Issue: Group III Written Notice with termination (threatening an employee); Hearing Date: December 11, 2001; Decision Date: December 12, 2001; Agency: Mary Washington College; AHO: David J. Latham, Esquire; Case Number: 5332

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5332

Hearing Date: December 11, 2001
Decision Issued: December 12, 2001

APPEARANCES

Grievant
One witness for Grievant
Registrar
Legal Representative for Agency
Three witnesses for Agency

ISSUES

Did the grievant threaten a coworker so as to 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 filed a timely appeal from a Group III Written Notice issued on October 11, 2001 because she threatened a fellow employee. The grievant was also discharged from employment on the same date. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

Mary Washington College (Hereinafter referred to as "agency") has employed the grievant as an assistant registrar for almost two years, first in a wage position and then as a classified employee for just over one year.

In the spring of 2001, grievant had purchased an automobile for her teenage daughter. An administrative assistant who also works in the registrar's office did not think it was appropriate for a teenager to have her own car and she had expressed this opinion to grievant on more than one occasion. On April 13, 2001, the administrative assistant again brought up this subject to grievant. The grievant told the assistant, "If you don't leave it alone, I'll have to take you down."[1] There was no further conversation between the two. The administrative assistant believed that grievant treated her rudely and condescendingly. She became so upset by grievant's statement that she had heart palpitations and used an inhaler to ward off an impending asthma attack. She went to her supervisor and related what had taken place; the supervisor took no action, did not report it further and thought it would blow over. The assistant then went to a second supervisor about the incident; the second supervisor also thought it was not significant, did not report it to the registrar and took no further action.

On October 8, 2001, a student came to the registrar's office at the end of the workday for assistance with a class drop. The administrative assistant felt that grievant was more knowledgeable about class drop procedure and asked grievant if she could assist the student. Grievant was tired, felt overworked and was irritable. She verbally erupted, loudly telling the assistant that she was the only person there and was behind in her work. After her cathartic outburst, grievant did assist the student in a polite and helpful manner. The assistant was very upset about grievant's behavior and reported it to the registrar, who asked the assistant to write a memorandum describing the incident.[2] In the summary paragraph of her memorandum, the assistant made a passing reference to grievant's threatening statement in April.

On October 10, 2001, the registrar conducted the annual performance evaluation discussion with grievant. During this meeting, she asked grievant if she had told the administrative assistant that she would beat the hell out of her.

[1] This is the statement grievant says she made. The assistant alleges that grievant said, "I want to beat the hell out of you." A supervisor, to whom the assistant related the statement, recalls the statement as, "I'm going to kick your butt."

[2] Exhibit 1. *Memorandum* from administrative assistant to registrar, October 8, 2001.

Grievant responded, "Yes, I'd love to beat the hell out of her." On October 11, 2001, the registrar issued a Group III Written Notice to grievant and discharged her from employment.[3]

During the spring of 2001, grievant went through a difficult divorce that became final in May 2001. The grievant was prone to verbal eruptions from time to time and had been verbally counseled by the registrar about the need to improve interpersonal communications.[4] She had also received written counseling in May 2001 for inappropriate language and attitude towards both students and coworkers.[5] Following that counseling meeting, grievant ripped up the counseling memorandum when she left the registrar's office. The registrar acknowledged the stress that grievant had been under and referred her to the Employee Assistance Program (EAP) for help. Grievant was already seeing a psychiatrist at that time and therefore did not utilize the EAP.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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 § 2.1-116.05(A) 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 § 2.1-116.09.

[3] Exhibit 11. *Written Notice*, issued October 11, 2001.
[4] Exhibit 4. *Probationary Progress Review*, December 5, 2000. See generally Exhibits 5-7.
[5] Exhibit 8. *Written Counseling*, May 9, 2001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances[6].

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training 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 Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include threatening or coercing person associated with any state agency (including, but not limited to, employees, supervisors, patients, inmates, visitors, and students).[7]

Grievant contends that her statement to the administrative assistant on April 13, 2001 was not a threat. There is disagreement about the exact words grievant used in that statement. Certainly, if grievant had said, "I'll beat the hell out of you," or, "I'm going to kick your butt," these statements constitute clear and unambiguous threats. When asked by the Registrar if she had said, "I'll beat the hell out of you," grievant responded affirmatively. However, grievant has subsequently recanted and now maintains that she said, "I'll have to take you down." Grievant further avers that this was not intended as a threat but that she meant only that she and the assistant would have to "sit down and discuss the matter."

Although the phrase "I'll take you down" is slang, the Hearing Officer takes administrative notice that the meaning of this phrase has a far more serious connotation than the benign meaning grievant attempts to attribute to it. Typically, the phrase is used when one intends to do either bodily harm or inflict significant emotional distress (as in removing one from a position). However, even if grievant did not intend to threaten, the fact remains that the words she used were perceived by the assistant to be a threat. Given the common usage of this phrase, the grievant knew, or reasonably should have known, that the assistant would perceive the statement as a threat. Therefore, it is concluded that grievant's statement to the administrative assistant on April 13, 2001 constituted the Group III offense of threatening.

