

Issue: Group I Written Notice (workplace violence); Hearing Date: 09/30/16;
Decision Issued: 10/24/16; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10855; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10855

Hearing Date: September 30, 2016
Decision Issued: October 24, 2016

PROCEDURAL HISTORY

On February 2, 2016, Grievant was issued a Group I Written Notice of disciplinary action for workplace violence.

On March 1, 2016, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 8, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 30, 2016, 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 Social Services employs Grievant as a Program Evaluation & Monitoring Coordinator. He began working for the Agency on December 25, 2006. No evidence of prior active disciplinary action was introduced during the hearing.

Prior to November 2015, Grievant worked for Mr. K. Grievant interacted as peers with the person who later became his Supervisor. Grievant perceived several of his interactions with the Supervisor as conflicts.

The Supervisor began supervising Grievant in November 2015.

On January 7, 2016 from approximately 1:30 p.m. to 3 p.m., a training meeting was held in the Conference Room. Several staff attended the training. The Supervisor was in charge of the meeting and was speaking to the employees. Grievant was at the meeting to hear the Supervisor and also be available to answer any staff questions. Grievant interrupted the Supervisor. Sometimes the interruptions were appropriate and sometimes they were not appropriate, according to the Supervisor. An employee asked if they would be delaying implementation of certain computer control functions. Grievant had implemented the control functions. The Supervisor said that they would be overriding the control functions. Grievant tried to explain the need for the controls. The Supervisor indicated the controls would be overridden. The interaction annoyed the Supervisor.

Once the meeting ended, staff including Grievant began leaving the Conference Room. The Supervisor instructed Grievant to remain in the room. Grievant remained in the room with the Supervisor. The Supervisor began admonishing Grievant for his behavior during the meeting. The Supervisor wanted to address how Grievant's facial expressions, voice tone and volume escalated. The Supervisor expressed that Grievant's voice was too loud.

Ms. P was standing outside the Conference Room. She perceived the conversation between Grievant and the Supervisor as too loud and entered the room to ask if everything was ok. The Supervisor said they were just finishing.

Grievant left the Conference Room and returned to his desk. Approximately ten to fifteen minutes after Grievant and the Supervisor left the Conference Room, the Supervisor told Grievant to go to her office. She also asked Mr. K to be present in the meeting. The Supervisor wanted Mr. K to be present when she discussed Grievant's behavior with Grievant.

Once Grievant, Mr. K, and the Supervisor were inside the Supervisor's office, the Supervisor told Grievant that he cannot challenge her during meetings. She told Grievant that his voice got so loud that Ms. P stayed outside the Conference Room and then had to enter the room because he was so loud.

Grievant said to the Supervisor, "If I wanted to do something to you (the Supervisor), I would have done it over a year ago when you wanted to discuss with me some reports I had completed an analysis on." The Supervisor became upset by Grievant's comment. She felt he had glared at her when he made his statement which she perceived as a threat. All of the "alarms in her body went off." Her heart rate accelerated and she wanted to leave the room. Mr. K asked Grievant if he was making a "veiled threat." Grievant smirked and said the Supervisor and Mr. K were interpreting him incorrectly.

The Supervisor left the office leaving Grievant and Mr. K inside. Grievant's statement caused the Supervisor to become fearful for her safety. She did not recall the conflict she may have had with Grievant several months earlier before becoming a Supervisor. The Supervisor went to the restroom and was "on the verge of tears." She stayed away for three to five minutes in order to calm down.

While Grievant and Mr. K remained in the Supervisor's office, Mr. K told Grievant that his comment sounded like he was threatening the Supervisor. Grievant responded that he should apologize to the Supervisor. Mr. K said "that would go a long way to clarifying this." When the Supervisor returned to the office, Grievant apologized.¹

¹ Mr. K testified during the hearing. Neither party, however, asked Mr. K about Grievant's conversation with Mr. K while the Supervisor was out of the office and whether Grievant apologized when the Supervisor returned to the office. Grievant's evidence about what he told Mr. K while the Supervisor left the office and when she returned is un rebutted by the Agency.

The Supervisor returned to the meeting but did not remember much of what happened after returning. Mr. K closed the meeting and Grievant left the office. Mr. K said to the Supervisor that he could see she was shaken. The Supervisor remained upset even as she drove home from work and until she reached her home.

The Supervisor now remains mindful when Grievant is around her. She positions herself in her office differently when she meets with Grievant. She has others with her when she meets with Grievant.

CONCLUSIONS OF POLICY

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.

The Agency has not presented sufficient evidence to support the issuance of a Group I Written Notice for workplace violence. The Written Notice must be reversed.

The Agency argued that Grievant should receive a Group I Written Notice for threatening the Supervisor. The Supervisor's reaction to Grievant's comment was genuine and clearly affected her that day and how she interacts with Grievant on subsequent days. The sincerity of the Supervisor's reaction is important in this grievance, but it is not sufficient to ignore the other evidence regarding what message Grievant intended to convey.

The context of this case is important. State Agencies may not take disciplinary action against employees for engaging in protected activities. To permit such disciplinary action would have the effect of retaliating against the employee.

Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right **otherwise protected by law.**"²

Virginia Code § 2.2-3000(A) states:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. 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 that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

When Grievant brought his concerns to the Supervisor about how she was implementing a division program and defending his actions in the face of her criticism his acts were "otherwise protected by law" and thus, protected activities.

This protection, however, is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness. The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis.

In this case, Grievant's words were perceived as a "veiled threat". When questioned, he immediately clarified he was not making a threat at all. He apologized

² See, Grievance Procedures Manual Section 4.1(b)(4) and Virginia Code § 2.2-3004 (A).

for saying something that could be misconstrued. Based on this evidence and the context of the conversation, there is no basis to take disciplinary action against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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