

Issue: Group III Written Notice (threats/coercion); Hearing Date: 12/20/16; Decision Issued: 04/24/17; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 10861; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10861

Hearing Date: December 20, 2016

Decision Issued: April 24, 2017

PROCEDURAL HISTORY

On February 29, 2016, Grievant was issued a Group III Written Notice of disciplinary action for threats or coercion and engaging in conduct that undermines the effectiveness and efficiency of the Department's activities.

On March 28, 2016, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 29, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. A hearing date was set but the Hearing Officer found just cause to grant several continuances. On December 20, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Virginia State Police employs Grievant as a Special Agent at one of its regions. He began working for the Agency in 2002. He was promoted to Special Agent in 2008. Grievant received an overall rating of Major Contributor on his most recent annual performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant married his Wife in 2006. They shared their home with Grievant's adult Stepdaughter. The Agency presented testimony from Grievant's Wife against Grievant. The Hearing Officer will disregard such testimony because Rule 2:504 (a)(1) provides:

Husband and wife shall be competent witnesses to testify for or against each other in all civil actions.¹

Grievant's adult Stepson and Grievant engaged in a physical altercation in July 2013. The Stepdaughter was also involved in the fight. Grievant suffered significant physical injuries. The Stepson was later charged with malicious wounding because of the fight. The fight had a traumatic emotional impact on Grievant.

¹ See, Va. Code § 8.01-398.

Grievant experienced depression with the loss of his grandmother in 2011. Grievant began taking Zoloft, an anti-depressant, and continued taking the medication for approximately four years. Grievant became ill with pneumonia and bronchitis in September 2015. He was taking antibiotics and prednisone, but felt weak. On or about October 7, 2015, Grievant went to the Doctor who wanted to test Grievant for sarcoidosis and treat his pneumonia. To accurately test Grievant, the Doctor recommended Grievant discontinue taking Zoloft. Grievant stopped taking Zoloft "cold turkey."

On October 9, 2015, Grievant and his Stepdaughter engaged in a "heated" argument at Grievant's home. Grievant understood the Stepdaughter to threaten him by referring to the 2013 confrontation. Grievant left the home. When he returned the Stepdaughter was gone. He moved the Stepdaughter's personal belongings from her bedroom to the front of the driveway.

On October 9, 2015, Ms. B was visiting Ms. B1 and Mr. T at their house. Later that evening, Grievant joined the group. Grievant was frantic and carrying a 12 pack of beers. Grievant put the beers in the refrigerator and sat down to talk with the group. Grievant said he wanted to tell them a story of what happened to him and his Stepdaughter that day. Grievant told Ms. B1 he had had a verbal altercation with the Stepdaughter and they were trying to work it out. Ms. B thought that Grievant did not look normal to her.

Grievant told Ms. B to send a text to Grievant's Wife telling her not to come home tonight. When Ms. B did not act immediately, Grievant grabbed her arm and said he was serious and that she should text her friend not to come home. Grievant said, "I will kill them."

Grievant told Ms. B that he would kill the Wife's whole family. He said he would kill the Wife, the Wife's Ex-husband, the Stepson and Stepdaughter and her third child.

Ms. B and Mr. B1 tried to calm down Grievant. Ms. B told Grievant "come on, nobody's going to do that, you are just having a fight." Grievant's behavior changed and he began to be "weepy and was crying". He said he did not understand how this was happening. He then "flipped back" to be furious and said can somebody tell his Wife not to come home tonight.

Ms. B sent Grievant's Wife a text message for her to call 911. She spoke with the Wife by telephone and told the Wife what Grievant said to Ms. B.

Ms. B perceived Grievant as someone who was on medication that was not prescribed or someone who was abruptly taken off his medications.

Grievant told Ms. B and Ms. B1 that if they were asked about his conversation with them, they should tell the truth. He said he had already written his resignation from the Virginia State Police.

Ms. B1 asked Grievant if he had any guns on him. Grievant said no.

At approximately 9:30 p.m., Mr. T drove Grievant home.

On October 10, 2015, the First Sergeant called Grievant to discuss Grievant's behavior. Grievant said that the Stepdaughter had threatened to harm him physically as she and her brother had done several years earlier. In a second conversation with the First Sergeant, Grievant told the First Sergeant why he was fearful that the Stepdaughter and Stepson might try to harm him. He said he had taken precautions against an attack by turning off the house lights and parking his car away from the house to make it look like no one was home.

Grievant completed a fitness for duty examination. The Evaluation Doctor found Grievant fit for duty and concluded that:

There is no formal psychiatric diagnosis currently. It appears that under the stress of the events of October 9th and possibly medication effects (either prednisone and/or withdrawal from Zoloft), as well as the background of the assault he suffered in 2013, [Grievant] suffered an episode of anxiety, panic and mild dissociation that lasted about a day between October 9th and 10th.

The Evaluation Doctor also concluded that Grievant "may benefit from going back on the Zoloft"²

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."³ 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 or coercing employees, supervision, or the public" is a Group III offense.⁴ On October 9, 2015, Grievant threatened to kill his Wife and her children. He made these statements to Ms. B and Ms. B1. They were concerned that Grievant might harm his Wife and her children. At Grievant's direction, Ms. B contacted the Wife to

² Grievant Exhibit 2.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ General Order ADM 12.02(14)(14).

inform her of Grievant's threat and warn her to avoid Grievant. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for threatening members of the public.

Grievant argued that he attached a contingency to his threat by saying that "if they come to hurt me, I'm going to defend myself – I'm going to kill them." Although Grievant may have attached such a contingency when he spoke to his Wife, he clearly did not express such a contingency to Ms. B and Ms. B1 every time he spoke about killing his Wife and her children. Even if Grievant attached a contingency to his threat when speaking with Ms. B and Ms. B1, they understood Grievant to be expressing an immediate threat. Instructing Ms. B to send a text to and call the Wife to inform her not to come home was not an instruction containing a contingency.

Grievant challenged the credibility of the testimony of Ms. B and Ms. B1 because they had been consuming alcohol on October 9, 2015. Neither witness testified she was intoxicated and unable to discern Grievant's statements to them. Grievant did not present any credible evidence to show they misunderstood his threats. Their testimony was credible.

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"⁵ 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.

Grievant presented evidence showing that the Group III Written Notice should be mitigated. Although Grievant did not testify, he presented his belief to Agency staff that his erratic behavior on October 9, 2015 resulted in large part from the trauma he experienced in 2013 and his Doctor's instruction that he immediately discontinue taking Zoloft. Agency managers appear to have agreed with Grievant's assessment and believed some mitigation is appropriate. Although the case was presented to the Hearing Officer as a Group III Written Notice, the Third Step Respondent wrote:

⁵ *Va. Code § 2.2-3005.*

In my review of the available mitigating circumstances, I have considered each of the issues raised in your Statement of the Grievance and all of the information available in this matter. This evaluation causes me to conclude that a reduction in the original corrective action is appropriate in the interest of fairness and objectivity, for the given circumstances documented as occurring in this matter. Therefore, I believe that the requested relief of reducing the Group III Written Notice to a Group II Written Notice is warranted.⁶

Moreover, the Agency Head wrote:

The third step resolution resulted in your Group III Written Notice being reduced to a Group II Written Notice.⁷

The evidence is sufficient to mitigate the disciplinary action from a Group III to a Group II offense, but not any lower.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice.

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.

⁶ Agency Exhibit 6.

⁷ Agency Exhibit 2.

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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.