

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 12/01/15; Decision Issued: 12/21/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10703; 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: 10703

Hearing Date: December 1, 2015
Decision Issued: December 21, 2015

PROCEDURAL HISTORY

On September 17, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On September 22, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On October 19, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 1, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency 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. 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 Behavioral Health and Developmental Services employed Grievant as a Food Service Tech at one of its facilities. He has been employed by the Agency for approximately eight years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant received annual training regarding work place violence.

On July 3, 2015, Grievant and Ms. A were working in the kitchen. Grievant used his cell phone to play rap music on a speaker. Others in the room could hear the music. Ms. A did not think the music was appropriate and she approached Grievant. She indicated she was given authority to control what music was being played through a speaker in the room. Grievant disconnected his cell phone and adapter from the speaker. They began to argue and became angry. Grievant called Ms. A a bi—ch. Ms. A told Grievant, "I'll spit in your face." Grievant was offended by Ms. A's statement. Ms. A was offended by Grievant's statement. Grievant said words to the effect of "let's take this outside into the parking lot." Ms. A told Grievant if she had \$300 she would pay some guys to beat him up.

Grievant told the Food Service Tech III that Ms. A was going to pay someone to beat him up.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

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.

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct 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;
- 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.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

“Threatening others” is a Group III offense.² On July 3, 2015, Grievant engaged in a heated argument with Ms. A. He was angry. He called her a bi-ch and said they should “take it outside”. His actions served as a threat to Ms. A and justified the Agency’s decision to issue a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that his statement was intended to have the parties move to the parking area where there would be cameras to record Ms. A’s bad behavior and he did not intend to threaten Ms. A. This argument is unpersuasive. The cameras in the parking area did not have microphones and would not have captured their conversation. There were cameras inside the facility which were closer to the parties. Saying “take it outside” is a common refrain for having a confrontation that could be a physical confrontation.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. He argues he was a good and dependable employee. Grievant wrote that, “I should not have allowed her to provoke me. I definitely should not have responded to her derogatory comments and threats in an unprofessional manner. For that I am sorry.”⁴ Although Grievant’s response reflects favorably as to his character and may form a basis for an agency to mitigate disciplinary action, it does not form a basis for the Hearing Officer to mitigate the disciplinary action in this case. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

² See, Attachment A, DHRM Policy 1.60.

³ Va. Code § 2.2-3005.

⁴ Agency Exhibit 2.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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.⁵

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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