



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11474

Hearing Date: March 17, 2020

Decision Issued: March 31, 2020

PROCEDURAL HISTORY

On November 19, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for acts of physical violence.

On December 13, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On December 30, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 17, 2020, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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. 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 employed Grievant as a Corrections Lieutenant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant and the Lieutenant did not like working with each other. They sometimes engaged in verbal conflict.

On October 21, 2019, the Warden met with Grievant and the Lieutenant in the Medical Office. The Lieutenant told the Warden that she could not get along with Grievant. The Warden told the Lieutenant to gather her things and go home. He said that when Grievant and the Lieutenant returned on the next day of work, they would discuss the matter and if there was a problem, he would separate Grievant and the Lieutenant.

The Lieutenant went to the Lieutenant's Office to get her coat and hat. Grievant and Captain C were already in the Lieutenant's Office. Grievant was seated at a desk. Captain C was standing by a file cabinet. At some point, Captain J entered the Lieutenant's Office.

Grievant asked the Lieutenant what was her problem in medical. The Lieutenant replied to Grievant, "Why you acting like a little bi—h?" The Lieutenant sat at a desk and faced Grievant. Grievant and the Lieutenant talked calmly and then their voices got louder and they began talking over one another.

The Lieutenant got up from her seat and walked past Grievant and said something about there being nothing more to talk about. Grievant said words to the effect of "I try to stay calm, but I'm not scared to throw these hands either." The Lieutenant stopped in front of Grievant and said words to the effect of "If you put your hands on me, I will defend myself and whoop your ass!" Grievant stood up and they both began pointing their fingers at each other as they argued.

Captain J stepped between Grievant and the Lieutenant. Captain J was facing the Lieutenant and trying to move her backwards into a corner. Captain C also began pulling the Lieutenant to get her out of the office. Grievant reached over Captain J and with a closed fist punched the Lieutenant in her face. The Lieutenant said, Grievant was a punk for hitting the Lieutenant in the face. The Lieutenant pushed against Captain J to push him against Grievant. The Lieutenant picked up a three-hole punch and threw it at Grievant. Grievant threw it back at the Lieutenant.¹

Captain J and Captain C moved the Lieutenant out of the Lieutenant's Office and into the support control area. As Captain J and Captain C were telling the Lieutenant "it's not worth it", all the Lieutenant could think about was how Grievant had hit her in the face. Grievant followed the Lieutenant to continue arguing with the Lieutenant.

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."² 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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

Operating Procedure 135.5 governs Workplace Violence. "Prohibited conduct includes, but is not limited to: *** Injuring another person physically."

¹ The evidence is unclear regarding whether Grievant or the Lieutenant was the first to throw the three-hole punch. The evidence is clear that both of them threw the three-hole punch at each other.

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

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

⁴ Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

“Acts of physical violence or fighting” is a Group III offense.⁵ On October 21, 2019, Grievant engaged in acts of physical violence and fighting. Grievant argued with the Lieutenant, pointed her finger at the Lieutenant, verbally threatened the Lieutenant and then punched the Lieutenant in the face. None of Grievant’s behavior was appropriate or justified. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for acts of physical violence. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

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”⁶ 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 contends the disciplinary action should be mitigated because Agency managers knew Grievant and the Lieutenant had ongoing conflicts and should have separated them. The evidence showed that Agency managers knew Grievant and the Lieutenant did not like to work with one another but expected them to perform their duties in a professional manner. There is no reason for the Hearing Officer to believe that Agency manager should have expected the conflict between Grievant and the Lieutenant to be so extensive as to result in Grievant punching the Lieutenant. 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**.

⁵ Virginia Department of Corrections Operating Procedure 135.1(II)(D)(2)(f). This Operating Procedure is misnumbered.

⁶ *Va. Code § 2.2-3005*.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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