



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11730**

Hearing Date: December 17, 2021  
Decision Issued: January 7, 2022

**PROCEDURAL HISTORY**

On May 14, 2021, Grievant was issued a Group III Written Notice of disciplinary action with removal for lack of civility in the workplace.

On May 20, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 30, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 17, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
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 Behavioral Health and Developmental Services employed Grievant as a Clinical Social Worker at one of its locations. She had been employed by the Agency for approximately six years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant completed Civility in the Workplace training on October 27, 2020.

When Grievant became frustrated with a co-worker she would "blow off steam" by saying she would hit the co-worker over the head with a shovel.

Grievant made several statements to Ms. Mo including, "I'm gonna get that [Supervisor]; hit him with a shovel. He does not know what he is doing. I'm tired of this damn place. [Supervisor] doesn't do a damn thing. I don't care what he says, I'm not doing that." Grievant made these comments to Ms. Mo on an almost "weekly" basis. Ms. Mo heard Grievant say, "this stupid f—king place", "damn [Supervisor]", and "[Supervisor] doesn't know s—t." Ms. Mo testified Grievant said, "I'm going to kill him" when referring to the Supervisor. Other employees heard Grievant make similar statements.

Grievant's co-worker and friend, Ms. Mi, gave Grievant a foldable shovel as a "gag" gift for Christmas in December 2020. Ms. Mi gave Grievant the shovel because

Grievant frequently said she was going to hit others with a shovel. Grievant left the shovel in her office. She did keep the shovel in her office in order to hit anyone with the shovel.

The Agency began an investigation and interviewed numerous employees including Grievant. Grievant told the investigator, "It's an ongoing joke that I am going to hit someone over the head with a shovel when I get frustrated."

Grievant did not tell the Supervisor that she was going to hit him over the head with a shovel. When the Supervisor learned of Grievant's comments as part of the investigation, he became speechless, troubled, and upset by Grievant's comments.

### **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."<sup>1</sup> 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."

DHRM Policy 2.35 governs Civility in the Workplace. Under this policy:

This policy is to ensure that agencies provide a welcoming, safe, and civil workplace for their employees, customers, clients, contract workers, volunteers, and other third parties and to increase awareness of all employees' responsibility to conduct themselves in a manner that cultivates mutual respect, inclusion, and a healthy work environment. All employees should receive training from either the agency EEO Officer or the Diversity, Equity, and Inclusion Unit in the Department of Human Resource Management to assist them in recognizing, preventing, and reporting behaviors that constitute harassment, sexual harassment, bullying, cyber-bullying, and threats or violence related to the workplace. Agencies are required to provide avenues for addressing complaints; to communicate how employees may access these procedures and participate in related investigations, free of retaliation; and to hold employees accountable for violations of this policy. \*\*\*

The Commonwealth strictly forbids harassment (including sexual harassment), bullying behaviors, and threatening or violent behaviors of employees, applicants for employment, customers, clients, contract workers, volunteers, and other third parties in the workplace.

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Behaviors that undermine team cohesion, staff morale, individual self-worth, productivity, and safety are not acceptable. \*\*\*

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 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.

The Policy Guidance for DHRM Policy 2.35 lists prohibited conduct to include, "[m]aking threats to injure another person."

Grievant violated DHRM Policy 2.35 by repeatedly saying she would hit the Supervisor and others on the head with a shovel. Grievant's words constituted a "threat to injure another person" prohibited by DHRM Policy 2.35. Grievant's statements were disrespectful and denigrating to the Supervisor. The Agency has presented sufficient evidence to show that Grievant violated DHRM Policy 2.35. A violation of policy is usually a Group II offense. In this case, DHRM Policy 2.35 authorized imposition of a Group III Written Notice based on the severity of the behavior. The Agency has established a basis to issue a Group III Written Notice because of the repeated statements by Grievant. Grievant should have realized threatening to hit the Supervisor with a shovel would not be appropriate in the workplace. Although the Agency could have taken lesser disciplinary action to correct Grievant's behavior, it acted within its discretion to issue 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 argued that she said she was going to hit someone over the head with a shovel in order to “blow off steam.” There is a significant difference between stating the desire to hit “someone” over the head with a shovel and the desire to hit a specific person over the head with a shovel. Grievant did not simply say “someone”, she referred to a specific person by name. By referring specifically to the Supervisor, Grievant’s behavior exceeded what would be a reasonable expression of frustration.

Grievant argued she did not threaten the Supervisor because she had no intention of actually hitting the Supervisor or anyone else on the head with a shovel. The Hearing Officer does not believe Grievant ever intended to carry out her threat to hit the Supervisor on the head. Grievant may have considered her statements to be an ongoing “joke” but her statements were not appropriate for the workplace. It was not necessary for the Agency to show Grievant intended to carry out her threat in order to establish her words were inappropriate in the workplace.

Grievant argued that other employees made similar statements when they became frustrated. The evidence showed that Agency managers were not aware that staff were making similar statements. The Agency’s failure to address inappropriate statements by other staff does not excuse Grievant’s inappropriate behavior.

Grievant argued she experienced significant anxiety and depression because of losing a co-worker to COVID19 and Ms. Mo’s repeated failure to report to work as scheduled. Although it is clear that Grievant was working under stressful conditions, Grievant did not establish that her anxiety and depression caused her inappropriate behavior.

*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 ....”<sup>2</sup> 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.

## DECISION

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<sup>2</sup> Va. Code § 2.2-3005.

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.