

DECISION OF HEARING OFFICER

IN RE: ██████████ v. VIRGINIA DEPARTMENT OF TRANSPORTATION
CASE NO. 11416
HEARING DATE: DECEMBER 18, 2019
DECISION ISSUED: JANUARY 16, 2020

PROCEDURAL HISTORY

Grievant was a 40-year employee at VDOT. In most recent years he had received various Group notices and counseling sessions. On July 25, 2019, Grievant was moved to a new position. On that date he made statements that lead to his Group III discipline with termination.

Grievant received letters from Agency on July 26, 2019¹, and August 2, 2019². Grievant responded on August 4, 2019³. A Written Notice was issued on August 15, 2019⁴. Grievant appealed on August 20, 2019⁵. A Hearing Officer was appointed on November 22, 2019. The pre-hearing conference occurred on December 2, 2019 and the hearing was set for December 18, 2019.

APPEARANCES

Agency Advocate
Agency Representative
5 Agency Witnesses
Grievant Advocate
Grievant as Witness
7 Grievant Witnesses

ISSUES

- 1) Whether Grievant's Group III disciplinary action was warranted under DHRM Policy 1.60 "Standards of Conduct"⁶.
- 2) Whether Grievant engaged in conduct prohibited by DHRM Policy 2.35 "Civility in The Workplace"⁷.
- 3) Whether Grievant engaged in conduct prohibited by Memorandum 11M-HR-2019-104 "Workplace Civility"⁸.
- 4) Whether Grievant engaged in conduct prohibited by VDOT Safety Policy SP #1-105⁹.
- 5) Whether mitigating or aggravating circumstances were considered.

¹ Agency Exhibit 10
² Agency Exhibit 11
³ Agency Exhibit 12
⁴ Agency Exhibit 13
⁵ Agency Exhibit 9
⁶ Agency Exhibit 17
⁷ Agency Exhibit 15
⁸ Agency Exhibit 18
⁹ Agency Exhibit 16

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.¹⁰

APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2017

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination.¹¹ Also, consideration of Policies:

- DHRM Policy 1.60
- DHRM Policy 2.35
- VDOT Memorandum 11M-HR-2019
- VDOT Policy SP #1-005

as they relate to this matter.

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of fact:

Briefly, Grievant, a 40-year veteran at VDOT was moved on July 25, 2019 to a new location retaining his superintendent position but with a new crew. Grievant was not happy about the move. Some members of the crew were unhappy their previous superintendent had been replaced.

¹⁰ *Grievance Procedure Manual* §5.8

¹¹ OP 135.1

On the first day at the new location Grievant had conversation with various employees. The employees alleged Grievant made remarks to them. The remarks were in four categories:

1. Grievant stated he wanted to “burn down the Residency Office”.
2. Grievant made comments about an employee who had left VDOT.
3. Grievant stated he wanted to “hook a chain to certain persons and drag them out of their office and down the street”.
4. Grievant told employees he had been sent to “get the ball rolling” and “get more work out of them”.

The Agency relied on the statements of the four (4) witnesses. The witnesses will be identified as G.R., D.H., D.M., and B.S. D.M. and B.S. reported to D.H., and D.H. reported to G.R. in the chain of authority. G.R. and D.H. while standing together were approached by D.M. and B.S. D.M. and B.S. reported statements made to them by Grievant. These statements were reported by D.H. and G.R. to their superior. All four (4) Witnesses were interviewed individually which resulted in written statements. The same four (4) Witnesses testified at hearing. The statements of D.M. and B.S. were fairly consistent. Whether G.R. and D.H. reported what they were told or what they actually heard was less clear.

In their interviews¹², B.S. and D.M. told G.R. and D.H. that Grievant had started a general conversation with them. The conversation evolved into a conversation about a previous employee with Grievant making several remarks about the employee saying: He was bi-polar, not on time for work, flipped a picnic table and so forth. Grievant then said he would like to chain up Residency Management and drag them out of the building down the road. Grievant finally said he had been sent to the location to get the crew to do good work. No mention was made about burning down a building.

D.H. said he witnessed Grievant talking about a previous employee and Grievant told D.H. he was at the new location “to get the ball rolling”. D.H. also stated Grievant had made comments about another employee’s “fling” and “burning down a building”. G.R. stated he heard Grievant talk to D.H. about another employee and Grievant’s reason for being at the new location. G.R. did not confirm the “burning” or “fling” statements.

