Issue: Group II Written Notice with termination (verbal threat of violence); Hearing Date: 03/19/03; Decision Issued: 03/20/03; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 5662

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5662

Hearing Date: March 19, 2003
Decision Issued: March 20, 2003

PROCEDURAL ISSUE

Grievant requested as part of his relief to be reimbursed for overtime pay that he might have earned since the time of his dismissal. Hearing officers may provide certain types of relief including rescission of discipline, and payment of back wages and benefits.[1] However, hearing officers do not have authority to direct payment of overtime pay.[2] Determining the amount of overtime grievant might have worked would be speculative at best. Moreover, since the grievant did not actually work any overtime, he would not be entitled to such pay.

APPEARANCES

Grievant
Three witnesses for Grievant
Observer for Grievant

[1] § 5.9(a) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.
[2] § 5.9(b)7 *Ibid.*

Transportation Operations Manager
Human Resource Director
Two witnesses for Agency

ISSUES

Was the grievant's conduct such as to warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Has the agency discriminated against the grievant?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for a verbal threat of violence.[3] The grievant's employment was terminated as part of the disciplinary action because of an accumulation of previous disciplinary actions. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4]

The Virginia Department of Transportation (hereinafter referred to as "agency") has employed the grievant as a crewmember for four years.[5] Grievant has three previous active disciplinary actions. He received a Group I Written Notice for using obscene and abusive language towards a lead worker.[6] Grievant was given a Group I Written Notice for the same type of offense two months later.[7] He received a third Group I Written Notice of abuse of leave and unauthorized time away from work.[8]

The Commonwealth's policy on workplace violence, which was received by the grievant, prohibits various types of conduct including: behavior that creates a reasonable fear of injury to another person, or threatening to injure an individual.[9] The grievant received a copy of the policy.[10] He also attended a training session about violence in the workplace at the same time. The training session advised attendees that the policy establishes a standard of zero tolerance for violent and threatening behavior.[11]

On more than one occasion, grievant's supervisor had talked with him about being more judicious in what he said, how he said it, and to whom he said it. When grievant became upset about things, he sometimes verbalized his

[3] Exhibit 2. Written Notice, issued October 28, 2002.
[4] Exhibit 1. Grievance Form A, filed November 15, 2002.
[5] Grievant had previously worked for the agency as a part-time wage employee for two years.
[6] Exhibit 7. Written Notice, issued June 26, 2002.
[7] Exhibit 7. Written Notice, issued September 17, 2002.
[8] Exhibit 7. Written Notice, issued October 28, 2002. NOTE: Although this disciplinary action was issued on the same date as the Group II Written Notice, grievant did not grieve the Group I disciplinary action.
[9] Exhibit 4. DHRM Policy 1.80, *Workplace Violence,* effective May 1, 2002.
[10] Exhibit 6. Employee's Receipt of policy, signed April 9, 2002.
[11] Exhibit 5. VDOT policy *Preventing Violence in the Workplace*, effective May 1, 2002.

feelings without thinking first, and without considering who was in the area. In August 2002, grievant's supervisor counseled grievant for more than two hours about being more reflective before speaking his mind.

Grievant had become dismayed about the disciplinary actions he had received in June and September 2002. Grievant's supervisor had begun supervising grievant in February 2002. Grievant felt that his new supervisor was being unduly harsh in issuing the disciplinary actions. About one week prior to October 21, 2002, grievant learned that a third disciplinary action was being contemplated because he had abused leave and taken unauthorized time away from work. On the morning of October 21, 2002, grievant went to the agency's district office to speak with a human resources representative in order to learn how he should file a complaint of discrimination against his supervisor. When he returned from the meeting, he was still disgruntled and complaining about management. A fellow crewmember and an administrative program specialist warned grievant at that time to be careful about what he said and to whom he spoke. Grievant told his supervisor that he was not feeling well and asked permission to leave for the day. The supervisor granted this request.

Shortly thereafter, at about 12:00 noon, grievant walked into the warming room (lunchroom) carrying a long machete.[12] Three other employees were in the room at the time – grievant's immediate supervisor, the fellow crewmember and the administrative program specialist. Grievant said, "I'm taking this home before I have to hurt someone around here." The fellow crewmember said, "What, the machete?" Grievant said, "Yeah, the machete – before I kill someone around here." Grievant then left the lunchroom and went home. All three employees heard grievant's statements. The supervisor felt threatened by grievant's statements because he knew that grievant was upset at him. The other two employees did not feel personally threatened because both knew that grievant's displeasure was directed at the supervisor, not at them. None of the witnesses felt that grievant was joking when he made the statements. All knew that grievant was upset at the time.

