

Issue: Group III Written Notice with Termination (theft and threats); Hearing Date: 07/06/16; Decision Issued: 07/08/16; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 10815; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10815

Hearing Date: July 6, 2016

Decision Issued: July 8, 2016

PROCEDURAL HISTORY

On March 30, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for theft and making threats.

On April 15, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 9, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 6, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's Counsel
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. 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 University of Virginia employed Grievant as a Resource Processor. No evidence of prior active disciplinary action was presented during the hearing.

The Agency has a policy prohibiting employees from removing someone else's property regardless of ownership from the workplace. For example, if a student leaves a bicycle on the property, the Agency places a notice on the bike saying the bike will be taken if it is not removed from Agency property. After the 30 days, the bicycle is taken by the Agency and held by the Agency. It would not be given to individual employees.

Grievant received training regarding his obligation to be respectful to other employees. This training included understanding the importance of avoiding conflicts.

Mr. S owned a bicycle built in 2013. The bicycle's front shock absorbers were detached. If he lifted the bicycle up by its handlebars, the front wheel might separate from the bicycle. Mr. S transported his bicycle in his car to a parking lot located away from the Building where he worked. He removed his bicycle from the bike rack and rode it to the Building.

On February 19, 2016, Mr. S parked his car and then rode his bicycle from his car to his office in the Building. He parked the bicycle next to a wall of the Building. He did not lock or otherwise secure the bicycle.

Mr. S came out of the Building. He could not see the bicycle. He walked around the area and walked behind an electrical transformer. The transformer was approximately six feet by eight feet in size. It was several feet tall. Mr. S observed the bicycle parked behind the transformer. He assumed he was the victim of a prank because there were a number of “pranksters” working with him. He did not want to return the bicycle to its original location because the pranksters might realize he had discovered his bicycle and then attempt to hide it in a more difficult place to find.

In the afternoon, Mr. S was talking to another employee outside of the Building. Grievant approached them and began “small talk”. Grievant then asked Mr. S when he expected to leave. Mr. S said he would leave a short time later. Mr. S returned inside the Building. While Mr. S was inside the Building, Grievant removed the bicycle from behind the transformer, put it in his vehicle, and took it to his home.

Mr. S came out of the Building and realized his bicycle had been removed from behind the transformer. He looked elsewhere and could not find the bicycle.

On February 23, 2016, a co-worker observed Mr. S’s bicycle at Grievant’s residence and took a picture. Upon learning this, Mr. S notified the University’s police department and an arrest warrant was issued for Grievant.

On March 16, 2016, Grievant was at work when the University Police arrived and served him with the warrant. Grievant became upset. Grievant left work. Several hours later, Grievant called Mr. M and said that “I know the m---er f--ker that did this and I am going to [department store] to get something to take care of it.” Mr. M perceived Grievant’s comment as a threat of harm. He reported Grievant’s statement to the University Police.

Grievant was prosecuted for petit larceny in a local General District Court. Grievant was found guilty.

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.”

DHRM Policy 1.60 lists numerous examples of offenses. These examples “are not all-inclusive, but are intended as examples of conduct for which specific disciplinary

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.”

Theft occurs when a person intentionally and fraudulently takes personal property of another without permission or consent and with the intent to convert it to the taker's use (including potential sale). Grievant took property belonging to Mr. S. He was convicted by a local General District Court of larceny. The Agency has presented sufficient evidence to support its conclusion that Grievant stole Mr. S’s bicycle.

In the Agency’s judgment, theft of another employee’s property is a Group III Offense. Theft of another employee’s property is not listed as a Group III offense. Theft of State property is a Group III offense. The Agency has presented sufficient evidence to support its conclusion that theft of an employee’s property should be a Group III offense because theft of an employee’s property is similar to and consistent with theft of an agency’s property. Grievant was convicted of larceny of Mr. S’s bicycle, thereby justifying the issuance of a Group III Written Notice.

Grievant argued that at approximately 6:30 a.m. or 6:45 a.m. on February 19, 2016 another person had the bicycle and asked him if he wanted the bicycle. This other person supposedly knew Grievant collected material to recycle. Grievant could not identify this other person. It seems unlikely that an unidentifiable person would walk behind a campus building early in the morning, steal a bicycle, and then a few minutes later give the bicycle away to someone for recycling. In any event, the General District Court’s conviction effectively resolves the issues regarding the merits of Grievant’s defenses.

Grievant argued that he was “set up” and his superintendent lied to his co-workers. No credible evidence was presented to support this allegation.

“[T]hreatening others” is a Group III offense.² On March 16, 2016, Grievant told Mr. M, “I know the m---er f--ker that did this and I am going to [department store] to get something to take care of it.” Grievant’s comment expressed anger toward the person who “did this” and a threat to “get something to take care of it.” Grievant’s words and context of the case, lead to the conclusion that Grievant threatened physical harm to Mr. S. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

Grievant argued that his comment was a mistake and that he did not actually intend to harm anyone. It is not necessary for the Agency to show that Grievant actually intended to carry out his threat. The Agency has shown that Grievant made a threat and that evidence is sufficient to support the issuance of a Group III Written Notice.

² See, Attachment A, DHRM Policy 1.60.

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"³ 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

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 file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before

³ Va. Code § 2.2-3005.

the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.