Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 09/14/12; Decision Issued: 09/26/12; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9891; Outcome: Partial Relief; **Administrative Review: EDR Ruling Requests received 10/10/12 and 10/11/12; EDR Ruling No. 2013-3452, 2013-3455 issued 11/30/12; Outcome: AHO's decision affirmed; Judicial Review: Appealed to Circuit Court; Final Order issued 01/29/13; Outcome: AHO's decision reversed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9891

Hearing Date: September 14, 2012
Decision Issued: September 26, 2012

PROCEDURAL HISTORY

On June 26, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for striking a resident in the mouth in response to his use of profanity.

On July 25, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 13, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 14, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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 Correctional Education employed Grievant as a Trainer & Instructor II at one of its Facilities. The Department of Correctional Education was merged into the Department of Juvenile Justice on July 1, 2012. The purpose of her position was:

> to provide effective Career and Technical Education instruction in the assigned trade area; to assist assigned students to complete the required competencies for that trade area; demonstrate effective classroom or lab management; ensure that the lab is operated in compliance with all aspects of safety management; and to maintain accurate and current student records for assigned students.[1]

On June 7, 2012, Grievant was supervising students while they cleaned a hallway. The Student was standing within arms-reach of Grievant and to Grievant's side. The Student began cursing even though students were not permitted to curse at the Facility. Grievant "out of reflex" quickly raised her hand to the Student's mouth and hit his mouth with the back of her hand. Grievant said, "Stop your cussing! We are in the hall. We have to be quiet!" Once Grievant recognize that she had hit the Student, she apologized to him and asked if he was okay. At first, the Student said he was okay and that Grievant did not hit him very hard. The Student became angry at Grievant and

[1] Agency Exhibit 1.

said "You f--king hit me in the mouth; only my momma can hit me in the mouth like that!" Grievant continued to apologize. The Student eventually calmed down and continued working. Several days later, the Student was meeting with his counselor and revealed that Grievant had hit him. The Principal learned of Grievant's actions and reported the matter to managers at the Agency's Central Office for further consideration.

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."[2] 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."

Agency Policy 1-17 defines "Abuse" as "any intentional act that causes physical, mental, or emotional injury to an individual." The policy provides, "any DCE employee or volunteer who physically or verbally abuses any client may be subject to disciplinary action." Agency Administrative Directive 05 – 009.2 Group III offenses include "fighting and/or any other acts of physical violence."

Grievant engaged in physical violence against the Student when she hit him in the mouth in response to his cursing. The Agency has presented 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 Employment Dispute Resolution…."[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.

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

[3] Va. Code § 2.2-3005.

Grievant contends the disciplinary action should be mitigated based on the inconsistent application of disciplinary action. Grievant presented several witnesses who observed Ms. C hit students in the back of their heads, twist their ears, and twist their arms behind their backs. Several witnesses of Ms. C's behavior reported Ms. C's behavior to the Principal. He had instructed them not to place their concerns in writing so he received their complaints verbally. The Principal did not report Ms. C's behavior to the Agency's Central Office. No disciplinary action was taken against Ms. C. Ms. C continued her behavior even after it was reported to the Principal. Ms. C was later transferred to another facility based on the Agency's business needs and not as part of any disciplinary transfer. The response to Ms. C's repeated inappropriate behavior was materially different from the response Grievant received from the Agency.

The decision to remove Grievant was made by managers in the Agency's Central Office and not by the Principal. These managers were not aware of the actions of Ms. C. If the Principal had reported her behavior to these managers, it is likely that Ms. C would have been removed from employment in a manner consistent with Grievant's removal. The Principal, however, is also representative of the Agency's management and serves in a position within the Agency with sufficient seniority to justify holding the Agency responsible for his actions. In this case, the Principal was aware that Ms. C hit students but he chose not to report that information to the Central Office for consideration. He chose only to submit to the Central Office Grievant's action toward the Student. As a result of the Principal's behavior, Ms. C was not disciplined for repeated instances of hitting students while Grievant was removed for one incident of hitting a student. The Agency has inconsistently disciplined employees thereby justifying the reduction of the discipline against Grievant. The Hearing Officer will reduce the Group III with removal to a Group II Written Notice with a ten work day suspension. Because Grievant has no prior active disciplinary action, a Group II Written Notice does not support removal and she must be reinstated.

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 **reduced** to a Group II with a ten work day suspension. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. The Agency may account for a ten work day suspension when calculating back pay.

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.[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].

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

S/Carl Wilson Schmidt

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH OF VIRGINIA

fdwlll'd L. Hogshire
315 East High Street
Charlottesville, VIrginia 22902
1434) 970-3760
(434) 970.3038 (fax)

Daniel R. Bouton
P.O. Box230

(540) 672-2433
(540) 672-2189 (fax)

Sixteenth Judicial Court

Albemllrle Cu!J)eper Auvanna Oooc:hland
Greene Louisa Madison Orange Charlottesville

1imothy K. Sanner
P.O. 80)(799
Louisa, VIrginia 23093
(540) 967-5300
(540) 967-5681 (fax)

Cheryl V. Higgins
SOl E. Jefferson St.. 3rd Floor

(434) 972-4015
(434) 972-4071 (fax)

Susan L. Whitlock
135 West Cam11ron Street
CuiP'I):)er, Virginia 22701
(540) 727-3440
(540) 727-7535 (filx)

January 29, 2013

[attorney for Agency]

[attorney for Grievant]

Re: Virginia Department of Juvenile Justice, Agency/Appellant
v.
[Grievant]

Gentlemen:

This matter comes to the court pursuant to Virginia Code Section 2.2-3006(8) in which the agency/appellant, Virginia Department of Juvenile Justice, seeks to reverse the decision of an administrative hearing officer.

