



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11522

Hearing Date: June 22, 2020

Decision Issued: July 13, 2020

PROCEDURAL HISTORY

On March 6, 2020, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence and lack of civility in the workplace.

On March 30, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On April 14, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 22, 2020, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Corrections employed Grievant as a Corrections Officer at the Facility. No evidence of prior active disciplinary action was introduced during the hearing.

On November 20, 2019, the Captain asked Grievant to bring her proposed vacation schedule to the Institution. The Husband contacted Grievant and asked to speak with her about some family issues he was having. Grievant had known Husband "for years" and he was considered a "friend of the family." Grievant told Husband she would be at the Institution later that night to turn in her vacation schedule to the Captain.

On November 20, 2019 after 8 p.m. or 9 p.m., Grievant drove to the Institution. Grievant was off-duty and not wearing a uniform. Once Grievant arrived at the Institution and turned in her vacation papers, she called the Husband to see if he still needed to speak with her. He said "yes" so Grievant went to the parking lot to wait until Husband took his one hour break. When Husband met with Grievant he said he wanted to smoke so they drove their vehicles to a secluded area of the Facility grounds near a "doublewide" structure. The Husband got out of his vehicle and entered Grievant's vehicle. They talked for a while.

The Wife learned that her Husband was with Grievant. The Wife went to the location of the two vehicles. The Wife got out of her vehicle and began walking towards

Grievant's vehicle. The Wife began yelling at Husband. The Husband got out of Grievant's vehicle. The Husband tried blocking Wife but she got past him and entered Grievant's vehicle. While Wife was in Grievant's vehicle the two "went back and forth." The Wife was pulling Grievant's hair and shirt as Grievant was trying to push Wife out of her car. Grievant feared for her life and safety. Grievant pushed Wife's shoulders to get Wife out of Grievant's car. The Husband tried to remove Wife from Grievant's vehicle. While Husband was pulling Wife out of Grievant's vehicle, Wife's dress ripped. Grievant was not responsible for Wife's dress being ripped.

The Husband and Wife continued to argue and Husband told Grievant to leave. The Wife got back into her vehicle and attempted to block Grievant from leaving. Grievant tried to get around Wife's vehicle. In that process of attempting to leave, Grievant's vehicle drove over a part of Husband's foot.¹ She did not realize Husband was so close to her car. She did not realize her vehicle had hit the Husband. After she was able to leave the area, the Wife followed Grievant down to a stop light. The Wife tried to block Grievant's vehicle again. Grievant was able to drive her vehicle around Wife's vehicle and Wife continued to follow Grievant until eventually turning to return to the doublewide location.

Wife used her cell phone to call the Major. The Major instructed Sergeant B and Sergeant C to go to the secluded location. Once the two Sergeants arrived at the secured location, Sergeant C instructed Wife and the Husband to leave the premises. Instead, they began arguing. Sergeant B noticed that Wife's dress was already torn in several places. Sergeant C and Sergeant B stepped between the Husband and Wife to separate them. Wife tried to hit the Husband. Wife hit Sergeant B in the back several times including hitting him in the head. The Husband said he had had enough and went to open his trunk and then got into his vehicle and returned to the Institution. Wife remained at the secluded location but then later left the campus.

The Agency disciplined and removed from employment all three employees.

CONCLUSIONS OF POLICY

The Agency's sergeants witnessed only the behavior between Husband and Wife. Grievant had left the doublewide area when they arrived. The Husband and Wife did not testify during the hearing.² Grievant was the only witness to testify regarding what happened when Grievant was present at the doublewide location.

¹ It is unclear the extent of the injury to Husband's foot. No one sought an ambulance or other immediate medical attention for Husband.

² Several of the Wife's written statements appear self-serving. It is difficult for the Hearing Officer to give weight to the statements of someone who assaulted Husband and Grievant and then chased Grievant. The Wife's judgment and opinion seem unreliable.

Grievant is not responsible for the actions of Husband or Wife. Her behavior must be evaluated separately to determine whether she engaged in behavior giving rise to disciplinary action.

The Agency argued that Grievant engaged in workplace violence. Grievant was inside her vehicle when Wife attacked her. Grievant was entitled to defend herself to stop the attack. Grievant's behavior consisted of pushing Wife out of her car. Grievant did not engage in workplace violence when she tried to push Wife out of her car.

The Agency argued that Grievant engaged in workplace violence when she ran over the Husband's foot. Grievant's action was not intentional and does not appear to be reckless. Grievant was attempting to flee the area because she had been assaulted by Wife who was blocking her attempt to escape. It is more likely that Grievant's action of driving over Husband's foot was the result of limited visibility at night and panic than any intentional act to harm Husband.

The Agency alleged Grievant displayed a lack of civility in the workplace. Grievant was attacked by Wife and was entitled to defend herself. Grievant did not admit to taking actions inconsistent with someone defending herself.

Grievant had a romantic interest in the Husband. Although such an interest may be morally inappropriate, it was not contrary to any Agency policy. Grievant should have left the Facility and returned to her home instead of meeting with the Husband in a secluded part of the Facility grounds. Grievant was not disciplined for remaining on the Agency's property in a secluded area. She entered the Institution because the Captain asked for her vacation schedule. The Agency suggested Grievant was found in "an alleged compromising position" but no evidence was presented to show this. It appears that Grievant and Husband were talking as Grievant described.

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 **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position, 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. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.