

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 10/15/14; Decision Issued: 10/16/14; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10459; 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: 10459

Hearing Date: October 15, 2014
Decision Issued: October 16, 2014

PROCEDURAL HISTORY

On August 20, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On September 4, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 16, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2014, 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 Services employed Grievant as a Direct Care Associate at one of its facilities. She had been employed by the Agency since 2009 until her removal effective August 20, 2014. No evidence of prior active disciplinary action was presented by the Agency.

On August 8, 2014, Grievant was standing outside of the office speaking with Ms. Cr. Grievant was angry and started punching in the air as she spoke with Ms. Cr. Ms. WB was inside the office seated at a computer. Ms. C was standing next to a sink. Mr. B and Mr. W were also in the office.

Grievant opened the office door and asked if someone could relieve Ms. Cr. Ms. C said "yes". As Grievant was closing the door, Grievant added "while the two love birds flirt." Grievant was referring to Ms. WB and Mr. W who were in the office. Ms. WB said "nobody is love birds." Grievant entered the office and went directly to Ms. WB. Grievant slammed her hand on the table where Ms. WB was sitting and demanded, "What did you say!" Grievant stood within a foot of Ms. WB, leaned over Ms. WB, and began yelling at Ms. WB. Ms. WB turned to her right and looked upward. Grievant said, "I will beat your ass." "I will f—k you up." Ms. WB feared for her safety. Ms. C believed Grievant was about to hit Ms. WB and stepped in between Grievant and Ms. WB and was facing Grievant with her body touching Grievant's body. Ms. WB stood up and said, "You need to get out of my face!" Grievant continued to point over and reach over Ms. C's body as she yelled and argued with Ms. WB. Ms. Cr grabbed Ms. WB's arms from behind. Ms. C said to Grievant that Grievant was not going to hit anyone and

that Grievant's shift was over and Grievant needed to leave. Grievant did not leave so Ms. C told Ms. WB to go out of the office. Ms. Cr was holding onto Ms. WB and guiding her out of the office. Ms. WB backed out of the office because she feared Grievant would hit her. Ms. C walked with in front of Ms. WB to remain between Grievant and Ms. WB. Ms. C then said she would take Ms. WB out of the unit and told Ms. Cr to stay with Grievant.

Ms. C and Ms. WB walked down a hallway and away from the office. Grievant followed them and continued to taunt Ms. WB with vulgar comments. Grievant's comments were over heard by several patients.

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."¹ 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."

[T]hreatening others" is a Group III offense.² On August 8, 2014, Grievant threatened Ms. WB. Grievant yelled at Ms. WB. Grievant assumed a threatening posture by leaning over her and positioning her body too close to Grievant's body. Grievant told Ms. WB Grievant would "f—k her up" and beat her ass" meaning to harm her physically. Grievant continued to taunt Ms. WB as Ms. WB tried to get away from Grievant. The Agency has presented sufficient evidence to support 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 apologized for her actions on August 8, 2014. Although offering an apology speaks well of Grievant's character, it does not, in itself, create a basis for reversal of disciplinary action.

At Grievant's request, the Hearing Officer ordered several employees to appear as witnesses. Not all of the orders were distributed to the witnesses as required by the *Rules for Conducting Grievance Hearings*. This is harmless error. Grievant proffered the testimony of the missing witnesses. They would have presented evidence showing that Grievant had received several text messages from an unknown cell phone number that Grievant perceived as threatening her job. Grievant suspected Ms. WB was

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

sending the anonymous messages. Even if the Hearing Officer were to assume that the text messages were sent by Ms. WB, this assumption would not form a basis to reverse or alter the disciplinary action. Grievant may have had remedies available to her with respect to the anonymous text messages. One of those remedies did not include threatening to harm Ms. WB while Ms. WB was working at the Facility.

Grievant expressed a desire to resign in lieu of receiving disciplinary action. The Hearing Officer does not have the authority under the Grievance Procedure Manual to compel an agency to accept a resignation in lieu of removal.

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”³ 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

³ Va. Code § 2.2-3005.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.