[6] § 5.8 *Grievance Procedure Manual*, Department of Employment Dispute Resolution, effective July 1, 2001.
[7] Exhibit 2. Employee Handbook, page 27.

The Written Notice in this case is less than clear. First, the Notice specifies that the date of the offense was October 10, 2001. However, the language in Section II makes reference to grievant's threat in April 2001. If the grievant is being disciplined because of the April threat, the correct date of offense should have been April 13, 2001. Second, language in Section IV of the Notice, as well as the Registrar's testimony, suggests that grievant was actually being disciplined for answering the Registrar's question on October 10, 2001. Since the Notice gives the date of offense as October 10, 2001, this appears to corroborate that the discipline was issued solely because grievant answered a question truthfully.

Grievant's response (that, yes, she made the threat in April) was only a truthful response to a direct question. When she added that she would love to beat the hell out of the assistant, she was not making a threat but rather expressing her feelings that she would like to take that action. The grievant did not express intent to actually inflict any injury on the assistant. Without the element of intention to inflict injury, grievant's response on October 10, 2001 was merely an expression of feelings, not a threat. Therefore, if the Written Notice was intended to discipline grievant solely for her response to the Registrar, it should be overturned.

However, given the ambiguity created by the language in Sections II and IV of the Written Notice, one may reasonably conclude that it was issued, at least in part, because of the statement made by grievant on April 13, 2001. Having concluded that the statement constituted a threat and warrants a Group III Written Notice, there remains the question of whether there are any mitigating circumstances. The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

> While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:
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> a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
> b. an employee's long service or otherwise satisfactory work performance.[8]

In this case, conditions do exist that compel a reduction in the disciplinary action. First, there was a delay of half a year between the time the agency became aware of the threat and the issuance of discipline. One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. Supervisors should be aware of inadequate or unsatisfactory work performance or behavior on the part of

[8] Section VII.C.3, DHRM *Standards of Conduct Policy No: 1.60*, effective September 16, 1993.

employees and attempt to correct the performance or behavior immediately.[9] When issuing the employee a Written Notice, management should issue the Notice as soon as practicable.[10] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless an extensive, detailed investigation is required, most disciplinary actions are issued within a few weeks after an offense.

In this case, not just one, but two supervisors were aware of the grievant's statement within minutes of the incident. Neither supervisor considered the incident serious enough to take any action or even report it to their superior, let alone take disciplinary action. This suggests that neither supervisor perceived the statement to be a threat but rather just a minor flare-up of tempers between a stressed employee and a somewhat excitable administrative assistant. On the other hand, if the supervisors did believe the statement was a genuine threat, they both failed to comply with the Standards of Conduct requirement to take prompt disciplinary action. Failure to promptly correct inappropriate behavior serves only to reinforce in the offender's mind that such behavior is apparently acceptable.

Second, during the six months since April, the grievant has not said anything else to the administrative assistant that could be construed as a threat. Thus, there has been no repetition of the offensive behavior, even in the absence of disciplinary action. Admittedly, grievant and the assistant do not particularly care for each other but they have apparently been able to perform their work without any further threats. It is also apparent that, although a major source of stress (divorce) is behind the grievant, there remains significant room for improvement in the grievant's interpersonal relationships.

Accordingly, given that 1) the agency took no disciplinary action for half a year after the incident, 2) the threat was an emotional outburst of a stressed individual, 3) the grievant did not intend her statement as a threat and, 4) she has not made any other threats since April, it is concluded that these circumstances are sufficiently mitigating to warrant a reduction in the disciplinary action. While the offense requires a Group III Written Notice, termination of employment is overly harsh. Therefore, in lieu of discharge, a suspension of 30 working days is the most appropriate discipline.

The grievant should understand that during the period between discharge and reinstatement, circumstances sometimes change in an agency making it impossible to reinstate an employee to the same position occupied on the date of discharge. In those cases, the agency is obligated to restore the employee to a position with the same salary and performing work that is as similar to the prior

[9] Section VI.A, *Ibid.*
[10] Section VII.B.1, *Ibid*.

position as possible. Therefore, in this case, the agency should reinstate grievant to her prior position, or if necessary, to a functionally equivalent position.

Grievant argues that her discharge was pretextual because the agency was attempting to avoid paying her for overtime she had worked during the past year. Grievant was working, on average, approximately one hour of overtime per day. However, by her own admission, she had not been asked to work overtime, had not sought permission to work overtime, and has not submitted a written request for overtime compensation. Therefore, this argument is deemed spurious and without merit.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued to the grievant on October 11, 2001 is AFFIRMED and will remain in the grievant's personnel file for the length of time specified in Section VII.B.2.c of the Standards of Conduct. However, the grievant is reinstated to her position, or a functionally equivalent position, subject to a suspension of 30 working days. She shall receive back pay for the period from completion of the 30-day suspension until the date she returns to work.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not

in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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David J. Latham, Esq.
Hearing Officer