

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 11/21/14; Decision Issued: 11/26/14; Agency: UVA; AHO: William S. Davidson, Esq.; Case No.10481; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10481

Hearing Date: November 21, 2014
Decision Issued: November 26, 2014

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice , on September 16, 2014, for:

#32, Violation of Policy 1.80, Workplace Violence, #13- Failure to follow policy 1.60. On August 20th 2014, [Grievant] was involved in a physical altercation with a co-worker during work hours... ¹ (See Written Notice for complete description)

Pursuant to this Written Notice, the Grievant was terminated on September 16, 2014. ² The Grievant timely filed a grievance to challenge the Agency's actions on September 24, 2014. ³ On October 14, 2014, this appeal was assigned to a Hearing Officer. The hearing was held at the Agency's location on November 21, 2014.

APPEARANCES

Counsel for Agency
Agency Party Representative
Grievant
Witnesses

ISSUE

Did the Grievant violate Policy 1.80, Workplace Violence?

AUTHORITY OF HEARING OFFICER

Code Section 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 Section 2.2-3005.1

¹ Agency Exhibit 1, Tab 2, Page 1

² Agency Exhibit 1, Tab 2, Page 1

³ Agency Exhibit 1, Tab 1, Page 1

provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁴ Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) 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. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁵ However, proof must go beyond conjecture.⁶ In other words, there must be more than a possibility or a mere speculation.⁷

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, I make the following findings of fact:

The Agency provided me with a notebook containing ten tabs and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided me with a notebook containing eleven tabs and that notebook was accepted in its entirety as Grievant Exhibit 1.

⁴ See Va. Code § 2.2-3004(B)

⁵ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁶ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁷ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

Policy 1.80, defines workplace violence as any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties.⁸ The uncontradicted evidence that was presented before me indicates that an altercation between the Grievant and another employee of the Agency took place on August 20, 2014. Pursuant to that altercation, various employees who were present during all or a part of the altercation were directed to reduce their memory of the altercation to writing. Those statements are contained at Agency Exhibit 3, Pages 1 through 9. Each witness who submitted a written statement, testified before me with the exception of the comment found at Agency Exhibit 1, Tab 3, Page 7. When considering the demeanor of each of the parties to this incident, the testimony of the witnesses to this incident, and the contemporaneous written statements of the witnesses to this incident, I find that the Agency has borne its burden of proof with regards to the fact that this Grievant entered into a physical altercation with another employee. Both of these employees were terminated by the Agency and either of these employees could have avoided this altercation by simply walking away. Instead they chose to take, what originated as a verbal confrontation, and escalated it to a physical confrontation.

The Grievant stated that she felt her FMLA rights were violated. No further evidence was introduced regarding these rights. I find no such violation.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The Grievant in this matter received a Group II Written Notice on September 14, 2010 for speaking to her co-workers in a hostile and derogatory manner. While I did not consider this with regards to the underlying charge, receipt of this earlier Written Notice was considered regarding mitigation in this matter.

DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof in this matter and that the issuance of the Group III Written Notice with termination was appropriate.

⁸ Agency Exhibit 1, Tab 2, Page 4

APPEAL RIGHTS

You may file an administrative review request 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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
Richmond, VA 23219

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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁹ 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.¹⁰

[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]

William S. Davidson
Hearing Officer

⁹An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁰Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.