



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11465

Hearing Date: February 25, 2020

Decision Issued: February 26, 2020

PROCEDURAL HISTORY

On October 28, 2019, Grievant was issued a Group III Written Notice of disciplinary action for making a threat.

On November 23, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 16, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 25, 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:

Virginia Commonwealth University employed Grievant as an Animal Care Technician. He had been employed by the University for approximately 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant had a longstanding complaint with the University regarding the adequacy of his compensation. He complained to his Supervisor, Supervisor N, and the Manager. Grievant was advised that the supervisors and Manager could not increase his compensation because that responsibility rested with University Budget and State Legislative authorities. Grievant remained angry and frustrated with his poor compensation.

On October 15, 2019, Ms. H was in the breakroom, seated in front of a table with a computer. She was working on the computer. The table was against a wall in the breakroom.

Mr. H and Ms. K were seated at a table in the breakroom. Grievant and the Supervisor entered the room. Grievant loudly said, "I wonder what it would be like to shoot up the place and what goes through people's heads. I know exactly who I would go for. This place is messing around and will not give me my money." Grievant's demeanor was serious. He was not "joking." The Supervisor said, "You can't make comments like that."

Ms. H heard Grievant's statement and felt threatened. She was concerned for her safety. She knew that Grievant could become angered easily. Mr. H could not recall the statements. Ms. K heard Grievant's comment but did not feel threatened by the statement.

She reported Grievant's behavior to Manager Ri. Manager Ri became concerned about Grievant's statements. Manager Ri reported Grievant's behavior to the Manager. The Manager believed Grievant considered the Manager to be one of the people who would not give Grievant his money. In other words, the Manager believed Grievant's comment was directed at the Manager. The Manager became distressed and upset.

The Manager contacted human resource staff and was advised to contact Grievant to place him on administrative leave. He was also advised to contact the University Police so they could investigate. Grievant had already left for the day when the Manager contacted him by telephone. The Manager notified Grievant not to report to work and that the University Police would contact him.

The Police Sargent contacted Grievant and concluded Grievant's behavior was a human resource issue and not a criminal matter.

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."

"[T]hreatening others" is a Group III offense. "Workplace violence" includes threatening behavior that creates a reasonable fear of injury to another person. Threatening behavior can result in removal.² Grievant had a longstanding dispute with the University regarding the amount of his compensation. Many employees knew he believed he was poorly compensated. On October 15, 2019, Grievant said, "I wonder what it would be like to shoot up the place and what goes through people's heads. I know exactly who I would go for. This place is messing around and will not give me my money." His statement suggested he was considering "shooting up the place" and he knew "exactly who I would go for." Grievant's statement was sufficient to establish a

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, DHRM Policy 2.35 governing Civility in the Workplace.

threat to others. Ms. H felt threatened by Grievant's comment and the Manager became upset by Grievant's comment because he believe it was directed at him. The University 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 apologized during the hearing. He indicated he did not realize he was saying anything in a bad way. Although Grievant's apology is commendable, it is not sufficient to reverse the disciplinary action. In addition, it is not necessary for the University to establish that Grievant actually intended to carry out his threat. It was not necessary for the University to show that Grievant had the ability to carry out the threat or that he was in the process of carrying out the threat. The University can met its burden of proof based solely on Grievant's statements. The University has done so.

Grievant argued Ms. H reported him because of his race.³ Even if Ms. H reported Grievant because of his race, the evidence showed that Grievant made the comments described by Ms. H. The University's disciplinary action was taken by University managers who did not consider Grievant's race when issuing the disciplinary action. The issued disciplinary action was solely based on Grievant's behavior. The Hearing Officer does not believe the University considered Grievant's race when determining how to address his threatening statements.

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"⁴ 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 University inconsistently applied disciplinary action. He presented the testimony of Mr. B to support his assertion. Mr. B was talking to a co-worker in September or October 2019. Mr. B's supervisor came into the room and asked if Mr. B was talking about her. He said no. The supervisor said, "I know you are not; because if you were, I would bop you." The supervisor received corrective action

³ Ms. H was disciplined in 2013 for using the n-word. Her removal was mitigated because several employees were using the phrase as slang.

⁴ *Va. Code § 2.2-3005.*

but was not removed from employment. Grievant and that supervisor are not similarly situated. Threatening to “bop” an employee is not the same level of violence as threatening to shoot employees. The Agency did not inconsistently apply 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 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]

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

[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