Issue: Group III Written Notice (workplace violence); Hearing Date: 11/05/03; Decision Issued: 11/07/03; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 5840

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5840

Hearing Date: November 5, 2003
Decision Issued: November 7, 2003

PROCEDURAL ISSUES

Grievant requested as part of his relief that his leave balances be restored to the levels of June 11, 2003. 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 adjust leave balances.[2] Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." Further discussion of the leave balance issue is found in the Applicable Law and Opinion section of this Decision, *infra*.

Grievant also requested assurance that no retaliation would occur as a consequence of his grievance. The Commonwealth's grievance procedure prohibits retaliation, stating, in pertinent part, "An employee may ask EDR to investigate allegations of **retaliation** as the result of the use of or participation in

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

[2] § 5.9(b)3. *Ibid.*

the grievance procedure….”[3] EDR will investigate such complaints and advise the agency head of its findings.

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Employee Relations Manager
Advocate for Agency
Five 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? Did the grievant’s temporary restriction from the workplace constitute a suspension?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice for workplace violence.[4] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[5] The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") has employed the grievant as a rehabilitation vocational evaluator for six years. He has worked for the Commonwealth for a total of 16 years.

The Commonwealth’s policy on workplace violence prohibits conduct such as engaging in behavior that creates a reasonable fear of injury to another person, or that subjects another individual to extreme emotional distress, or threatening to injure an individual.[6] Violation of the policy may subject an

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[3] § 1.5. *Ibid.*
[4] Exhibit 1. Written Notice, issued July 15, 2003.
[5] Exhibit 1. Grievance Form A, filed July 28, 2003.
[6] Exhibit 7. Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence*, May 1, 2002. Workplace Violence is defined as: “Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.” Prohibited actions include, but are not limited to: “engaging in behavior that creates a reasonable fear of injury to another person, and engaging in behavior that subjects another individual to extreme emotional distress.”

employee to disciplinary action up to and including termination of employment.[7] Prior to the incidents at issue herein, grievant's supervisor had verbally counseled him on multiple occasions not to use vulgar or profane language.

In April 2003, grievant asked his supervisor to change the work schedule so that he would not have to work on Friday evenings. The supervisor agreed to make the change beginning in June because the May schedule had already been posted. On Thursday, May 29, 2003, grievant became upset because he had to work the following night and struck a bulletin board so forcefully that one employee thought someone had collapsed in the hall. Grievant loudly stated that he was "tired of this fucking shit," and "I've had it with this fucking place."[8] Grievant was angry with his supervisor because he thought she should have changed the schedule since Sunday, June 1 fell on that weekend. Grievant's supervisor heard his outburst. She attempted to explain the situation to grievant but he was so upset that she concluded further conversation would not be productive. As she left the building for the evening, grievant was in front of her loudly voicing dissatisfaction about his work schedule and stated, "Fuck this place."[9]

On June 6, 2003, security personnel detained grievant as he entered a secure building because he was carrying two cans of wood stain. As part of his job duties, grievant supervises a woodworking class for residents. Grievant had previously obtained permission to bring materials such as wood stain to the building. The two security personnel were relatively new employees who were unsure whether the stain was permissible. They called their supervisor who came to the entry and approved grievant to bring the stain into the building. Although the security detention was not lengthy, grievant was upset and told the security people, "I'm tired of you fucking people. I'm sick of this shit." After being given approval to enter, grievant said, "They expect us to remember this shit everyday – bunch of morons."[10]

As a consequence of the May 29, 2003 incident, and the prior verbal counseling, grievant's supervisor and her supervisor (Director of Rehabilitation Services) determined that grievant should be given a written Notice of Improvement Needed/Substandard Performance.[11] The Notice addressed grievant's lack of professionalism in dealing with supervision and peers and, in particular, his behavior on May 29, 2003. At about 3:00 p.m. on June 6, 2003, grievant's supervisor met with him to present and discuss the Notice of Improvement. After discussion with his supervisor, grievant became visibly and vocally upset, refused to sign the Notice, threw it across her desk, and left.

[7] Exhibit 7. Ibid.
[8] Exhibit 3. Written statement of employee who heard the incident, June 9, 2003.
[9] Exhibit 3. Ibid.
[10] Exhibit 2. Written statement of security officer, June 6, 2003. Corroborated in part by written statement of second security officer, June 9, 2003.
[11] Exhibit 4. Notice of Improvement Needed/Substandard Performance, June 6, 2003.

