



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11444

Hearing Date: January 16, 2020

Decision Issued: January 21 2020

PROCEDURAL HISTORY

On August 28, 2019, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for failure to follow policy, violation of DHRM Policy 2.35, and threats or coercion.

On September 23, 2019, 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 November 4, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 16, 2020, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Corrections employs Grievant as a Corrections Officer at one of its facilities. He has been employed by the Agency for approximately 23 years. No evidence of prior active disciplinary action was introduced during the hearing.

On July 3, 2019, Grievant was working near the medical department of the Facility. Vending machines were located in a room near the medical department.

Nurse P entered the breakroom to get a pack of peanuts and a drink from the vending machines. Grievant was also in the breakroom. Nurse P bought the peanuts and then moved in front of the drink machine. Grievant walked up behind Nurse P and grabbed her arm. Grievant stated, "Give me some money." Nurse P said, "Sorry no money." Grievant stepped behind Nurse P, reached his arm around to her front and used the side of his hand to hit Nurse P in the throat. Nurse P asked Grievant to "lay off." Grievant then hit Nurse P in the throat again. The second hit took her "breath away." Nurse P tried to get around Grievant and asked Grievant to move away. Grievant stepped away from Nurse P and she left the breakroom. Nurse P felt threatened by Grievant's behavior. Grievant made her feel scared and uncomfortable. Nurse P complained to her supervisor about Grievant's behavior.

Nurse L was in the breakroom. Grievant approached her. Nurse L had never met Grievant before that moment. Grievant demanded that Nurse L “share” her can of soda with him after she purchased it. Grievant looked “serious” when he spoke to Nurse L. When Nurse L was leaving the breakroom, Grievant grabbed a cup and told Nurse L, “Don’t be stingy.” Grievant’s demeanor was serious and insistent. Nurse L felt intimidated by Grievant. Nurse L felt she needed to share her drink with Grievant to avoid confrontation with him. After the incident, Nurse L attempted to avoid encountering Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”¹ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”² Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”³

DHRM Policy 2.35 governs Civility in the Workplace. This policy provides:

The Commonwealth strictly forbids ... bullying behaviors, and threatening or violent behaviors of employees *** Any employee who engages in conduct prohibited under this policy or who encourages or ignores such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Bullying is defined as:

Disrespectful, intimidating, aggressive and unwanted behavior toward a person that is intended to force the person to do what one wants, or to denigrate or marginalize the targeted person. The behavior may involve a real or perceived power imbalance between the aggressor and the targeted person. The behavior typically is severe or pervasive and persistent, creating a hostile work environment. Behaviors may be discriminatory if they are predicated on the targeted person’s protected class (e.g., using prejudicial stereotyping or references based on the targeted person’s characteristics or affiliation with a group, class, or

¹ Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

² Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

category to which that person belongs, or targeting people because they are in a protected class).

Workplace violence is defined as:

Any physical assault, threatening behavior, or verbal abuse occurring in the workplace by employees or third parties. Threatening behaviors create a reasonable fear of injury to another person or damage to property or subject another individual to extreme emotional distress.

“Violation of DHRM Policy 2.35 Civility in the Workplace” is a Group III offense.⁴ On July 3, 2019, Grievant engaged in threatening behavior. He hit Nurse P twice in the throat. He attempted to force Nurse P and Nurse L to give him a drink using aggressive and unwanted behavior. 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 or in lieu of removal may suspend an employee for up to 30 work days. The Agency suspended Grievant for five workdays. Accordingly, the Agency’s suspension must be upheld.

Grievant admitted to touching Nurse P but not with the force she claimed. Grievant asserted he was “joking” and Nurse P understood his actions to be a “joke.” Grievant denied unduly influencing Nurse L. The evidence showed that Grievant was not “joking” with either Nurse P or Nurse L. He did not have a relationship with either nurse that showed that any of his actions could be construed as welcome, tolerated, or expected.

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”⁵ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁴ See, Operating Procedure 135.1(II)(D)(2)(s).

⁵ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a five workday suspension 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.

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].

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer