

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 04/23/15; Decision Issued: 06/12/15; Agency: VCCS; AHO: Neil A.G. McPhie, Esq.; Case No. 10578; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 06/26/15; EDR Ruling No. 2015-4183 issued 08/12/15; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 06/26/15; DHRM Ruling issued 07/22/15; Outcome: AHO’s decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case Number: 10578

Hearing Date: April 23, 2015

Decision Issued: June 12, 2015

PROCEDURAL HISTORY

On February 13, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal. Specifically, the Notice stated that:

During an altercation on 12/5/2014, [Grievant] threw a mirror forcefully on the ground in the direction of her supervisor destroying the mirror and damaging the carpeting. This was determined to be a violation of the college's workplace violence policy. Additionally [Grievant] accessed campus on December 6, 2014 without permission and removed and/or destroyed state documents by shredding them.¹

On March 5, 2015 Grievant timely filed a grievance in which she denied the charges and alleged that she had been the victim of racial and sexual harassment at the agency and the charges were distorted by her supervisor in retaliation for her opposing his sexual harassment. (Agency Exhibit 1, Section 1, page 1-4). On March 19, 2015, the Department of Human Resource Management (DHRM) assigned the matter to the Hearing Officer, effective March 23, 2015. On April 23, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant's Attorney and Paralegal
Agency Advocates
Fourteen Witnesses

¹ By letter dated February 4, 2015, the Director of Facilities Planning provided Grievant with his intent to issue a Group III Written Notice with termination for the reasons set forth in the February 13, Written Notice. Grievant was given until 5 p.m. on Wednesday, February 11, 2015 to respond to the letter by providing any additional information Grievant wished to be considered directly to the Facilities Director. (Agency Exhibit 5, Section 1, Page 1) Grievant failed to do so.

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 1, 11, or 111 offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, 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 carefully reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact.

[Virginia Community College System] ("the Agency") employed Grievant as an Administrative Office Specialist at one of its campuses. At the time of termination, Grievant had 9 years of service with the Agency. During employment, Grievant received training in Fundamentals of EEO Law (1/3/2014); Preventing Workplace Harassment (12/16/2013) and Preventing Workplace Violence (12/17/13). (§ 3 Ex.2, p.1).²

Grievant had prior active disciplinary action consisting of a Group I Written Notice for "Leaving work without permission" issued on October 31, 2014. (§ 4 Ex. 3).³

Grievant's work unit consisted of five individuals including a supervisor⁴. The evidence indicated that Grievant had conflicts with fellow employees but overall unit employees maintained professional relationships. Although contradicted by Grievant, the overwhelming evidence was that Grievant and [her] Supervisor had a close personal relationship on and off the worksite.

² Reference refers to Grievant's exhibits.

³ Grievant testified that she did know she had received the Written Notice. This testimony is clearly contradicted by the memorandum to Grievant dated October 29, 2014 with the subject line "Intent To Issue a Group I Written Notice" for leaving work without permission as described in the Written Notice. (§ 4 Ex 2)

⁴ One conflict resulted in Grievant receiving a Letter of Concern from her former supervisor dated June 28, 2013 for "displaying unprofessional conductor using profanity in addressing a fellow employee at [the Agency]." (§ 4 Ex. 1) This document is recited as background, it was not considered by the Hearing Officer in reaching his conclusion in this case.

Grievant's ability to obey work hours continued to be a concern to her supervisor. On December 4, days after she received the Group I Notice, referenced above Grievant and [her supervisor] exchanged the following excerpted text messages over her failure to return to the office at noon as approved by her supervisor.

"Tried radio got nothing what is your ETA ([Supervisor]) (§ 6 Ex 8 p.1)

Hello [Grievant's name]....Tried the radio again nothing... when are you coming back. I should not have to tell you that you need to be back here. You have to take company time more seriously it will be your demise.... ([Supervisor]) (Id.)

Come on your killing me. Might as well come back and say F you [Supervisor's name]. I'm going to do what I want. ([Supervisor]) (Id)

That's all I have ever asked of you was to be at your station. You seem to lose that somewhere. ([Supervisor]) (Id at p. 10)

You keep talking about what others are doing. ... as much as you want to believe your being unfairly treated that's a joke. I have been more than fair with you and more than accommodating to some of these things. I'm not feeling it any more cause you fail to maintain any accountability for your time at the job station.... ([Supervisor]) (Id.at p. 11)

Don't talk to me anymore. I can't stand you now.... (Grievant) (Id at p.12)

I don't care if ur my boss or not. (Grievant) (Id. At p. 13)

U straight fake. (Grievant) (Id)

I'm not going to fight with you over my trying to protect you from yourself. ([Supervisor]) (Id. At p.13)

Fuck u (Grievant) (Id. At p.14)

You don't have to like me but you will respect your position at the college. ([Supervisor]) (Id. at p. 15)

You have just created your worst enemy your worst nightmare. (Grievant) (Id. at p. 16)

Don't forget I'm the one that does the paperwork. (Grievant) (Id. at p. 17)

I would hate to become a disgruntled employee." (Grievant) (Id.)

