Issue: Group III Written Notice with termination (threatening behavior); Hearing Date: 11/01/06; Decision Issued: 11/06/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8447; Outcome: Employee granted partial relief. Addendum issued 11/30/06.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8447

Hearing Date: November 1, 2006
Decision Issued: November 6, 2006

PROCEDURAL HISTORY

On June 22, 2006, Grievant was issued a Group III Written Notice of disciplinary action for threatening the Warden. On July 12, 2006, 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 October 4, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 1, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Corrections employed Grievant as a Corrections Officer at one of its prison facilities. The purpose of her position was to "[p]rovide security and supervision of adult offenders."[1] No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On May 2, 2005, Grievant received permission from the prior warden to bring bottled water into the Facility. She informed the Agency that she needed to bring in bottled water for medical reasons.[2] She began the practice of bringing bottled water into the Facility when she worked. Grievant received a doctor's note dated May 25, 2006 requesting that she be permitted to bring water into the Facility.[3]

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[1] Agency Exhibit 4.

[2] Grievant Exhibit 2.

[3] Grievant represented that her request had been approved by the Agency and presented a copy of her request as an Exhibit. The copy quality is so poor that the Hearing Officer cannot determine who approved the request and when. It does not appear, however, that the Agency contests that Grievant was given permission to bring bottled water into the institution up to June 20, 2006.

On March 8, 2006, the Regional Director notified Wardens within his region that, "[e]ffective April 1, 2006, there will be no food or drinks allowed inside the security perimeter. The warden shall determine, depending upon the layout of the facility, the boundary lines for the perimeter."[4]

The Warden began working at the Facility on March 9, 2006. The Warden believed that employees with notes from medical providers could bring food or drinks into the Facility despite the Regional Director's March 8, 2006 memorandum. She formed this impression based on past practice at her former Facility and at other Facilities. During a meeting the Warden attended between several wardens and Agency Executives, the Regional Director's memorandum was clarified that it should be read literally and that wardens did not have the discretion to grant exceptions for employees with doctor's excuses.

On June 20, 2006, the Warden sent an email to all Facility staff with email accounts informing them that, "[e]ffective today, no food will be allowed inside the compound. If some of you will need (2) thirty minute breaks instead of the one hour have been getting, please discuss this issue with your Watch Commander."[5] During muster on June 22, 2006, when security staff meet with their supervisors prior to beginning their shifts, employees were notified that no food could be brought into the Facility. Grievant was notified of the change in policy but she did not realize that the Warden intended to include drinks within the meaning of food.

On June 22, 2006, Grievant returned from a break and attempted to re-enter the Facility. She attempted to bring three unopened bottles of water through the security check point and into the Facility. Officer B was at the security entrance and told Grievant that Grievant could not bring bottled water into the Facility. Grievant mentioned to Office B that she had a doctor's slip permitting her to bring in water. Officer B responded that Grievant could not bring water into the institution.

Grievant picked up the telephone and called the Warden's office. Grievant identified herself and spoke with the Warden.[6] Grievant told the Warden that Officer B would not let her take water into the Facility and that Grievant needed the water for medical reasons. The Warden explained to Grievant that a memorandum went out to staff two days earlier advising that no food items would be allowed in the compound. The Warden mentioned Grievant may be able to take 30 minute breaks so she could go up front to get water. Grievant abruptly interrupted the Warden by saying she had just given the Warden a doctor's note a week earlier. The Warden explained that she understood Grievant's comment, but Grievant rudely interrupted the Warden again and said "so you are expecting me to pay five times as much." The Warden told Grievant that if Grievant continued to be rude, "I would not be holding this conversation with her."

[4] Agency Exhibit 2.

[5] Agency Exhibit 2.

[6] Grievant and the Warden had not met prior to this occasion.

Grievant said sarcastically, “Let me put this in the form of a question then. You expect me to pay five times as much for my water.” Grievant told the Warden “I have a doctor’s note” and “you will see” and then abruptly hung up the telephone.

After Grievant finished her conversation with the Warden, Grievant asked Officer Brown “I wasn’t mean to her?” Officer B responded “you [were] not mean.”

Grievant was later called into the Warden’s office to discuss her telephone call with the Warden. Grievant made additional comments but was not disciplined for those comments[7] and, thus, the facts relating to that meeting are not relevant in this proceeding.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”[8] Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”[9] Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”[10]

The Department of Corrections is a para-military organization where security staff wear uniforms and hold rank. Employees with lower rank are trained and expected to show utmost respect to higher ranking employees.

Insubordination is a Group II offense. Insubordination is a Group II offense because it is similar to the charge of failure to follow a supervisor’s instructions which is a Group II offense under the Standards of Conduct. An insubordinate employee challenges a supervisor’s authority in a way similar to an employee who willfully disregarding a supervisor’s lawful directive.

