

Issues: Group II Written Notice (workplace violence), Group II Written Notice (failure to follow instructions and insubordination), and Termination (due to accumulation);  
Hearing Date: 07/01/16; Decision Issued: 07/05/16; Agency: DSS; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 10816; 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: 10816**

Hearing Date: July 1, 2016

Decision Issued: July 5, 2016

#### **PROCEDURAL HISTORY**

On April 19, 2016, Grievant was issued a Group II Written Notice of disciplinary action for workplace violence. On April 19, 2016, Grievant was issued a Group II Written Notice with removal for failure to follow a supervisor's instructions and insubordination.

On April 26, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 10, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 1, 2016, a hearing was held at the Agency's office. Grievant did not attend the hearing.

#### **APPEARANCES**

Agency Party Designee  
Agency Representative  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Department of Social Services employed Grievant as an Information Technology Specialist III at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant, Ms. B, and the Division Manager worked on the same floor of a Building with several floors. Two or three security guards worked in the Building lobby. Employees and visitors of the Agency were required to pass by the security guards. Employees had to display their badges and visitors had to disclose their identity and sign their names on a list. Visitors were to be escorted from the lobby into the Agency's offices. Only Agency employees with badges could "swipe" to enter the floors containing the Agency's offices.

On March 29, 2016, Mr. S entered the Building. He bypassed the security guard and entered the elevator. He attempted to access one of the Agency's floors but could not do so because he did not have an Agency badge. He returned to the security desk and began speaking with the security guards to gain entry. The Security Corporal told Mr. S that he could not enter the Agency's offices without appropriate credentials or being escorted by an employee with appropriate credentials.

Grievant entered the Building. He observed Mr. S speaking with the Security Corporal. He asked Mr. S, "What's the problem?" Mr. S replied, "They won't let me upstairs." Grievant said he would escort Mr. S into the Agency's offices. The Security Corporal asked Grievant to "sign in" Mr. S. Grievant refused to do so. Grievant

instructed Mr. S to come with him. The Security Corporal again asked Grievant to “sign in”. Grievant said, “No, those are not the rules.” The Security Corporal insisted that Grievant sign the log. Grievant was angry at the Security Corporal and raised his voice when speaking to him. Grievant positioned himself within one or two feet of the Security Corporal on at least three times. He moved behind the security desk. He cause the Security Corporal to step backwards to avoid coming into contact with Grievant. The Security Corporal asked another security guard to call the police because of Grievant’s behavior. The Security Corporal felt that Grievant was trying to intimidate the Security Corporal. Grievant falsely accused the Security Corporal of racial profiling.

Ms. B overheard the conflict caused by Grievant. Ms. B approached the Security Corporal and Grievant. She said she would take care of escorting Mr. S upstairs. She signed the log and escorted Mr. S to the elevator.

Grievant left the lobby and went to the floor where he worked. Grievant went to the Division Manager’s office and asked if something had changed with the Building’s security. The Division Manager asked for clarification. Grievant said he attempted to bring Mr. S upstairs but was prevented from doing so. Grievant asked the Division Manger what had changed and why the Division Manager was not aware of the change. The Division Manager said the security guards have a job to do and maybe their internal policies had changes. Grievant said the security guards had engaged in racial profiling. The Division Manager said that if a guard sees something suspicious, he must ask questions. Grievant said, “You don’t know anything about racial profiling because you are white!” The Division Manager was insulted by Grievant’s comment. Based on his life experiences he was familiar with racial and other profiling.

The Division Manager wanted to de-escalate the interaction and for Grievant to begin working. The Division Manager instructed Grievant to return to his desk. Grievant did not comply with that directive. Grievant continued to express his allegations of racial profiling. The Division Manager again directed Grievant to return to his desk. Grievant left the Division Manager’s office but went to Ms. B’s desk. The Division Manager stopped what he was doing and went to where Grievant was speaking with Ms. B. The Division Manager told Grievant to go to his desk. Grievant turned around and said, “What, I can’t talk to [Ms. B]?” The Division Director told Grievant to return to his desk. Grievant replied, “No, I will not!” The Division Director told Grievant to go to his desk or go home. Grievant then returned to his desk.

## **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

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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.

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.”

#### Group II Written Notice – Workplace Violence

DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

On March 29, 2016, Grievant entered the Building and created a conflict with the Security Corporal. Grievant refused to comply with the Security Corporal’s request to sign in. Grievant argued with the Security Corporal and positioned himself within one or two feet of the Security Corporal. The Security Corporal had to move away from Grievant because of his behavior. The Security Corporal asked another employee to call the police because of Grievant’s behavior. Grievant’s objective was to intimidate the Security Corporal. The Agency has presented sufficient evidence to show that Grievant created an intimidating presence. Grievant’s behavior rises to the level of a Group II offense.

#### Group II Written Notice – Failure to Follow Instructions

Failure to follow a supervisor’s instructions is a Group II offense. On March 29, 2016, Grievant was instructed at least three times by his supervisor to return to his desk. Grievant disregarded those instructions thereby justifying the issuance of a Group II Written Notice.

#### Accumulation of Disciplinary Action

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency’s decision to remove Grievant must be upheld.

#### Mitigation

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

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for workplace violence is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice for failure to follow instructions is **upheld**. Grievant’s 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 14<sup>th</sup> St., 12<sup>th</sup> 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 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:

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<sup>2</sup> Va. Code § 2.2-3005.

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 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.<sup>3</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>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.