On the morning of Friday December 5, 2014, [the Supervisor] sent Grievant an email regarding his expectation that she work a full shift. (§ 6 Ex. 10). Grievant was irate at receiving the email. She forwarded the email to other staff members (Id. at Ex. 10 7 14), and sent two strongly worded emails to [her Supervisor]. In the first one sent at 6:56 a.m. she wrote "BTW If you need to give me something to do, don't disrupt me and tell me what you n need, just put it in my inbox/desk...." (Id at Ex. 11). In the second email sent at 6:57 a.m., she wrote "Oh did I forget to mention... don't ever touch me, and don't

come within arm's length of my space, and don't hover over my chair. Your breath smells and I can feel it on my neck... the smell is bad enough." (Id. at Ex. 12). I find these emails and text messages to be highly unprofessional and offensive.

Later in the morning of December 5, 2014, [the Supervisor] and Grievant had a meeting in [the Supervisor's] office to discuss the text messages and emails. During the course of that meeting, voices were raised; Grievant became irate and smashed a large industrial type mirror with a metal mount on the floor in the direction of [the Supervisor].⁵ Grievant's version is that the mirror slipped out of her hand when [the Supervisor] raised his voice and got into her personal space. The Hearing Office is unpersuaded by Grievant's version given her state of mind as evidenced by the text messages on December 4 and the emails on December 5. Moreover, the mirror had to have hit the carpeted floor with such force causing the heavy frame of the mirror to break and the carpet to tear. The Hearing Officer finds that the mirror was thrown by the Grievant in the direction of [her Supervisor]. The Hearing Officer also finds that the mirror was college property.⁶ It was an industrial type mirror, not generally suitable for personal use and had been in different offices over a period of time prior to the incident.

[The Supervisor] was shaken and felt threatened by the incident. Fearing that the situation would escalate further, he summoned a Campus Police Officer. The officer promptly interviewed Grievant and [the Supervisor]. In his police report he noted that Grievant was crying and shaking. He also noted that Grievant admitted that her correspondence to [her Supervisor] was a mistake. Grievant also admitted to the Officer that she and [her Supervisor] are close. (Id.) The Officer asked Grievant to leave the facility and take her complaints to HR and he escorted her off the premises. (§ 5 Ex. 1). After she was off campus, Grievant continued to send text messages to [the Supervisor] to which [the Supervisor] did not respond. One text stated "I'm sorry I lost my cool" "However this is the worst time of my life in all aspects including work" (§ 6 Ex. 8 p. 21)

On December 5, the very day she was escorted off campus, [the] HR Specialist advised Grievant in a written memo that she was being placed on paid administrative leave⁷ effective that same day while the Agency investigates the incident in [the Supervisor's] office. The memo stated that while she was on Administrative Leave, "you are not allowed on any Agency premises. Should you require to be on campus, you must contact myself or [the] Director of Human Resources in advance to obtain permission." (§6 Ex. 3 pages 12 & 13). [The HR Specialist] also left a voice mail message for Grievant to call her which she did. When they spoke [the HR Specialist] explained that HR would be in touch with her in the coming days and directed her to the memo regarding Grievant's paid administrative leave.

On December 5, 2014, at 7:22 p.m., Grievant sent an email to [the HR Director] requesting access to the campus on Saturday to retrieve personal effects from her office. (§ 6 Ex 15 p 2). [The HR Director] was one of the persons the memo directed Grievant to for access. [The HR Director] promptly

⁵ Pictures of the remnants of the mirror and the damage to the carpet are at Agency exhibits, § 5, Exhibit 6, pages 1,2 & 4. The actual base was entered into evidence as Agency Exhibit 1.

⁶ There was conflicting testimony as to who owned the mirror. According to Grievant it was owned by [the Supervisor] and he gave it to her. The mirror was in a number of offices and was used by Grievant's former supervisor before it ended up in [her current Supervisor's] office. Given the industrial nature of the mirror, it was clearly college property.