Grievant returned to his supervisor's office at about 4:30 p.m., interrupted a meeting she was having with another employee, and told the supervisor that she was harassing him and that "he would get satisfaction."[12]

The supervisor was upset and scared by grievant's demeanor during this confrontation. She spoke with her supervisor who advised her not to walk to the parking lot alone when she left the building. She arranged for a male employee to accompany her to her car that evening. On June 10, 2003, this same male employee had a brief conversation with grievant about the Notice of Improvement grievant had received and grievant's displeasure with his supervisor. Grievant stated, "I hope she dies in a car wreck, and I hope that it is a slow death."[13] He also said he, "had come close to ramming [his supervisor's] head into the wall." He further stated that if the supervisor had continued to goad him into a confrontation that he would have assaulted her.[14]

The male employee immediately reported these statements to the Director of Rehabilitation Services and to Human Resources management. The following day, the Director of Human Resources directed grievant to utilize the Employee Assistance Program and participate in a minimum of four counseling sessions. He was advised not to come on the facility grounds and not to contact other employees until the counseling sessions were completed. Grievant was also told that he would be allowed to use any available leave balances during the period he was undergoing counseling. The counseling sessions were conducted during the period from June 12, 2003 through July 7, 2003. The counselor addressed grievant's anger management problem and other work-related issues.[15] He also referred grievant for psychiatric evaluation by the psychiatrist who manages grievant's psychotropic medications.

For several years following coronary surgery, grievant has taken various medications to manage blood pressure, cholesterol levels, fluid accumulation and depression. He has had no adverse side effects and has tolerated these medications well. In the spring of 2003, he received two injections of steroids to manage spinal pain.[16] At the same time, he received a one-time prescription of oral hydrocodone.[17]

APPLICABLE LAW AND OPINION

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[12] Exhibit 4. Supervisor's notes, June 9, 2003.

[13] The Written Notice indicates this statement was made on June 6, 2003. However, the testimony and memoranda of the employee to whom grievant made the statement establish that the actual date was June 10, 2003.

[14] Exhibit 3. Two memoranda from male employee, June 11, 2003.

[15] Exhibit 6. Letter from counselor to Human Resources, July 7, 2003.

[16] While long-term steroid use has some side effects, side effects from an epidural steroid injection tend to be rare. *See* Spine-health.com, lowbackpain.com, and spineline.com websites.

[17] Hydrocodone is an antitussive (cough suppressant) medication. *Encyclopedia and Dictionary of Medicine and Nursing.*

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.[18]

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 Commonwealth of Virginia's Department of Personnel and Training Manual *Standards of Conduct* Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal [from employment].[19]

The agency disciplined grievant for three incidents that it believes constitute workplace violence. The policy (cited in footnote 6) covers a broad

[18] § 5.8, EDR Grievance Procedure Manual, effective July 1, 2001.
[19] Exhibit 9. DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

range of physical, verbal and other behavior. For purposes of this case, workplace violence can be demonstrated if the agency shows that grievant engaged in behavior that either created a reasonable fear of injury to another person, or subjected another individual to extreme emotional stress.

June 6, 2003 statements

The agency did not sustain the burden of proof to show that grievant's use of vulgar language at the security checkpoint meets the definition of workplace violence. Grievant did not directly threaten anyone and did not direct his statements to any one individual. Neither of the two security officers testified at the hearing. Their written statements do not contain any suggestion that they felt afraid or under stress as a result of grievant's statements.

Grievant admits to referring to the security officers as "morons" but does not recall using vulgar language. Notwithstanding grievant's apparent inability to recall his vulgarity, the combined weight of the security officers' written statements and the testimony of their supervisor are sufficient to demonstrate that he did use vulgarity. There was no evidence to suggest that the security officers and their supervisor had any reason to fabricate their statements. Moreover, even independent of the vulgarity, referring to the security officers as morons in their presence constitutes the use of abusive language. Thus, grievant did commit an offense that warrants a Group I Written Notice.[20]

June 10, 2003 statements

The agency has demonstrated, by a preponderance of evidence, that grievant made statements to another employee that meet the definition of workplace violence. Grievant's statement that he hoped his supervisor would have a car wreck and die was a morbid expression of his anger. However, his further expression of hope that she would die "a slow death" reveals a very dark and frightening facet of the grievant's psyche. Grievant further revealed the depth of his anger when he admitted that he had come close to ramming his supervisor's head into the wall. Grievant then stated that if his supervisor had continued to pursue confrontation he would have assaulted her.

