

Issue: Group III Written Notice with 30-day suspension (fighting with coworker);
Hearing Date: 07/21/03; Decision Issued: 07/22/03; Agency: DMHMRSAS;
AHO: David J. Latham, Esq.; Case No. 5764



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5764

Hearing Date:	July 21, 2003
Decision Issued:	July 22, 2003

APPEARANCES

Grievant
Human Resources Director
Director of Administration
Three witnesses for Agency

ISSUES

Did the grievant's actions warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant timely filed a grievance from a Group III Written Notice issued for fighting with a coworker.¹ The grievant was suspended for 30 workdays as part of the disciplinary action. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.²

The Department of Mental Health, Mental Retardation and Substance Abuse Services (MHMRSAS) (Hereinafter referred to as “agency”) has employed the grievant as a food operations assistant for three years.

On January 21, 2003, grievant and a coworker became embroiled in a dispute after the coworker called grievant vulgar names. Grievant went to her supervisor (Food Service Manager A) and complained. The female Manager asked grievant and the coworker to come to her office. Another employee who is the coworker’s aunt followed grievant and the coworker into the Manager’s office. Both grievant and the coworker began shouting and calling each other vulgar names. As the verbal dispute escalated, they approached each other and “got into each other’s faces.” Then the dispute suddenly erupted into a physical fight that continued for at least two minutes. At some point, the Manager said, “Alright, go ahead and fight then.”³ During this time, the Manager told the combatants to stop but the fight continued. The Manager then sought assistance from two male supervisors. The male supervisors came into the office where they found the coworker pulling out grievant’s hair; grievant was on her back on the floor. They separated the two and the incident ended. Both employees were suspended pending investigation.

The agency promptly investigated the matter and concluded that both employees had violated the prohibition against fighting.⁴ However, during the investigation, both grievant and her coworker filed criminal charges of assault and battery against each other. The agency then decided to further suspend both employees pending disposition of the criminal charges. On April 7, 2003, both grievant and the coworker mutually agreed to drop their charges against other and the cases were dismissed by the court. Upon notice of this disposition, the agency determined that both grievant and the coworker were to be disciplined with a Group III Written Notice and 30-day suspension. By this time, the two protagonists had been on suspension for 80 days; it was therefore decided that the 30-day suspension would be imposed retroactively from January 27 through March 7, 2003.

¹ Exhibit 2. Written Notice, issued April 11, 2003.

² Exhibit 1. Grievance Form A, filed May 9, 2003.

³ Grievant contends that the supervisor told them to fight before any blows were struck. The supervisor said she made the statement after fighting had started when she was not able to get the two to stop fighting. Since other key witnesses did not testify, this issue is unresolved.

⁴ Exhibit 5. Investigator’s Summary, January 23, 2003.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Standards of Conduct policy provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.⁶

⁵ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

⁶ Exhibit 11. DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.

The essential facts in this case are not disputed. Grievant acknowledged during the hearing that she was involved in both the name-calling and in the physical fighting. Both grievant and her coworker contend that the other threw the first punch but the available evidence is insufficient to resolve this issue.⁷ However, after the fight began, it is undisputed that both fought for several minutes before being separated, and neither of the two attempted to get away from the other. Thus, it appears that both were equally culpable for continuing to fight, and neither made an attempt to escape from the area.

Moreover, grievant agreed that she was wrong to have been fighting, that discipline was warranted, and that Group III is the appropriate level of discipline. Grievant's purpose in utilizing the grievance process was to assure that agency management understands that her supervisor had been wrong to tell them to fight each other.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice for fighting and the 30-day suspension are hereby UPHELD. The Written Notice shall remain in grievant's personnel file for the length of time specified in Section VII.B.2.c of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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.

⁷ The Food Service Manager A told the investigator that grievant had thrown the first punch. However, when questioned under oath during the hearing, the Manager admitted that she did not see the first punch thrown and did not know who threw it.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁸ 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.⁹

[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]

David J. Latham, Esq.
Hearing Officer

⁸ An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002). See also *Virginia Department of Agriculture and Consumer Services v. Tatum*, 2003 Va. App LEXIS 356, which holds that Va. Code § 2.2-3004(B) grants a hearing officer the express power to decide de novo whether to mitigate a disciplinary action and to order reinstatement.

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.