On June 26, 2012, [grievant] was terminated by Principal as custodial maintenance/sanitation instructor at the [location] Juvenile Correctional Center. Her termination was based on a violation of DCE Policy 1·17, Inmate/Client Relations as well as DHRM Standards of Conduct which lists as a Group Ill Offense use of physical violence in the workplace as well as client abuse. The violation was based on a finding that [grievant] struck a resident in the mouth in response to his use of profanity in the hallway on June 7, 2012.

[Grievant] does not deny striking the student but instead she rationalizes her behavior by characterizing it as a motherly instinct.

On July 25, 2012, [grievant] filed a grievance to challenge the Agency's action. Thereafter, a hearing was held at the Agency's office. In issuing his ruling, the Hearing Officer delineated the following "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." [footnote omitted). 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."
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> Agency Policy 1·17 defines "Abuse" as "any intentional act that causes physical, mental, or emotional injury to an individual." The policy provides, "any DCE employee or volunteer who physically or verbally abuses any client may be subject to disciplinary action." Agency Admini- strative Directive 05·009.2 Group III offenses include "fighting and/or any other acts of physical violence."
>
> Grievant engaged in physical violence against the Student when she hit him in the mouth in response to his cursing. The Agency has pre- sented 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 Employment Dispute Resolution...." [footnote omitted] 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 reasonable- ness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A nonexclusive 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 arriving at his decision, Hearing Officer Schmidt found that the Agency's inconsistent discipline of employees similarly situated was sufficient to warrant a reduction of the disciplinary action to a Group II with a ten work day suspension. The Agency was ordered to reinstate [grievant] to her same position prior to her removal, or if the position had been filled, to an equivalent position. The Agency was further directed to provide [grievant] with back pay less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

The Court of Appeals in the case of Virginia Department of State Police v. Barton, 39 Va. App 439 (2002) held:

> "..the General Assembly adopted Code §2.1-116.08:1(B){footnote omitted) (recodified as amended at §2.2-3006) authorizing the circuit court, based on the record and sitting without a jury, to affirm, reverse or modify the hearing officer's decision. See 2000 Va. Acts, ch. 947. However, the only grounds of appeal of the hearing officer's decision is "that the determination is contradictory to law."

(Id. P. 445).

The Appellant would have this Court reverse the Hearing Officer's decision as being contradictory to law in two respects: (1) The Hearing Officer's Determination of Inconsistent Discipline is Contradictory to law and (2) The Hearing Officer's Imputing Management Authority to the School Principal is Contradictory to Law.

The basis for the hearing officer's decision was his comparison of what happened in this case with what happened over a course of time with another Agency employee, identified as "Ms. C." Other agency employees *testified* at the hearing that they had witnessed "Ms. C" commit acts of abuse on students, that such acts were reported to the Principal and that he did not report them to the Agency Central Office. The hearing officer also found that the managers in the Agency's Central Office were not aware of the actions of Ms. C but that if they had been made aware of her actions "It is likely that Ms. C would have been removed from employment in a manner consistent with Grievant's removal."

Two cases were cited by the Appellant. In Houck v. Virginia Polytechnic Institute, 10 F.3d 204 (1993), the Court ruled that the plaintiff must identify a comparable male performing work substantially "equal in skill, effort, and responsibility under similar working conditions."

Secondly, in Moore v. City of Charlotte, 754 F.2d 1100 (4th Cir. 1985), the appellate court found that the facts found by the lower court fell short of establishing that the white comparators were similarly situated because the fact finding process was superficial and inadequate.

Here, the Appellant argues that based on the rulings set forth in Houck and in Moore, the Hearing Officer's findings are "*too* sketchy to support- or Inconsistent with- the legal conclusion that [grievant] and Ms. C are similarly situated."

An appeal of a final decision of a grievance hearing is a matter of state law; it is not an appeal of an action under Title VII of the Civil Rights Act of 1964. As such, it is not controlled by the decisions of the Fourth Circuit. Old Dominion University v. Birkmeyer, 73 Va. Cir. 341, 344 (2007)(see Grievant/Appellee's Memorandum of Law in Opposition to Agency Appeal page 6). Like in Old Dominion University, Appellant's argument is a sufficiency of the evidence claim not one contradictory to Virginia law. This Court has no authority to review the sufficiency of the evidence.

The Court does concur with Appellant's second argument that the Hearing Officer imputed Management's Authority to the School Principal. As stated in Appellant's Memorandum of Law in Support of its Appeal beginning at page 8 "The legal error made by the hearing officer is his failure to recognize that as a matter of state law agency heads are ultimately responsible for administering their agencies and cannot delegate that legal responsibility to lower level managers.... There is nothing in state law to suggest that he [the Superintendent of the Department of Correctional Education, the agency head] can delegate that ultimate responsibility to a supervisor such as the Principal, who has not made and cannot make Agency policy." Therefore, the Principal's actions regarding Ms. C cannot be imputed to the Agency.

Based on the above, the court holds that the decision ofthe hearing officer is contrary to law. That decision is reversed and the discipline administered by the Department of Juvenile Justice (previously Department of Correctional Education) is reinstated.

[Grievant's] Motion for Attorney's fees is denied.

Counsel for the Department shall draft the order reflecting this court's ruling, circulate it

for endorsement and return it to the court for entry.

Sincerely,

Susan L. Whitlock