The person, P.B., to whom D.H. and G.R. reported, put the matter under investigation. In questioning the Witnesses, P.B. felt the employees were concerned and felt threatened by Grievant’s remarks. The employees were offended that they were told they needed someone to get more work out of them. They felt the discussion about another employee was unnecessary and caused them to be uncomfortable.

P.B. stated at Hearing that his reason for relocating Grievant was to be in a position to better monitor his behavior as Grievant had, in the last 3 years, received previous disciplines. P.B. submitted evidence of a counseling memo in March of 2016¹³, a Group I in September of

¹² Agency Exhibits 19, 20, 22, 23

¹³ Agency Exhibit 6

2018¹⁴, a verbal counseling in April of 2019¹⁵, and a Group II dated July 18, 2019¹⁶ for an incident in May of 2019.

P.B. found the Witness's statements to be credible. He sent a letter to Grievant on July 26, 2019¹⁷ stating he was under investigation. An investigative summary was generated on July 29, 2019¹⁸. A letter sent on August 2, 2019¹⁹ of intent to impose disciplinary action. Grievant responded to this letter on August 4, 2019²⁰. P.B. sent a letter²¹ and Written Notice with Group III termination on August 15, 2019²².

Grievant's representative called seven (7) Witnesses to attest to Grievant's good character and work ethic. All Witnesses unanimously stated Grievant had never been rude or threatening to them. One witness stated he heard D.H. say he did not want Grievant to be his superintendent. None of these Witnesses were present at the work location on the day of this incident, and none were in Grievant's crew. Grievant presented evidence of his recent awards for exemplary service²³. Grievant denied he made any of the alleged statements. Grievant stated he had only 14 more months of a 40-year career until retirement.

OPINION

While there were differences in the complaining Witnesses facts as they were repeated over time, there was enough consistency for the Agency to believe four (4) people coming forward with essentially the same facts could be a true scenario.

There was no collaborating evidence represented about "burning down a building" or "an employee's fling".

While P.B. was of the opinion Grievant "lied" in telling employees his reasons for being relocated, there was no evidence presented that Grievant had been told any different reason. Although, P.B. stated at Hearing what P.B.'s reasons were, nothing would indicate P.B. had told Grievant his reasons. Therefore, it is impossible to "lie" if you are not aware of the "true" statement.

It could be believed that Grievant made statements about another employee. No specific policy statement presented addressed confidential information. However, common sense would dictate it was unprofessional and employees stated it made them uncomfortable.

¹⁴ Agency Exhibit 2

¹⁵ Agency Exhibit 4

¹⁶ Agency Exhibit 3

¹⁷ Agency Exhibit 10

¹⁸ Agency Exhibit 26

¹⁹ Agency Exhibit 11

²⁰ Agency Exhibit 12

²¹ Agency Exhibit 13

²² Agency Exhibit 9

²³ Grievant's Exhibits 1, 2, 3

The comment about chaining up persons and dragging them is the most concerning matter. Policy does not require that the threat be made to a named person nor does it require that person be frightened. In other words, simply making a statement of a violent act is sufficient to be actionable²⁴.

Grievant's actions were significant enough to warrant a Group III discipline under DHRM Policy 1.60. Grievant did violate Policy 2.35 Civility in the Workplace as well as Memorandum 11M-HR-2019-104 addressing workplace civility and VDOT Safety Policy SP #1-105.

The Agency considered mitigating circumstances in Grievant's 40 years of contribution to VDOT. It is regrettable that a person with such a long service record would be terminated. However, the aggravating factors of recent disciplines (Group I and Group II) as well as VDOT's policy of civility and no tolerance of violence were deciding factors in determining a Group III with a termination outcome.

A Hearing Officer is not a "super-personnel officer". Therefore, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy.²⁵

DECISION

Considering the matter and all evidence presented, the Group III discipline with termination is **UPHELD**. With a previous Group I, Group II discipline, and counseling within the last three years, previous disciplines are also considered, and the action of termination is **UPHELD**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

²⁴ Agency Exhibit 16

²⁵ Rules for Conducting Grievance Hearings 2017, VI.A., page 15

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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].

Sondra K. Alan, Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.