

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 09/19/16; Decision Issued: 09/20/16; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10860; 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: 10860

Hearing Date: September 19, 2016

Decision Issued: September 20, 2016

PROCEDURAL HISTORY

On July 11, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence.

On July 22, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 15, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2016, a hearing was held at the Agency's office.

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. 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 Food Service Tech 1 at one of its locations. She has been employed by the Agency for approximately three years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant and Mr. T developed a romantic and intimate relationship. Both of them worked at the Facility. Their personal relationship came to an end and conflict arose between them.

On July 4, 2016, Mr. T was angry with Grievant. He followed Grievant to an area at the Facility near an ice machine. Mr. T knocked a cup of ice out of Grievant's hand. Grievant was afraid. She told him he should not do this at work and for him to leave her alone.

Mr. W heard the argument and moved to separate Mr. T and Grievant. Mr. T said, "Don't nobody threaten my family" and that "I will kill her" referring to Grievant. Mr. T punched the refrigerator hard enough to leave a dent. Grievant responded, "You better call security to come get him, because no one threatens to kill me, or I will get him." Grievant told Mr. T, "I'm going to make you lose your job!"

A security officer was called to respond.

Mr. W. moved Mr. T into Mr. W's office. When the security officer arrived, he spoke with Mr. T in Mr. W's office. Mr. W left the office and went to the main office. Ms. A and Grievant were already in the main office. Grievant said she could get her cousin to "come in and handle him" referring to Mr. T. Mr. W understood Grievant's comment to be referring to causing physical harm to Mr. T. Mr. W said, "That's a threat!" Grievant said, "No, it's not."

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."

"Threatening others" is a Group III offense.² On July 4, 2016, Grievant threatened to have her cousin "come in" and "handle" Mr. T. Grievant's statement was a threat of physical harm to Mr. T. The Agency has presented sufficient evidence to support the issuance of a Group III offense. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant denied saying that she would have her cousin handle Mr. T. She denied threatening Mr. T. The Agency presented evidence from Mr. W and Ms. A who heard Grievant make the threat. Both of these witnesses were credible. Grievant did not present any evidence of any motive Mr. W or Ms. A had to lie about Grievant.

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

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, Attachment A, DHRM policy 1.60.

³ *Va. Code § 2.2-3005.*

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 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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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