⁷ While on administrative leave, Grievant was paid \$6,522.50. (§ 3 Ex. 4 p.1.)

responded to Grievant to determine the need for campus access on a Saturday. Finding none, [the HR Director] did not approve Grievant's request to enter the campus. Later that night at 10:01 p.m., Grievant sent yet another email to [the HR Director] declaring "I am going to be there in the morning so I can avoid the staff" (Id.). At 6:30 am on December 6, 2014, [the HR Director] emailed Grievant "Please do not go to the campus until I have made arrangements for you..." (Id. at p.1). Grievant ignored [the HR Director's] directive and went to the campus without authorization and removed property from her office. Grievant's excuse that she had not checked her email before she went on campus is contradicted by the evidence. Additionally in her statement to the investigative team, Grievant claimed that she had not read the administrative leave memo prior to entering the campus. (§ 5 Ex.4 at p.4.). That claim is not believable. The fact that [the HR Specialist] directed her to the memo when they spoke on December 5, and the fact that she knew to contact [the HR Director] for permission clearly demonstrate that Grievant knew she could not enter the campus without authorization. The Hearing Officer therefore finds that Grievant disobeyed a clear directive from a superior when she entered the campus premises on the morning of December 6, 2014.

When business resumed at the college on Monday December 8, 2014, it became evident that Grievant had entered the premises and cleaned out her office. A security video revealed that Grievant had illegally parked her personal automobile next to a loading dock and entered and exited her work area 13 times each time carrying items from her office. The Agency claims that Grievant not only removed her personal property, but also emptied files containing essential documents for business and shredded invoices. The trash bag of shredded items is pictured at § 5 Ex. 6 p.6). The evidence presented by the Agency is insufficient to support the Agency's claim that business documents were removed or shredded by the Grievant.

When she met with the investigation team, Grievant alleged, for the first time, that she experienced race discrimination and sexual harassment at the Agency primarily by [her Supervisor]. These claims were investigated and found to be without merit. Significantly, Grievant never reported these claims to Agency authorities until after the incident of December 5, 2014. (§ 5 Ex. 4)

ANALYSIS AND OPINION

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 employees 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)

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 § 2.203001.

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 (GPM) § 5.8.

The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees. Policy 1.60⁸. “The purpose of the policy is to set forth the Commonwealth’s Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee’s ability to do his/her job and/or influences the agency’s overall effectiveness.” A legitimate goal of the policy is to “enable agencies to fairly and effectively discipline and/or terminate employees.... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.” Id.

Under the Policy, unacceptable behavior is divided into three types of offenses, according to their severity. Group III offenses “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.” 1.60 § B(2) (c).

Workplace Violence DHRM Policy 1.80

DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing. (§ 7 Ex. 1 p.1)

Prohibited conduct under DHRM Policy 1.80 includes, but is not limited to:

- Injuring another person physically;
- **Engaging in behavior that creates a reasonable fear of injury to another person;**
- Engaging in behavior that subjects another individual to extreme emotional distress;
- Possessing, brandishing, or using a weapon that is not required by the individual’s position while on state premises or engaged in state business;
- **Intentionally damaging property;**

⁸ The policy has an effective date of April 16, 2008 and was last revised June 1, 2011. (§ 7 Ex. 2)

- **Threatening to injure an individual or to damage property;**
- Committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- Retaliating against any employee who, in good faith, reports a violation of this policy. (Id.)

Grievant argues that the mirror fell from her hands when [her Supervisor] raised his voice and got into her personal space. The Hearing Office is unpersuaded by Grievant's version given her state of mind as evidenced by the text messages on December 4 and the emails on December 5. Moreover, the mirror had to have hit the carpeted floor with such force causing the heavy frame of the mirror to break and the carpet to tear. The more plausible explanation is that Grievant threw the mirror, as charged, thus generating the force to destroy it. Grievant's actions clearly violate Policy 1.80. Her actions clearly endangered her supervisor, subjected him to extreme emotional distress, fear of injury and disrupted the workplace. Campus police had to be called that resulted in Grievant being escorted off the campus and ordered not to return on campus unless she had the specific approval of the Director of Human resources. Additionally she intentionally damaged the state owned mirror and the carpet.

Unauthorized Access of Campus on December 6, 2014.

Grievant received explicit instructions from [the HR Specialist] and the Director of Human Resources, that she was barred from entering any college campus and premises without first getting authorization from [the HR Specialist] and/or the Director of Human Recourses. Grievant clearly disregarded the instruction and entered the campus and her office, without authorization on Saturday December 6, 2014.

Destruction/Removal of State Property.

The Agency alleges that Grievant removed and/or destroyed state documents by shredding them when she entered her office without authorization on December 6, 2014. State property i.e. the mirror was destroyed. The removal of state property has not been proven. The Agency offers shredded documents, presumably taken from agency files Grievant had in her office, one piece of which appears to be an invoice; however there is no date on the sliver. (§ 5 Ex. 6 p. 7).⁹ The agency offers a list of items that were purchased for Grievant's office that were missing when the office contents were audited on December 8.¹⁰ Beyond that, the agency relies on circumstantial proof based on Grievant's December 4, text messages and emails and her furtive unauthorized entry on campus.