Grievant may have been upset about receiving a Notice of Improvement the week before making these statements. Nonetheless, the potential for physical violence implied in grievant's statements would make any reasonable person fearful for her safety. Grievant is a large male, his supervisor is a smaller female. The testimony of both grievant and the male employee to whom he made the statements established that grievant is given to sardonic, dark humour.[21] His physical stature, visage, and serious demeanor are imposing to others.

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[20] Exhibit 9. Section V.B.1.c, *Ibid.*

[21] Exhibit 11. Letter from male employee to whom it may concern, August 28, 2003.

One of grievant's witnesses testified that grievant's supervisor is an irritating person. However, even if the supervisor is annoying, she has as much right to be free from fear of injury as every other employee. For the following two reasons, it is concluded that grievant's supervisor did have a reasonable fear of injury and/or sustained extreme emotional distress as a consequence of grievant's statements. First, the supervisor presented undisputed testimony that she was so fearful of grievant after hearing his statements that she sought professional counseling to help her deal with her fear. It is reasonable to conclude that an employee would obtain professional counseling only if she had a significant fear, or was under significant emotional distress. Moreover, at the present time the supervisor still remains somewhat concerned about grievant's potential behavior, despite the professional counseling.

Second, the male employee to whom grievant made the offensive statements was called as a witness by both grievant and the agency. His testimony was very clear, precise, and compelling. He had witnessed grievant's outburst on May 29, was aware of the grievant's acrimony towards his supervisor, and had known him for some time. Moreover, he is a Ph.D. specializing in psychosocial rehabilitation. Thus, he is able to render a detailed clinical picture of what grievant said and what concerns existed as a result of grievant's statements. He recognized that grievant's statements were a form of venting, and therefore somewhat therapeutic. However, he also observed that grievant was displaying a significant degree of anger towards his supervisor. He testified that he had never seen grievant so angry and was concerned that he might have a stroke. He reported grievant's statements to management because he was "concerned that it may become increasingly difficult for grievant to 'manage' this anger."[22]

The male employee felt so concerned about grievant's emotional and mental status as well as the safety of the supervisor that he felt he had to report the situation to appropriate management in the hope that the agency would address the matter before something untoward occurred. This employee demonstrated through his testimony and demeanor, as well as his memoranda, that he reported the matter because of an abiding concern for his fellow coworkers.

<u>Grievant's defenses</u>

Grievant argues that his First Amendment right to freedom of speech is being abridged. The Constitutional right to freedom of speech is not unlimited. When one's speech adversely affects the safety of another, it is no longer protected. As the noted Supreme Court Justice Felix Frankfurter said, "Utterance in a context of violence can lose its significance as an appeal to reason and

[22] Exhibit 3. Memorandum from male employee to Rehabilitation Director, June 11, 2003.

become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."[23]

Grievant suggests that his supervisor had a motive to discipline him because grievant told her he was going to grieve the Notice of Improvement Needed/Substandard Performance. Even if she had such a motive, the supervisor did not issue the discipline in this case. The Director of Rehabilitation Services issued the discipline, and only after consultation with the Human Resources Director. Although grievant's supervisor had some input into the discussion about possible discipline, it was upper management that made the ultimate decision to issue discipline.

Grievant suggests that his steroid injections or hydrocodone prescription may have exacerbated his mood changes. The available evidence indicates that side effects of steroid injections are rare, however, a possible side effect of hydrocodone can be mood changes. Grievant failed to offer any evidence from the physician who administered the spinal injections and prescribed the hydrocodone as to the dosage of either medication, or the side effects, if any, reported by grievant. Accordingly, one can only speculate as to whether grievant *actually* experienced such a side effect. Therefore, the evidence regarding this issue is inconclusive.

