Issue: Group III Written Notice with termination (violence in the workplace); Hearing Date: 02/14/06; Decision Issued: 02/15/06; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8243; Outcome: Agency upheld in full

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8243

Hearing Date: February 14, 2006
Decision Issued: February 15, 2006

PROCEDURAL ISSUE

The hearing was originally docketed for a hearing within 30 days of appointment. However, the agency requested a postponement due to the sudden illness of a key witness. The hearing officer granted the request and the case was redocketed for, and heard on, February 14, 2006.

APPEARANCES

Grievant
Attorney for Grievant
Residency Administrator
Representative for Agency
Three 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?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice issued for violence in the workplace.[1] As part of the disciplinary action, grievant was removed from employment effective October 5, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Virginia Department of Transportation (Hereinafter referred to as "agency") has employed grievant as a transportation operator for 15 years.

The Commonwealth's policy on workplace violence specifically prohibits, *inter alia*, 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.[3] Violation of this policy will subject an employee to disciplinary action up to and including termination of employment. The agency has promulgated its own policy to prevent violence in the workplace; grievant received this policy.[4] Grievant also received agency training on this policy.[5] That policy defines workplace violence to include both verbal threatening behavior and visual intimidation and threats.[6] The agency has a standard of **zero tolerance** for threats of violence against its employees while they are engaged in performing work responsibilities.[7] The Commonwealth's policy on workplace harassment strictly forbids harassment of any employee on the basis of, *inter alia*, an individual's race or color.[8] The policy defines workplace harassment to include any verbal or physical conduct on the basis of race or color that has the purpose or effect of creating an intimidating, hostile or offensive work environment.

Several months prior to the incident at issue in this case, grievant (who is white) had tied a hangman's noose in a piece of rope and showed it to a black coworker. The coworker reported the incident to the superintendent because he felt that grievant's action was symbolic of lynching. The superintendent, who is grievant's brother-in-law, verbally counseled grievant not to repeat this behavior and to be temperate in his actions and words.

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[1] Agency Exhibit 2. Group III Written Notice, issued October 5, 2005.
[2] Agency Exhibit 1. Grievance Form A, filed November 1, 2005.
[3] Agency Exhibit 4. Department of Human Resource Management (DHRM) Policy 1.80, *Workplace Violence*, May 1, 2002.
[4] Agency Exhibit 9. Receipt of *Preventing Violence in the Workplace Policy*, signed May 15, 2002.
[5] Agency Exhibit 8. Grievant's training transcript, May 15, 2002.
[6] Agency Exhibit 5. Section III.B, Virginia Department of Transportation *Preventing Violence in the Workplace Policy,* May 1, 2002.
[7] Agency Exhibit 5. Section IV.A, *Ibid*.
[8] Agency Exhibit 6. DHRM Policy 2.30, *Workplace Harassment*, May 1, 2002.

On the morning of September 26, 2005, grievant's supervisor conducted the daily safety meeting with approximately 16 employees. Grievant sat at a table directly across from the black coworker mentioned in the preceding paragraph. A length of yellow sash cord was lying on the table and grievant picked it up and tied a knot in one end.[9] The coworker reached across the table, snatched the cord away from grievant and placed it on the table. Grievant again picked up the cord and tied an abbreviated hangman's noose (4-5 coils instead of a larger number) in the other end of the cord.[10] He dangled the cord from one finger and swung the end with the hangman's noose back and forth. The black coworker asked grievant "Who is that for?" Grievant said, "It's for you." The coworker snatched the cord away from grievant. The meeting was just ending and the coworker immediately took the cord to the superintendent's office to report what had occurred.

A few minutes later when the coworker left the superintendent's office, grievant approached him and asked for the cord. Grievant said he wanted to show the coworker how to tie what he called a fisherman's hook knot. The coworker told grievant he was too late because he had already given the cord to the superintendent. The superintendent investigated the incident, completed a Workplace Violence Incident report, and recommended that grievant's employment be terminated.[11]

Four other coworkers observed grievant tying knots in the cord during this incident; one coworker was close enough to observe that one of the knots appeared to be a hangman's noose.[12] The latter coworker corroborated the verbal exchange between grievant and the black coworker. When the residency administrator interviewed the black coworker the following day, the coworker stated that he feared for his own safety as well as the safety of his family. He asserted that the incident caused him c

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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. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[13]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated *Standards of Conduct* Policy No. 1.60. 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. 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.[14] Examples of Group III offenses include threatening coworkers, and violation of Policy 2.30, Workplace Harassment.