Grievant testified that the items were destroyed, not returned by coworkers or otherwise disposed of in the normal course of business. Grievant's explanations are plausible and un rebutted by the agency.

Retaliation

⁹ A pictorial inventory of the contents of Grievant's office on December 8 appears at agency exhibits 1 – 21 in Section 5 of the Agency's evidence binder.

¹⁰ The allegedly missing items are highlighted in yellow on the last four pages of agency exhibits in Section 5. These items were purchased by the agency for \$127.91.

Grievant raised the affirmative defense that she was fired in retaliation for complaining of racial and sexual discrimination. (§ 1 Ex. 1) Grievant bears the burden of proof by a preponderance of evidence.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show she (1) engaged in a protected activity; (2) suffered an adverse employment action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.

Grievant has not established that the Agency retaliated against her. She has not established that she engaged in protected activity. The evidence is clear that she never complained to management of [her Supervisor's] alleged behavior, or filed an EEO complaint until the events of 12/5 and 6 that led to her termination.¹¹ Grievant contends that she did not complain because no one would listen to her and she did not know to file an EEO complaint. Grievant's contentions are not believable. She received EEO training and discussed issues with coworkers.

Mitigation

The Standards of Conduct Policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that compel a reduction to promote the interests of fairness and objectivity, or based on an employee's otherwise satisfactory work performance; or (2) an employee's long service or otherwise satisfactory work performance. Grievant had 9 years of service when she was fired. Her performance evaluations were good. (Grievant's Exhibit C(1)). Nevertheless, the charges against Grievant are serious. Moreover, Grievant had prior active disciplinary action consisting of a Group I Written Notice for "Leaving work without permission" issued on October 31, 2014. (§ 4 Ex. 3). This is the same underlying behavior that gave rise to supervisor's need to meet with Grievant on December 5, 2014. And the evidence also revealed that Grievant displayed this behavior under her prior supervisor. The Hearing Officer observed nothing in Grievant's demeanor or testimony that she is remorseful and would obey her supervisor's lawful instructions were she returned to the workforce.

Dur Process

Grievant contends that she was denied due process because the Agency did not extend the time for her to respond to the Notice of Intent to Issue a Group III Written Notice with Termination. (§ 2 Ex. 5) The Notice was issued by [the] Director of Facilities Planning on February 4, 2015. It stated in detail, the reasons for the Notice. It explicitly gave Grievant until 5 p.m., Wednesday February 11, 2015 to respond by providing any additional evidence she wished to be considered. The Notice also made it clear that Grievant's response must be submitted directly to [the Director of Facilities Planning] by email, U.S mail, or personal delivery. Counsel for Grievant sent a letter to the college dated February 9, 2015 which contained notice to preserve evidence and included some generalized accusation of sexual and racial harassment (§ 2 Ex. 3). By letter dated February 17, 2015, SP declined Grievant's "request, dated February 16, to extend the deadline for her response. (Id. at Ex. 4). Grievant first laid out her allegations

¹¹ Grievant has filed a discrimination charge with the EEOC on or about March 8, 2015. Nothing in this opinion is intended to address the allegations in that charge.

of discrimination when she filed her Grievance Form A with the Office of Employment Dispute Resolution. (EDR) on or about March 6, 2015. (§ 1 Ex. 1).

Prior to an employer taking certain disciplinary actions, the United States Constitution generally entitles, to those with a property interest in continued employment absent cause, the right to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case.¹² The pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, nor provide the employee with an opportunity to correct his/her behavior. Rather, it need only serve as an "initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."¹³

On the other hand, post-disciplinary due process requires that the employee be provided a hearing before an impartial decision-maker; an opportunity to present evidence; and the presence of counsel.¹⁴ The grievance statutes and procedure provide these basic post-disciplinary procedural safeguards through an administrative hearing process.

It is evident that Grievant received due process. She had ample notice of the charges against her as set forth in the Written Notice and in the agency's notice of intent to issue disciplinary action. Grievant also had the benefit of a hearing before an impartial hearing officer and she defended the charges fully. The Agency was under no constitutional or policy obligation to extend the time for Grievant to respond to the charge. The Agency's only obligation was to give her a fair hearing which it did. Grievant was not deprived of due process.

DECISION

The disciplinary action of the Agency is affirmed.

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resources Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St., 12th floor
Richmond, Va 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of the Office of Employment Dispute Resolution (EDR) to review the decision. Address your request to:

¹² Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545-546 (1985)

¹³ Loudermill, 470 U.S. at 546.

¹⁴ Detweiler v. Va. Dep't of Rehabilitative Services, 705 F. 2d 557, 559-561 (4th Cir. 1983)

Director
Office of Employment Dispute Resolution
Department of Human Resource Management
101 N 14th St., 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 the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request **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 calendar days of the date when the decision becomes final.**

Neil A.G. McPhie
Hearing Officer