

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 06/29/15; Decision Issued: 08/24/15; Agency: VDOT; AHO: Neil A.G. McPhie, Esq.; Case No. 10611; Outcome: No Relief – Agency Upheld.

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

DECISION OF HEARING OFFICER

In re:

Case Number: 10611

Hearing Date: June 29, 2015

Decision Issued: August 24, 2015

PROCEDURAL HISTORY

On April 3, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for fighting on the job with a coworker in violation of VDOT and DHRM workplace violence policies.

On or around May 4, 2015 Grievant timely filed a grievance. (Agency Exhibit 1). On May 14, 2015, the Department of Human Resource Management (DHRM) assigned the matter to the Hearing Officer, effective May 20, 2015. On June 29, 2015, a hearing was held at the Agency's Administrative Office.

APPEARANCES

Grievant's Representative
Agency Representative
Nine Witnesses including Grievant

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.

The Virginia Department of Transportation ("VDOT" or "the Agency") employed Grievant as a Transportation Operator II. In this capacity, Grievant drove a VDOT maintenance truck.

At the time of termination, Grievant had 11 years of service to VDOT.

Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on June 24, 2014 as a result of his conviction in a General District Court for conviction of a moving traffic violation while using a state owned vehicle. (Agency Exhibit Tab 5 p. 8).¹

¹ The Agency submitted multiple exhibits tabbed 1 to 11. Grievant submitted no exhibits. Grievant was clearly advised by the Hearing Officer during the pretrial conference and in the scheduling order of his right to submit exhibits. There were no objections to any exhibit.

Grievant had a prior inactive Group I Written Notice for disruptive behavior that included verbal threats of violence and use of profanity to a coworker. This disciplinary action was mitigated from a Group II to a Group I because of Grievant's good work performance and no prior incidents. (Id. at p. 1)

Because this Group I was inactive it cannot be used as a basis for Grievant's termination. However, it is instructive that Grievant was put on notice that the disruptive behavior constituted workplace violence that was not tolerated by VDOT and could lead to his termination for future violations. Grievant assured VDOT management that he would make sure that confrontations with coworkers would not escalate.

Grievant received a copy of VDOT Preventing Violence in the Workplace and training. (Agency Exhibit Tab 8),

During the work day on Friday March 27, 2015 Grievant was at the Maintenance Facility with his VDOT truck. While there, he had to attach a snow plough to the front of his VDOT truck.² That process required a loader and operator to raise the plough and the assistance of a coworker to help align the plough and hitch it to the front bumper of the truck.

Grievant and the coworker worked at opposite sides of the plough. The coworker experienced difficulty in getting his end of the plough to line up, words and profanity were hurled between the two, and a confrontation ensued which quickly escalated into a full blown fight during which punches were thrown by both men. The loader operator blew his horn, and another employee hurried to the scene and separated the two protagonists.

The police were summoned to the scene. The State Police investigating officer noted that the coworker was bleeding. The State trooper interviewed both men and concluded that Grievant was the aggressor; he threw the first punch. Grievant was arrested and charged with assault and battery.

² A representative picture of the loader, the plough and the truck appears at Agency Exhibit 4.

The Hearing Officer concludes that on the evidence as a whole, Grievant was the aggressor and threw the first punch.

Both Grievant and the coworker were fired.

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 1.60. "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 VDOT Policy SP#1-005 (Agency Ex. Tab 9)

VDOT Policy SP#1-005 defines workplace violence as:

Any act of property destruction, physical assault, intimidation, or act having the effect of intimidation, verbal abuse, shouting, swearing in anger, harassment, pranks designed to illicit (sic) a fear response, or other threatening behavior that causes others to feel unsafe. This includes encouraging others to engage in such conduct. (Tab 9 at p. 4)

Prohibited conduct under SP#1-005, includes, but is not limited to:

Violence directed to an employee by a co-worker

- *Verbal – voiced threats of violence toward person or property,... the use of vulgar or profane language toward others....*
- *Physical – brandishing a weapon, any physical assault such as hitting, pushing, spitting, kicking, holding, impeding or blocking*

the movement of another person, stalking, vandalism and destruction of property. (Tab 9 at p. 5)

The Policy makes it clear that “VDOT does not tolerate workplace violence” and “strictly prohibits the use of violence or threats of violence in the work place and will treat such incidents in a serious and professional manner”. (Policy at page 2). The policy also clearly states that “[a]ny behavior that is contrary to this policy may result in formal discipline, including ... suspension or termination of employment, and/or criminal charges and prosecution of the person or persons involved”.

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. Agency Ex. At Tab10)

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;

Grievant argues that he acted in self-defense after his coworker came around to his side of the plough and cursed at him which caused him to feel threatened. This argument ignores the fact that grievant had the option to walk away from the confrontation and report the incident to his supervisor as witness RW did when faced with a similar confrontation. In addition, it is clear that Grievant threw the first punch and was therefore the aggressor. Also, all witnesses called by the agency and Grievant testified consistently and demonstrated no bias towards Grievant.

Based on the evidence and the policies, Grievant violated both the VDOT and DHRM Workplace Violence policies and was appropriately disciplined.

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 11 years of service when he was fired. He received a below contributor assessment on his most recent performance evaluation because he received a Group I disciplinary action for a traffic violation during the rating cycle. (Agency Exhibit, Tab 6 at p. 1)

The charges against Grievant are serious. Moreover, Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on June 24, 2014 as a result of his conviction in a General District Court for conviction of a moving traffic violation while using a state owned vehicle. (Agency Exhibit Tab 5 p. 8).

Grievant argues that he was not trained in recognizing workplace violence. This argument is not supported by the evidence. Grievant received a copy of the Workplace Violence Policy. Moreover, he clearly had notice that his conduct violated the policy based on his prior inactive Group I Written Notice for disruptive behavior that included verbal threats of violence and use of profanity to a coworker. During that process he was clearly put on notice that such behavior constituted workplace violence that was not tolerated by VDOT and could lead to his termination for future violations. Grievant assured VDOT management that he would make sure that confrontations with coworkers would not escalate. There is therefore no basis to mitigate his termination.

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 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.³

[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].

Neil A.G. McPhie
Hearing Officer

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.