

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 07/19/13; Decision Issued: 07/25/13; Agency: Department of Behavioral Health and Developmental Services; AHO: John V. Robinson, Esq.; Case No. 10116; Outcome: No relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 10116

Hearing Officer Appointment: June 11, 2013

Hearing Date: July 19, 2013

Decision Issued: July 25, 2013

**PROCEDURAL HISTORY, ISSUES
AND PURPOSE OF HEARING**

The Grievant requested an administrative due process hearing to challenge termination of her employment effective May 23, 2013, pursuant to a Group III Written Notice issued by Management of the Department of Behavioral Health and Developmental Services (the "Department" or the "Agency") as described in the Grievance Form A dated May 24, 2013. The termination resulted from the Grievant's physical altercation with another employee of the Agency on May 6, 2013. The Grievant is seeking the relief requested in her Grievance Form A, namely reinstatement if she prevails.

The hearing officer issued a Scheduling Order entered on June 25, 2013 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented herself and the Agency was represented by its advocate, (the "Advocate"). Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the Agency into evidence at the hearing .

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative claims she has raised.

References to the Agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not present any exhibits.

APPEARANCES

Representative for Agency
Grievant
Witness for Agency

FINDINGS OF FACT

1. The Grievant was formerly employed as a Direct Support Associate II ("DSA II") by the Agency at a facility (the "Facility") providing habilitative, therapeutic and health services to persons with intellectual disabilities. AE 3.
2. The Grievant's core responsibilities included showing respect for the safety of others and working in a professional, non-abusive/abrasive manner with peers. AE3.
3. The Grievant has only been employed with the Agency since February 10, 2012, has an active Group ■ Written Notice for unsatisfactory attendance and a Written Counseling for refusal to work mandated overtime. AE 1.
4. On May 6, 2013, at approximately 10:30 p.m. another DSA II with whom the Grievant lives ("S") left her cottage a short distance away to see the Grievant in a different cottage. AE 2.
5. Sand the Grievant "had a few words before they left home." AE 2. The Grievant told S to leave and when S put her arms around the Grievant in a hug, the Grievant hit S in the left temple with the bottom part of a phone. AE 2.
6. The Grievant admitted that she threw the first punch. The encounter escalated into a full-scale fight between the two protagonists. Both claimed self-defense.
7. The Agency witness who is the Faculty's Assistant Director for Human Resources, conducted a fair, impartial and thorough investigation and reasonably concluded that there were other actions that the Grievant could have taken to get S to release the Grievant that would not have involved physical violence. AE2.
8. The Assistant Director reasonably concluded that the Grievant's conduct was serious, inappropriate and considered to be workplace violence, adding:

The Department of Behavioral Health & Developmental Services has a *zero tolerance* policy against workplace violence. There are numerous methods of resolving workplace disputes short of verbal abuse and physical violence. Either staff could have walked away and asked a supervisor to intercede or if a supervisor was not immediately available, either staff could have called Security for assistance. The use of verbal abuse or physical violence to resolve a dispute in the workplace is unacceptable.

AE2.

9. The testimony of the Agency witness was credible. The demeanor of the Agency witness was open, frank and forthright. The Grievant did not cross-examine the Agency witness.
10. The Grievant received significant training from the Agency concerning procedures and methods to resolve conflict without resorting to physical violence.

APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code § 2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual, § 5.8.*

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards

for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to DHRM Policy No. 1.60, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency.

Policy 1.60 provides in part:

c. Group III Offense:

Offenses in this category include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.

- See attachment A for examples of Group III Offenses...
- One Group III Offense normally should result in termination unless there are mitigating circumstances.

Attachment A specifically provides that physical violence constitutes a Group III offense. However, the SOC further provides:

Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activity, may be considered unacceptable and treated in a manner consistent with the provisions of this section.

Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.

In this instance, the Agency appropriately determined that the Grievant's infractions constituted a Group III Offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the Group III Written Notice by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group III offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part: DHRM'S

Standards of Conduct allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein and all of those listed below in his analysis:

1. the Grievant's service to the Agency;
2. the often difficult and stressful circumstances of the Grievant's work environment;
3. the Grievant's overall rating of "Contributor" in her most recent performance evaluation (AE 3); and
4. the fact that S instigated or precipitated the confrontation.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and

will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *!d.*

Here the offense was serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings, § VI; DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *!d.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

At the hearing, the Grievant did raise the issue of harassment and/or discrimination but did not develop this theory at the hearing and certainly did not begin to satisfy her burden of proof in this regard.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld,

having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 ore-mailed.
2. A challenge that the hearing decision does not comply with grievance procedure as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th floor, Richmond, Virginia 23219, faxed ore-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 7/25/13



John v':-Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).