

Issues: Group I Written Notice (workplace harassment), Group II Written Notice (workplace violence), and Termination; Hearing Date: 06/05/15; Decision Issued: 06/19/15; Agency: DBHDS; AHO: Thomas P. Walk, Esq.; Case No. 10591; Outcome: Partial Relief.

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: EDR CASE NO.: 10591

DECISION OF HEARING OFFICER

**HEARING DATE: JUNE 5, 2015
DECISION ISSUED: JUNE 19, 2015**

I. PROCEDURAL BACKGROUND

The grievant commenced this matter by filing a single Form A on March 23, 2015. This grievance was challenging two separate Written Notices issued to him on March 18, 2015. I was appointed as the hearing officer on April 13. I conducted a prehearing conference by telephone on April 28. I issued my prehearing order on April 29. As previously scheduled, the hearing was conducted on June 5. The hearing lasted approximately four hours.

Subsequent to the hearing the grievant submitted several documents that he asked me to consider as evidence. My review of those documents indicated that they pertained to earlier grievances and were not material to this grievance. I have not considered them in my decision.

II. APPEARANCES

A non-attorney employee of the agency served as an advocate for the agency. A different employee was present throughout the hearing as the representative of the agency. The agency called seven witnesses. It presented ten exhibits prior to the hearing which were accepted into evidence. A handwritten sheet of notes prepared by a witness and submitted at the hearing was also accepted as an exhibit without objection.

The grievant represented himself and presented no additional witnesses. Prior to the hearing he proffered several documents. The agency did not object to the introduction of those documents and they were also admitted as evidence.

III. ISSUES

A. Whether the agency properly issued to the grievant a Group I Written Notice for workplace harassment on March 18, 2015?

B. Whether the agency properly issued to the grievant a Group II Written Notice for workplace violence on March 18, 2015?

C. Whether the agency properly terminated the grievant from employment?

IV. FINDINGS OF FACT

The grievant, at all relevant times, was employed by the agency at one of its mental health facilities as a nursing timekeeper. The grievant held this position for several years. On January 16, 2013 the agency issued him a letter of counseling for inappropriate behavior. A Notice of Improvement Needed was issued. On July 24, 2014, the agency issued the grievant a Group I Written Notice for disruptive behavior. A new Notice of Improvement Needed was issued.

The grievant received a Contributor rating on his performance evaluation in October, 2014. On November 7, 2014, the agency issued him a Group II Written Notice for inappropriate behaviors.

On February 26, 2015, the grievant made a statement to a co-worker that he wanted to take his belt and wrap it around the neck of his supervisor. Shortly thereafter, he repeated the

statement to a nurse with the employee assistance program. The nurse reported the statement and had the grievant evaluated for possible civil committal. He was determined not to be a danger to himself or others. On March 3 he admitted to Human Resource employees that he had made the statement.

On or about February 25 the grievant had given a co-worker a pamphlet that the other employee felt was overly religious. On March 18 the agency issued to the grievant a Group I Written Notice for workplace harassment, and a Group II Written Notice for workplace violence. The agency terminated him from employment on that date.

V. ANALYSIS AND DISCUSSION

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

I will discuss these considerations in the order presented.

Workplace Harassment Violation

The pamphlet on which this discipline was based, according to the testimony of the grievant, was over sixty pages in length. The agency submitted as part of its exhibits portions of the pamphlet. I am unwilling to accept at face value the description of the pamphlet as being overly religious. The portions introduced in evidence contain purely secular materials that I believe are inoffensive. In the absence of the entire pamphlet, or at least the religious portion or portions of it, I cannot find that the act by the grievant of distributing the pamphlet constituted a violation of Policy Number 2.30, the workplace harassment policy.

Workplace Violence Allegation

The agency relies on the statement by the grievant of wanting to wrap his belt around the neck of the supervisor to support this discipline. The grievant has not denied making the statement and it has been proven to my satisfaction. Policy Number includes threats in the definition of workplace violence. I find that the statement does constitute a violation of that policy.

Under the Standards of Conduct, a violation of the policy qualifies as a Group II Level of Offense. I believe that the issuance of that discipline was consistent with law and policy. I find no evidence of discrimination against the grievant or an unfair application of the policy. Although the grievant suffers from certain mental conditions, he has made no argument, or

presented any evidence, that the subject threat was a manifestation of his conditions. Even if he had, such would not necessarily excuse his behavior.

I also find no reason to mitigate the punishment given by the agency. At the outset of the hearing the agency stipulated that the grievant was a competent employee from the standpoint of the technical requirements of his position. The agency submitted as exhibits materials pertaining to the prior disciplines issued to the grievant. As I ruled with regard to the post-hearings submissions by the grievant, I do not find those materials to be relevant. All those matters have been concluded and were useful to me solely as a frame of reference and to be considered as active Written Notices for purposes of determining the appropriate punishment.

VI. DECISION

For the reasons stated above, I vacate the Group I Written Notice issued to the grievant. I uphold the Group II Written Notice and the termination of the grievant based on the prior accumulated discipline.

VII. 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 to EDR.

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.

RENDERED this June 19, 2015.

/s/Thomas P. Walk