

Issue: Group III Written Notice with Termination (threatening a co-worker); Hearing Date: 12/02/14; Decision Issued: 12/19/14; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10470; Outcome: No Relief – Agency Upheld;

Administrative Review: EDR Ruling Request received 01/13/15; Outcome: No Ruling – untimely.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10470

Hearing Date:	December 2, 2014
Decision Issued:	December 19, 2014

PROCEDURAL HISTORY

On September 11, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for threatening or coercing persons associated with any State agency.

On September 11, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On September 29, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 2, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Virginia Department of Transportation employed Grievant as a Transportation Operator II at one of its facilities. He had been employed by the Agency for approximately 15 years. No evidence of prior active disciplinary action was introduced during the hearing.

On August 22, 2014, Grievant and several other employees including Mr. M left the headquarters to travel to a nearby area to a work site. Mr. M spent several hours working including digging. He noticed that Grievant seemed to remain in the truck and not be working with the other employees. Mr. M returned to the headquarters at approximately 3 p.m. He drove a truck to the maintenance bay and began offloading equipment from the truck. Inside the building was a chain link cage for essential equipment. The cage was about ten feet by ten feet with a fenced top. The right side of the cage abutted a wall. The cage contained equipment such as weed eaters and lawn mowers as well as equipment parts such as sharpening tools, blades, and files. Mr. M opened the door to the cage and walked inside.

Grievant approached the cage and was moving from left to right outside of the cage as if he were going to walk to an office with a door in the wall on the right side of the cage. The office door was located a few feet to the front of the cage. Mr. M said "Hi" to Grievant and began "small talk." Mr. M made a comment about not knowing where Grievant was at the job site. The effect of Mr. M's comment was to suggest that Grievant was not performing his work duties even though other employees were

working. Grievant became angry. He dropped the bag he was carrying and walked quickly into the cage. Mr. M turned to face Grievant as Grievant approached Mr. M. Grievant grabbed the collar of Mr. M's shirt. Grievant "got in the face" of Mr. M and told Mr. M "not to f—k with me." Grievant pushed Mr. M back against the wall and held him there. A Supervisor observed Grievant's behavior and told Grievant to stop. Grievant removed his hands from Mr. M and walked away.

Mr. M felt threatened by Grievant. Mr. M had never seen Grievant so angry. There were tools in the cage that could be used as weapons if Grievant had chosen to do so. This increased Mr. M's fear of what Grievant might do next.

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."

"[P]hysical violence" and "threatening others" are Group III offenses.² Grievant engaged in physical violence on August 22, 2014 by approaching Mr. M, grabbing Mr. M's shirt collar, and pushing Mr. M backwards against the wall. Grievant threatened Mr. M when he told Mr. M not to f—k with him. Grievant was angry during the confrontation. He was not acting in self-defense. Mr. M did not take any action that would have justified Grievant's response. 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 asserted that he did not threaten anyone and did not use abusive language. The Agency, however, presented credible evidence that Grievant grabbed Mr. M and told Mr. M not to f—k with him.

Grievant argued that Mr. M approached him at a social event after Grievant had been removed from employment and told Grievant that he did not intend for Grievant to be terminated from his job. Grievant argued that if Mr. M had felt threatened, he would not have approached Grievant at the social event. This argument is not persuasive. Mr. M testified that he felt threatened at the time of the confrontation and his testimony was credible. Even if Mr. M had not felt threatened by Grievant on August 22, 2014,

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.

there would remain sufficient evidence to support the issuance of a Group III Written Notice.

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.

Grievant argued that some disciplinary action would be appropriate but not with removal. The Agency considered mitigating circumstances. Once the Agency has met its burden of proof, the Hearing Officer can only mitigate the disciplinary action if it exceeds the limits of reasonableness. In this case, the Agency’s decision was consistent with policy and no credible evidence was presented to show that the Agency’s judgment exceeded the limits of reasonableness. In light of the standard set forth in the Rules, 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

³ Va. Code § 2.2-3005.

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.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.