Grievant maintains that he did not tie a hangman's noose but rather a "hook" knot used by fishermen. The evidence (which includes the actual cord and knot tied by grievant) indicates that the knot tied by grievant was tied in exactly the same way as a hangman's knot or hangman's noose. Traditional lore is that a hangman's noose has 13 coils, however, in practice that produces a very elongated knot which may be unstable as the knot starts to bend, so it seems likely that this was ever the case outside fiction.[15] Typically, hangman's

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[13] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

[14] Agency Exhibit 3. Section V.B, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[15] *See* http://en.wikipedia.org/wiki/Hangman's_noose

nooses were tied with only eight coils. However, the very same knot with five to eight coils is used by fishermen and is also called a hangman's noose.[16]

Therefore, the preponderance of evidence establishes that grievant did tie a hangman's knot or noose. Moreover, both the superintendent and the two witnesses who observed the knot perceived it to be a hangman's noose. Merely tying the knot would, by itself, probably have been insufficient to warrant discipline. However, grievant then swung the noose back and forth directly in front of a black coworker. When the coworker asked who the noose was for, grievant said it was for the coworker. Grievant's actions and words thus transformed what might have been merely a preoccupation with knots into a threat.[17] Based upon the undisputed testimony of the black coworker, grievant's behavior created a reasonable fear of injury and subjected the coworker to emotional stress sufficient to manifest itself in physical symptoms of chest pain and vision problems. Accordingly, the agency has presented preponderant evidence and testimony to conclude that the totality of grievant's behavior constituted a violation of both the Commonwealth's and the agency's workplace violence policies, as well as the policy on workplace harassment.

Grievant denied that he had been counseled six months earlier for displaying a hangman's noose to a black coworker. However, the superintendent testified that he had verbally counseled grievant for that incident. Grievant argues that there is no contemporaneous written documentation of the verbal counseling. However, the Standards of Conduct policy does not require verbal counseling be documented in writing. The superintendent's testimony that he did counsel grievant is found more credible than grievant's denial for three reasons. First, the superintendent testified credibly that he counseled grievant. Second, the superintendent signed and submitted a written report attesting that he had counseled grievant. Third, the fact that the superintendent is grievant's brother-in-law lends credibility to the superintendent's testimony because grievant has not demonstrated that the superintendent had any motive not to testify truthfully. Accordingly, grievant's denial of the previous counseling tainted his credibility.

Grievant argues that he did not intend to threaten the black coworker. The workplace violence policy does not specifically require that intent be an element of the offense. While the agency must show intent if an employee damages property, it is not necessary to show intent where the behavior itself is specifically prohibited. It is sufficient to constitute an offense if an employee engages in behavior that creates a reasonable fear of injury to another person. However, in this case, grievant knew, or reasonably should have known, that displaying a hangman's noose in a provocative manner towards a black person and telling that person that the noose is for him could create a reasonable fear. Thus, the

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[16] *See* www.predatek.com/2_hn_knot.htm

[17] Although the last known lynching of blacks in the United States occurred more than 75 years ago (*See* www.americanlynching.com, August 7, 1930, Marion, Indiana), the fear of racial violence against blacks remains strongly embedded in the consciousness of blacks, particularly in southern states where 95 percent of lynchings in the first part of the twentieth century occurred.

totality of the circumstances make it more likely than not that grievant knew exactly what message a swinging hangman's noose would send to a black person. Even if grievant did not intend to send a negative message, his actions were sufficiently provocative and egregious to send the negative message despite the purported lack of intent.

"Finally, it is worth noting that the policy behind prohibiting threats is not just to prevent the harm that would come from their actual execution. The goal is also to prevent harm that comes from the mere threat itself, such as the anxiety and fear that are created by a threat of harm, and the expense that goes into additional safety precautions taken to prevent the threatened action from occurring. Thus, anti-threat statutes are aimed not only at statements where a defendant actually intends to carry out the threat, but also at statements where the defendant's sole intent is to convey a threatening message for the pure sake of frightening the intended recipient."[18] In this case, there is no statute involved, however the cited policies prohibit engaging in behavior that creates a reasonable fear to another person.

Grievant argues that the black coworker's interpretation of the incident was subjective and that one cannot attribute intent to grievant based on a subjective interpretation. Grievant is correct that the coworker interpreted what he saw and heard based on his own frame of reference and that it may well have been subjective to some degree. However, as with sexual harassment claims, the determinative factor is not whether the harasser intended to harass but whether the recipient perceived the conduct to be sexually harassing. The same principle applies in the instant case. The black coworker perceived grievant's conduct to be threatening, even though grievant may or may not have intended to threaten him.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long service and an otherwise satisfactory performance record. The agency considered these factors but also weighed as aggravating factors the fact that grievant had been previously counseled about the same behavior, and that the offense was sufficiently egregious that it should not be tolerated. The agency concluded that the aggravating factors outweigh the mitigating circumstances. In view of the fact that the agency has a zero tolerance policy and, the fact that grievant had already been given a second

[18] The UCLA Online Institute for Cyberspace Law and Policy: *When is a Threat "Truly" a Threat Lacking First Amendment Protection? A Proposed True Threats Test to Safeguard Free Speech Rights in the Age of the Internet*, Anna S. Andrews, May 1999.

chance after previous counseling, the hearing officer concludes that the agency properly determined that grievant should be removed from employment.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and removal from employment effective October 5, 2005 are hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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 15 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 15-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.