Grievant was insubordinate to the Warden, an employee holding superior rank. Grievant rudely confronted the Warden. Grievant interrupted the Warden without permitting the Warden to finish an explanation that would have enabled Grievant to understand the reasons for the change in practice. Grievant spoke sarcastically to the Warden by saying “let me put this in the form of a question.” The Agency has presented sufficient evidence to support the issuance to Grievant of a Group II Written Notice.

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[7] The Written Notice refers to Grievant’s comments during the telephone call as the basis for discipline.

[8] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

[9] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[10] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Virginia Department of Corrections Operating Procedure 130.3 defines "workplace violence" 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, staffing, suicide, shooting, rape, attempted suicide, attempted rape, psychological trauma such as threats, obscene phone calls and/or electronic communications, an intimidating presence, and harassment of any nature such as stalking, shouting, or abusive language.

Virginia Department of Corrections Operating Procedure 135.1(XII)(B)(12) defines Group III offenses to include "threatening or coercing persons association with any state agency, including but not limited to employees, supervisors, patients, visitors, and students."

Agency policy does not define "threat." Blacks Law Dictionary, 6th Ed. defines "threat" as:

> A communicated intent to inflict physical or other harm on any person or on property. A declaration of an intention to injure another or his property by some unlawful act." *** A declaration of intention or determination to inflict punishment, loss, or pain on another, or to injury another or his property by the commission of some unlawful act. ***

Based on the foregoing, the Hearing Officer believes whether a threat has been made depends on the employee's intent to cause adverse consequences to another by engaging in some prohibited act.

The Agency argues Grievant threatened the Warden by saying "you will see." It is possible that when Grievant said "you will see" she intended to mean "you will see because I will inappropriately harm you." It is also possible that Grievant meant to say "you will see that I am right because I have a doctor's note that overrules your authority." Or Grievant could have meant "you will see because I will file a grievance or complain about you to the Regional Director."

Based on the evidence presented, it is unclear what Grievant meant when she said "you will see." It is equally likely that Grievant meant to suggest she would engage in some prohibited act against the Warden as it is likely that Grievant meant she would engage in some permitted act such as filing a grievance. Because the burden of proof is on the Agency, the issue must be resolved in Grievant's favor. Insufficient evidence exists to prove that Grievant threatened the Warden. Accordingly, no basis exists to support a Group III Written Notice against Grievant. Grievant's removal must be reversed.

Mitigation

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[11] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

Grievant is further entitled to recover a reasonable attorney's fee, which cost shall be borne by the Agency.

[11] *Va. Code § 2.2-3005.*

APPEAL RIGHTS

You may file an administrative review request within **15 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. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

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. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   830 East Main St. STE 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 all of your appeals to the other party and to the EDR Director. 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. 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.[12]

[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].

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

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8447

Addendum Issued: November 30, 2006

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[13] For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[14]

The Hearing Officer has received a petition dated November 21, 2006. The petition seeks reimbursement in the amount of $127 per hour. For grievances initiated on or after August 1, 2006, grievants are allowed to recover at their attorneys' customary hourly rate not to exceed $127 per hour. Grievant initiated her grievance on July 12, 2006. Accordingly, reimbursement in the amount of $123 per hour will be granted.

Grievant's petition includes attorneys' fees for services rendered by his attorney prior to the qualification of the grievance for hearing. Not all grievances proceed to a hearing; only grievances that challenge certain actions qualify for a hearing.[15] The hearing officer may award relief only for those issues that qualify for hearing. Further, the statute provides that an agency is required to bear only the expense for the hearing

[13] Va. Code § 2.2-3005.1.A.

[14] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

[15] Va. Code § 2.2-3004.A. *See also* §4, Qualification for a Hearing, *Grievance Procedure Manual*, August 30, 2004.

officer and other associated *hearing* expenses including grievant's attorneys' fees.[16] Attorney fees incurred during the grievance procedure's Management Resolution Step stage are not expenses arising from the hearing. Accordingly, a hearing officer may award only those attorney fees incurred subsequent to qualification of the grievance for hearing and as a direct result of the hearing process. The grievance was qualified for hearing by the agency head on September 5, 2006. Attorney's time occurring prior to this date has been excluded from the award.

The petition includes a request for attorney travel time. When an attorney travels to a step meeting or a hearing, he or she is not providing legal advice and counsel. Accordingly, travel time may not be reimbursed. Grievant is awarded 3.5 hours of attorney's time at the hearing.

AWARD

The grievant is awarded attorneys' fees for 7.4 hours at $123 per hour for a total of $910.20. The petition for time prior to the qualification date and for travel time is denied.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

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Carl Wilson Schmidt, Esq.
Hearing Officer

[16] Va. Code § 2.2-3005.1.B.