At times, crewmembers have been engaged in joking sessions with each other and made mock threats. In one case, an employee told another that if he gave the employee any more paperwork, he would punch him in the mouth. Both employees knew the statement was made in jest. In another case, employees had been joking and repeating a statement made by a television comedian involving splitting one's head open. On one occasion, the supervisor had jokingly responded to an employee's complaint by saying, "Don't make me get a can of whupass."[13] In each of these cases, all involved knew that the comments were

[12] The agency had permitted crewmembers to bring personal machetes to work, store them in their lockers, and use them in lieu of agency tools to facilitate brush clearing on state highways. Grievant and several other employees had been using personally owned machetes at work for at least two years prior to October 2002. As a result of this incident, local management has banned employees from bringing machetes into the workplace and now requires employees to use state-issued tools when clearing brush.

[13] This is a reference to a phrase used by a well-known professional wrestling entertainer.

made in jest. In none of the cases was anyone holding a potentially lethal weapon when the comments were made.

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. The grievant must prove his claim of discrimination by a preponderance of the evidence.[14]

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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses, and are such that an accumulation of two Group

[14] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

II offenses normally should warrant removal from employment. Failure to comply with established written policy is a Group II offense.[15]

Violence in the Workplace

The agency has demonstrated, by a preponderance of the evidence, that grievant made statements that must be construed as threatening, and that violated the agency's zero tolerance policy against violence in the workplace. Grievant's statements, by themselves, were sufficiently threatening to create a reasonable fear of injury. When combined with the facts that grievant was holding a long machete in his hand when he made the statements, and was known by all present to be upset at his supervisor (who was present in the room), the totality of grievant's actions was more than sufficient to constitute a violation of the violence in the workplace policy. Accordingly, the agency has borne the burden of proof to demonstrate that grievant's offense warranted disciplinary action.

The burden of persuasion now shifts to grievant to demonstrate any mitigating circumstances. Grievant argues that he did not threaten a specific person by name. While this is correct, it was apparent to all three employees in the room that grievant had been upset for some time with his supervisor and had just that morning looked into filing a discrimination complaint against the supervisor. The other two employees in the room were fully aware of grievant's displeasure with the supervisor. Thus, the totality of the circumstances were such that a reasonable person in the supervisor's shoes would have felt threatened by grievant's actions and statements.

Grievant argues that his machete was only a tool, not a weapon. Webster's Ninth New Collegiate Dictionary defines machete as, "A large heavy knife used for cutting sugarcane and underbrush **and as a weapon**." (Emphasis added). Moreover, the hearing officer will take administrative notice that machetes have frequently been used as lethal weapons, especially in countries where machetes are in common use.

Grievant cited three examples of statements made by others that he equates to his threats. However, in each case, the statements of others were spoken in a joking manner, and were taken in a joking manner by all those who heard them. Most importantly, those who made the joking statements were not carrying a lethal weapon at the time. In contrast, grievant was not only not joking, but he was upset at his supervisor when he made the threatening statements.

[15] Exhibit 8. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993. NOTE: Although the agency elected to discipline grievant with a Group II Written Notice, the Standards of Conduct provides that threatening persons associated with any state agency is a Group III offense, which warrants removal from employment.

Discrimination

Grievant alleged discrimination on the basis of national origin. To sustain a claim of discrimination, grievant must show that: (i) he is a member of a protected group; (ii) he suffered an adverse job action; (iii) he was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's protected status.[16] Grievant was born in a Caribbean nation, has been removed from employment, and was performing his work satisfactorily. Accordingly, grievant has satisfied the first three prongs of the test. However, he has not presented any evidence to satisfy the fourth prong. Grievant has offered no evidence to show that his dismissal was occasioned by his national origin. Grievant's sole argument with regard to this issue was to speculate that he was being discriminated against either on the basis of national origin or because of his hair.[17] Therefore, grievant has not borne the burden of proof with regard to his claim of discrimination.

Grievant's removal from employment was occasioned by the accumulation of three active Group I Written Notices and the Group II Written Notice.[18]

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice and termination of employment on October 28, 2002 are hereby UPHELD.

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.

[16] Cramer v. Intelidata Technologies Corp., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).
[17] Grievant has very long and noticeable dreadlocks.
[18] Section VII.D.2.b (2), DHRM Policy 1.60, *Ibid*., provides that a Group II Written Notice following three active Group I Written Notices normally should result in discharge.

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.

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.[19] 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.[20]

[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]

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David J. Latham, Esq.
Hearing Officer

[19] 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).

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