Grievant argued that some of his offensive statements were merely exaggerations to make a point. He also testified that he often exaggerates things to make a point. Based upon the testimony and evidence, grievant's imprudent comments have been a problem over a period of time. His statements on June 10, 2003 went beyond imprudent to the point of being offensive, however, they were certainly an extension of his previously established pattern. Even if grievant's mood had been exacerbated, he had control over his actions and words.

Grievant asserts that he did not make threats towards his supervisor because she did not hear the statements directly from him. The agency points to a DHRM ruling letter opining that state policy does not distinguish between direct threats and indirect threats.[24] Further, policy does not require that a threat be made directly to an individual in order to warrant the most severe form of discipline. While the DHRM ruling correctly states the policy regarding threats, the issue herein does not involve the type of overt threat made in the 1998 case. The test in the instant case is whether grievant engaged in behavior that created a reasonable threat of injury to another person and/or subjected another individual to extreme emotional distress. This decision concludes that grievant's actions did meet this test.

Leave Balances

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[23] *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941).
[24] DHRM Ruling, *[Name of grievant} v. Virginia Department of Transportation*, October 20, 1998.

Grievant requested as part of his relief that his leave balances be restored to their levels of June 11, 2003. Grievant was not permitted to work between June 12, 2003 and July 15, 2003 while he was receiving counseling because the agency was concerned about grievant's behavior toward agency staff and supervision. It concluded that, for the safety of all concerned, it would be prudent to remove grievant from the work site until such time as the counselor indicated grievant could safely return to work. Grievant considers this period of time to be a suspension and part of the disciplinary action that should be restored to him.

The Standards of Conduct provides a definition of the term suspension, as it is used in Policy 1.60:

> An employee's absence from work, without pay, that an agency imposes as part of a disciplinary action and/or to remove the employee from the workplace pending (1) an investigation related to his or her conduct, or (2) a court action.[25]

It must be concluded that grievant was not suspended within the meaning of this definition for four reasons. First, employees placed on suspension are not paid and may not utilize leave balances during the period of suspension. However, grievant was allowed to use available leave balances (annual leave, personal leave, and sick leave) and thereby continued to receive pay during his time away from the work site.[26] Therefore, his absence from work was *not* without pay. Moreover, grievant could also have applied for short-term disability pursuant to the Virginia Sickness and Disability Program.[27] Second, the disciplinary action was issued on July 15, 2003 - the day grievant returned to work. Thus, his time away from work prior to the imposition of discipline could not have been *part of* the disciplinary action. Moreover, Section III of the Written Notice does not include a period of disciplinary suspension.

Third, the agency did not remove grievant from the workplace in order to conduct an *investigation related to his conduct*. In fact, no investigation was ever conducted. The agency had acquired all of the facts it needed for issuance of discipline before grievant was directed to obtain counseling on June 11, 2003. The purpose of restricting grievant from being on campus was not to investigate his conduct but to assure the safety of all employees. Finally, grievant was not

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[25] Exhibit 9. Section II.E., *Ibid.* *See also* Section VI.C.1, which states: Before the need for, or in addition to, corrective action, supervisors may refer employees to the *employee assistance program*, as appropriate. Referral to the *employee assistance program* shall <u>not be considered a substitute</u> for any disciplinary action imposed for the commission of an offense."

[26] Exhibit 6. Letter from Human Resource Director to grievant, June 11, 2003 states, "You will be allowed to use any leave balances currently available."

[27] DHRM Policy 4.57, *Virginia Sickness and Disability Program Leave*, January 1, 1999, provides up to six months of leave for an employee with a medical condition that renders him partially or totally incapable of performing the duties of his job.

removed from campus due to a *court action*. Accordingly, grievant's temporary restriction from being at the work site was not a suspension as defined above.

Level of Discipline

Grievant committed a Group I offense on June 6, 2003, and a Group III offense on June 10, 2003. The agency combined the two offenses into a single Group III Written Notice. A Group III offense normally results in removal of an employee from employment. The agency not only did not discharge grievant but it also elected not to impose any of the other available sanctions such as suspension without pay, demotion, transfer, or salary reduction. The agency issued only the Written Notice because grievant appeared remorseful after he had completed the professional counseling.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice for workplace violence issued on July 15, 2003 is hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.[28] 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.[29]

[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

[28] 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).

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