Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 12/16/15; Decision Issued: 12/31/15; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10714; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10714

Hearing Date: December 16, 2015
Decision Issued: December 31, 2015

PROCEDURAL HISTORY

On October 7, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On October 19, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 9, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 16, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Storeroom Warehouse Specialist III at one of its Facilities. He had been employed by the Agency for approximately 24 years. No evidence of prior active disciplinary action was introduced during the hearing.

On September 29, 2015, Grievant was checking inventory in the storeroom. He noticed that some items were not placed in their proper place. The items were placed too high, turned the wrong way, or dated on the wrong side. Grievant asked Mr. W to correct the problem. Mr. W claimed he was not responsible for the errors but that the truck drivers caused the problem. Grievant told Mr. W he needed to own up to his mistakes and stop blaming others. Mr. W left Grievant's office and spoke with another employee.

Mr. W returned to Grievant's office and said he thought they needed a mediator. Grievant's and Mr. W's arguments had been loud enough for several other employees to hear. Grievant's Wife also worked at the Facility. She had overheard the argument. She entered Grievant's office and observed Grievant seated in his chair and Mr. W standing over Grievant. The Wife said, "I don't mean to interrupt but I think you need a mediator." The Wife told Grievant to be quiet and to go get some help. Grievant said he agreed and began moving towards the Supervisor's office. Mr. W and Grievant continued to argue. The Wife raised her hand and placed her palm over Grievant's mouth to stop him from talking. She told him to be quiet. She told Grievant to go get a

supervisor because standing there arguing would not help anything. Grievant and Mr. W ended their argument.

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."

Disruptive behavior is a Group I offense.[2] On September 29, 2015, Grievant engaged in a heated argument with Mr. W. Rather than attempting to deescalate the argument by walking away or stop arguing, he continued to argue with Mr. W and did so in a manner loud enough for other staff to stop what they were doing and focus on Grievant's behavior. The Agency has presented sufficient evidence to show that Grievant's behavior was disruptive thereby supporting the issuance of a Group I Written Notice.

The Agency alleged that Grievant threatened a subordinate with bodily injury on September 29, 2015. The Agency claimed that while arguing with Mr. W, Grievant balled up his fist and said "I'll kno[ck you out!]. Grievant's Wife covered his mouth after he said "I'll kno" but before he finished saying "ck you out!" The Agency attached significance to Grievant's behavior on June 14, 2014 when Grievant threatened another employee when he told that employee he would knock him out.

When the Hearing Officer weighs the evidence of this case, it is clear that the Agency has not presented sufficient evidence to show that Grievant threatened Mr. W. Ms. W is the only objective witness who supposedly heard Grievant say "I'll kno ..." The Agency did not call Ms. W as a witness or otherwise justify her absence from the hearing. The Agency has assumed that Grievant intended to complete his sentence to say "knock you out" but this assumption cannot be confirmed without the testimony of Ms. W.

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

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

[2] See, Attachment A, DHRM Policy 1.60.

[3] Va. Code § 2.2-3005.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further 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 **reduced** to a Group I Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.