

Issue: Group III Written Notice with demotion and salary reduction (threatening a customer and engaging in disruptive behavior in the workplace); Hearing Date: 09/03/03; Decision Issued: 09/09/03; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 5778



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5778**

Hearing Date: September 3, 2003  
Decision Issued: September 9, 2003

**PROCEDURAL HISTORY**

On May 9, 2003, Grievant was issued a Group III Written Notice of disciplinary action with a demotion and adverse salary action for:

*Threatening a DMV customer and engaging in disruptive behavior in the Medical Review Work Center on April 28, 2003.*

On June 9, 2003, 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 she requested a hearing. On July 24, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for August 18, 2003. Upon Grievant's request, the Hearing Officer found just cause to grant a continuance. On September 3, 2003, a rescheduled hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee

Agency Representative  
Seven witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion and adverse salary action for threatening a customer.

## **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 Motor Vehicles employs Grievant as a Program Support Tech. She has worked for the Agency for approximately 29 years. Prior to the disciplinary action taken against her, Grievant worked as a Program Support Tech Senior. The purpose of her former position was:

This position works in the Medical Review Services where drivers with a medical/vision condition are evaluated and monitored to determine if their condition is such that they will not be granted a driver's license or commercial driver's license. The incumbent is responsible for activities related to the issuance and monitoring of disabled parking placards, BTL certification, CDL disability waivers, CDL hazardous materials variances and window tinting medical waivers and ensuring compliance with DMV's medical guidelines, the Virginia Motor Vehicle Code, and state and federal Motor Carrier Safety Regulations. These activities are: reviewing and evaluating medical information, determining eligibility for a driver's license, commercial driver's license, BTL certification, CDL disability waiver, CDL hazardous materials variance; processing applications for disabled parking placards and window tinting medical waivers; preparing correspondence and responding to telephone inquiries related to the above activities; sorting incoming mail and retrieving files.

Grievant had very high production levels compared to other employees holding similar positions. Other than her interpersonal skills with customers, Grievant's work performance was good.

On May 1, 2003, the Customer sent the Agency an email stating:

On Monday, May 28, 2003, about noon, I called the medical department of DMV to find out why I could not renew my license online. I got the number from DMV, because it seemed that no one could tell me why. Everyone said the same thing, "I can't see any reason why you shouldn't be able to renew your license online." So they gave me the number to the medical department to see if they could answer the question. When I called, [Grievant] answered the phone. I introduced myself and proceeded to ask her if she knew why. From the moment she answered the phone I felt like I was putting her out by asking her this question. The only answer she had was "because of your medical condition, that's why." I kept asking her to explain herself, because her answer did not clarify my question. She became very irate and started to yell. She told me that the problem was that I did not like the answer, so I wasn't listening. At this point I told her that she must really hate her job, she replied "it's a job, and I need it." She also told me that if she lost her job she would "hunt me down." At this point I became very upset, and the conversation turned into a yelling match. I asked her if she was threatening me, and if the phone calls were recorded. I also told her that I might contact the Richmond Police and file a complaint. She gave me [her] name and number, and said I could call [Supervisor] if I did not like her answers. She said [Supervisor was] out of the office today, but would be in on Tuesday. She ended the phone call by telling me not to call back, and hanging up on me.

This was the first time I had to renew my license with my condition. I did not understand the process, so I started asking questions. I am sure that you all get many phone calls a day, but that should not take away from how each person is handled. I work for the [Employer] and my boss stresses all the time how important customer service is. I do apologize for allowing myself to enter into a yelling match, but I was really upset when she threatened me. I did get my license renewed, and I waited in line for two hours. I still do not really understand the process. They did not ask me any questions, nor did I do anything different from anyone else renewing their license. I would think that with the closings of many DMVs and the shorter hours, you would want less people coming in the buildings. Maybe this will change in the future. I would like to thank you for calling me back, answering my questions, and taking this matter seriously. If you have any further questions, please feel free to call or email me.

Grievant is a devoted Christian and is of outstanding character. Despite her statements to the Customer, she did not actually intend to harm him. Grievant and the Customer had not met prior to their interaction and the Customer had no way of knowing that Grievant did not intend to harm him. He believed she may harm him if given the right circumstances.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).<sup>1</sup> Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

“Threatening or coercing persons associated with any state agency (including, but not limited to, employees, supervisors, patients, inmates, visitors, and students)” is a Group III offense.<sup>2</sup> Grievant threatened to “hunt down” the Customer. The Customer interpreted Grievant’s comments as a threat to take physical action against the Customer. In light of Grievant’s combative demeanor during her conversation with the Customer and Grievant’s choice of words, the Customer’s interpretation of Grievant’s actions as threatening is a reasonable interpretation by the Customer. Accordingly, the Agency has established that Grievant threatened a person associated with a State agency, namely a customer. The Group III Written Notice must be upheld.

“The normal disciplinary action for a Group III offense is the issuance of a Written Notice and discharge.”<sup>3</sup> In lieu of a termination, the Agency demoted Grievant to a position not requiring customer contact. The Agency did not wish to take the risk that Grievant might repeat her behavior in the future. The Hearing Officer finds that the Agency’s demotion of Grievant was appropriate under the facts presented. DHRM § 1.60(II)(C) provides:

Disciplinary action also may include demotion or transfer in lieu of termination. In such cases, the agency must initiate a disciplinary salary action. With a disciplinary salary action, employees may be retained in their current positions and have their duties reduced or be moved to positions in the same or lower pay band with less job responsibilities. In

---

<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>2</sup> DHRM § 1.60(V)(B)(3)(k).

<sup>3</sup> DHRM § 1.60(VII)(D)(3)(a).

either case, the employee's salary must be reduced by at least 5%. In no case may an employee's salary exceed the maximum of the pay band following a disciplinary salary action.

Grievant's demotion and salary reduction was in accordance with DHRM policy and must be upheld.

Grievant contends that she could not have threatened the customer because she had no actual intent to harm him. Whether a threat has been made does not depend solely upon the intent of the person making the statement. The question is (based upon the circumstances presented) whether a reasonable person would interpret the statement made as a threat. Based on the nature of the conversation and the words spoken by Grievant, it was reasonable under the circumstances for the Customer to believe that Grievant intended to harm him if he complained about her. The Customer did not know Grievant and could not have known that Grievant is not the type of person who would carry out a threat to harm another person.

Grievant contends that there are a mitigating circumstances justifying a reduction in the disciplinary action. She experienced a number of untimely deaths of friends and family members resulting in her feeling great sadness. The evidence, however, is insufficient<sup>4</sup> for the Hearing Officer to conclude that those untimely deaths were the substantial cause of Grievant's inappropriate behavior. For several years, the Agency had counseled<sup>5</sup> Grievant regarding her interpersonal skills with customers. Grievant's difficulties in dealing with customers preceded the sadness she felt from the loss of ones she held dear. Accordingly, no mitigating circumstances exist to reduce the Agency's 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 demotion and 5% pay reduction is **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:

---

<sup>4</sup> The Hearing Officer rejects the conclusion of an LCSW who met with Grievant on three occasions.

<sup>5</sup> For example, on March 29, 2002, the Agency counseled Grievant regarding "Your loud and angry outburst in the work center; sometimes towards co-workers, sometimes towards customers and sometimes towards no one in particular." See, Agency Exhibit 3.

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.
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. 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.<sup>6</sup>

[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].

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.