavior that creates a reasonable fear of injury to another person;
- (ii) engaging in behavior that subjects another individual to extreme emotional distress; and
- (iii) threatening to injure an individual or to damage property.

An examination of the evidence shows that on September 20, 2013, Grievant re-entered the break-room after excusing himself to answer his cell phone. He approached, Agency Witness 1 and instructed her to get out of his seat, a chair Grievant previously occupied before leaving the break-room. The evidence demonstrates that when Agency Witness 1 declined to give up her seat and instructed Grievant to find another seat, Grievant took hold of the chair she was seated in, spun Agency Witness 1 around in it, and attempted to dump her out of the chair. An argument ensued with Grievant referring to Agency Witness 1 as a “bitch” on several occasions. The arguing was so loud that Housekeeping Manager and Housekeeping Supervisor, who were meeting in offices that were located a distance down the hall from the break-room, heard the confrontation and rushed to the break-room to determine what was occurring. Once there, they discovered Grievant and Witness 1 arguing. Housekeeping Manager instructed the two to report to his office. During discussions about the incident in the manager’s office, Grievant apologized to Agency Witness 1. She was upset, refused the apology, and insisted that management take action or she would report the incident to the police and/or human resources.

Considering the policy and incident as discussed above, the Hearing Officer finds Grievant's approaching Agency Witness 1, grapping the chair, spinning it around, and attempting to dump Agency Witness 1 out of it constitute workplace violence. This is so because the Hearing Officer finds that it is reasonable that an individual (such as Agency Witness 1) subjected to Grievant's behavior would fear being injured. Moreover, Grievant's conduct - attempting to dump Agency Witness 1 from the chair - threatened to physically injure her. What is more, the evidence shows Grievant shouted at Agency Witness 1, referring to her as a bitch several times. Further, the evidence demonstrates that Agency Witness 1 was more than marginally upset with Grievant's conduct. As she refused his apology, insisted management take action, and warned Housekeeping Manager that she would inform human resources or the police if management took no action to deal with Grievant's behavior. Also, the Hearing Officer notes that noting of record shows that Agency Witness 1's behavior was inappropriate or that she was at fault.

Having found Grievant engaged in workplace violence, the Hearing Officer is cognizant of Grievant's testimony and description of the incident as "a misunderstanding." She also takes note of Grievant's testimony that he simply touched the chair Agency Witness 1 was seated in and he did not refer to her as a "bitch." The Hearing Officer finds Grievant's testimony is contrary to the overwhelming evidence, including the testimony and written statements of two impartial eye witnesses to the incident, as well as Grievant own statement "taking responsibility for what occurred." Accordingly, the Hearing Officer does not find Grievant's characterization of what occurred convincing.

Considering the above, the hearing officer finds Grievant engaged in the conduct alleged in the written notice and it constituted workplace violence.

B. Was the discipline consistent with policy and law?

As previously mentioned, Standards of Conduct governing state employees reveals that Group III Offenses include acts and behavior of such a serious nature that a first occurrence normally warrants removal.

First, the Hearing Officer notes that a review of the facts indicates Grievant's misconduct was dangerous and instigated by him. Grievant threatened Agency Witness 1 with physical injury. Moreover, his conduct emotionally distressed his co-worker. Further, Grievant laced his physical violence by using obscene language that referred to Agency Witness 1 as being a lewd woman.

The Hearing Officer notes that even if Grievant's conduct on September 20, 2013, had been his first act of workplace violence, his behavior was serious enough to warrant a Group III Written Notice and termination. That said, the facts before the Hearing Officer demonstrate that before September 20, 2013, on several occasions Grievant had engaged in behaviors similar to those he displayed in the group notice that Grievant challenges now. But instead of management terminating Grievant because of those prior incidents, management provided counseling, allowed Grievant to participate in anger management, and transferred Grievant to different locations

and/or issued a lesser group notice.

Thus, considering the seriousness of Grievant's conduct on September 20, 2013, that he had committed prior similar offenses, and that the Agency had employed progressive discipline, the Hearing Officer finds the Group III Written Notice with termination is consistent with policy and law.

II. Mitigation

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”³ EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁴ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁵

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice, the behavior was misconduct, and the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has carefully deliberated and considered all evidence. This includes, but is not limited to, several assertions of Grievant. He contends that the Agency should have resolved the matter by transferring him. The evidence shows on 3 prior occasions the Agency did relocate Grievant. But his pattern of behavior - getting in the face of others and shouting, using obscenities, urging others to fight him, and not getting along with his supervisors - continued. Also, Grievant seems to argue that other employees engaged in workplace violence had received

³ Va. Code § 2.2-3005 and (c)(6)

⁴ *Rules for Conducting Grievance Hearings* VI(A)

⁵ *Rules for Conducting Grievance Hearings* VI(B)

lesser or no punishment. A review of the evidence does not support Grievant's claim. In fact, in all incidents of record involving altercations between Grievant and others, the investigations illustrate that Grievant was the instigator or that the other party was not at fault. Accordingly, Grievant received the discipline warranted.

Further, the Hearing Officer does note several aggravating factors. First Grievant's conduct was of a repeated nature. Second, the Agency attempted to work with Grievant and assist him in being successful as a housekeeper. Of note, on several occasions, management recommended issuing Grievant group notices, but did not. Moreover, as mentioned before, management transferred Grievant several times when it became evident he could not get along with co-workers or his supervisor. Third, Management employed progressive discipline with Grievant. Fourth, the Agency has a responsibility to maintain a workplace without violence. Grievant's pattern of shouting in the faces of others, instigating a confrontation, using obscenities, and threatening to injure others does not foster a workplace void of violence.

Accordingly, having undergone a thorough consideration of all the evidence, the Hearing Officer cannot find the Agency acted without reason.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

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
Departmental of Human Resource Management
101 N. 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 N. 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.⁶

Entered this 23rd day of December, 2013.

Ternon Galloway Lee, Hearing Officer

cc: Agency's Advocate
Agency's Representative
Grievant's Advocate
Grievant
EDR

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.