

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 12/08/15; Decision Issued: 12/22/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10704; 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: 10704

Hearing Date: December 8, 2015
Decision Issued: December 22, 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 21, 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 8, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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. She had been employed by the Agency for approximately seven and a half years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 10, 2014, Grievant was given a Notice of Needs Improvement/ Substandard Performance regarding behavior the Supervisor considered intimidating. She was given an improvement plan requiring her to review the Facility's policy governing mutual respect through adherence to the vision, mission, and values of the Facility. She was also instructed to complete online training regarding conflict management skills.

Grievant received annual training regarding workplace violence.

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

As Mr. J walked away, Grievant called him a fa—ot and Mr. J called Grievant a bi—h. The Agency police dispatcher received an anonymous call reporting the conflict. The Agency began an investigation.

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

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

- 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.

“Threatening others” is a Group III offense.² On July 3, 2015, Grievant engaged in workplace violence by threatening Mr. J. She threatened to spit on him. She said she could hire someone to harm Mr. J which Mr. J considered to be a threat. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant argued the Agency needed to present evidence of fear to establish workplace violence. It is not necessary for an agency to show that the victim of workplace violence experienced fear in order to establish a violation of policy.

Grievant argued they were just “joking” and did not mean their words as stated. The evidence showed to the contrary. Neither Grievant nor Mr. J were “joking” during their argument.

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 argued the Agency failed to apply progressive discipline. Agencies are encouraged to take progressive disciplinary action but they are not required to do so. In addition, the Agency counseled Grievant regarding her obligation to show respect for other employees. Such counseling would constitute progressive action.

Grievant argued that the Agency failed to take consistent disciplinary action. No credible evidence was presented showing that other employees engaged in workplace

² See, Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

violence and Agency managers were aware of the violence yet failed to take disciplinary action. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.