

Issue: Group II Written Notice with termination (due to accumulation) (intimidating and threatening behavior towards a coworker); Hearing Date: 01/05/07; Decision Issued: 02/26/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq; Case No. 8480; Outcome: Agency upheld in full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8480**

Hearing Date: January 5, 2007  
Decision Issued: February 26, 2007

**PROCEDURAL HISTORY**

On June 27, 2006, Grievant was issued a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for displaying threatening and intimidating behavior towards a coworker. On July 25, 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 he requested a hearing. The Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 5, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
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 Virginia Department of Transportation employed Grievant as a Bridge Inspection Team Leader at one of its Facilities. He had been employed by the Agency for approximately 26 years prior to his removal effective June 27, 2006. On March 1, 2006, Grievant received a Group II Written Notice with suspension for acting contrary to written policy.<sup>1</sup>

On June 12, 2006, Grievant received an email from another Facility staff indicating they would not provide him with traffic control on the dates he need traffic control to perform his duties. Grievant became angry because he had taken the time to plan and arrange for traffic control on specific dates. Grievant loudly expressed his displeasure to others in working in his office area. Grievant used profanity. The Bridge Inspector overheard Grievant's comments and profanity.

On June 13, 2006, the Bridge Inspector wrote an email to the Supervisor describing Grievant's behavior and expressing his objection to that behavior. Shortly

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<sup>1</sup> Agency Exhibit 8.

thereafter, the Supervisor called Grievant into his office and counseled Grievant regarding his outburst on the prior day. Although the Supervisor did not identify who complained about Grievant's behavior, Grievant concluded that it was the Bridge Inspector who complained.

On June 14, 2006, Grievant began telling other workers in the office that the Bridge Inspector complained about him. On June 15, 2006, someone had emptied a whole puncher onto the Bridge Inspector's chair and all over the floor. The Bridge Inspector reported this to the Supervisor. At the end of his workday, the Bridge Inspector walked to his vehicle in the parking lot and observed that Grievant had parked his truck so close to the driver's side of the Bridge Inspector's vehicle that the Bridge Inspector had difficulty squeezing into his vehicle. The Bridge Inspector did not recall Grievant previously parking his vehicle next to the Bridge Inspector's vehicle. The Bridge Inspector complained to the Supervisor.

Shortly after the Bridge Inspector arrived to work on June 20, 2006, Grievant made comments the office hallway about "The rat has made another phone call", "Stab them in the back", and that he "did not mind going back to jail."<sup>2</sup> The Bridge Inspector immediately notified the Supervisor. At approximately 9:30 a.m., the Supervisor counseled Grievant about his behavior. In particular, the Supervisor told Grievant to leave the Bridge Inspector alone.

Later in the day on June 20, 2006, the Bridge Inspector's work van, Grievant's work van and several other vans were parked next to each other in the parking lot between two buildings. At approximately the same time, Grievant walked out of one of the buildings and walked towards his van, the Bridge Inspector and Mr. R walked out of the other building and began walking towards the parked vans. As Grievant walked towards the vans, he stared at the Bridge Inspector.<sup>3</sup> Grievant walked to his van and opened the driver's side door and put equipment inside. He observed the Bridge Inspector standing at the back of his van. Grievant became angry. Grievant looked at the Bridge Inspector and spoke loudly that if the Bridge Inspector had a problem with him, the Bridge Inspector should come to him with his concern and "be a f—king man about it." Grievant was pointing at the Bridge Inspector. The Bridge Inspector responded that he was not going to argue with Grievant and he was not going to waste his time. Grievant began walking towards the Bridge Inspector and began yelling that the Bridge Inspector needed to come to him the next time he had a "Goddamn problem" with him and to "quit being a f—king baby about it and be a man about it."

Mr. I had walked with Grievant to the van. As he was standing outside of Grievant's van on the passenger's side, Mr. I heard the confrontation between Grievant and the Bridge Inspector. He quickly walked to the other side of the van and stepped

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<sup>2</sup> Grievant previously had not been to jail.

<sup>3</sup> The Bridge Inspector testified that Grievant stared the whole way "with a look of I want to beat your ass."

between Grievant and the Bridge Inspector. Mr. I told Grievant that the issue could not be handled here and “let’s get in the van and go.”

The Bridge Inspector felt concern for his safety. He was upset by Grievant’s behavior. Mr. R observed Grievant’s behavior and felt the confrontation would become a fist fight.

## **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>4</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).

DHRM Policy 1.80 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, 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 under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual’s position while on state premises or engaged in state business;

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<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

Grievant expressed an intimidating presence and threatening behavior towards the Bridge Inspector. Grievant confronted and approached the Bridge Inspector while Grievant was angry. Grievant yelled at the Bridge Inspector, cursed, and pointed his finger at him. Grievant challenged the Bridge Inspector's integrity by suggesting he was weak. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice. Upon the accumulation of a second active Group II Written Notice, an employee may be removed from employment. Accordingly, the Agency's removal of Grievant from employment must be upheld.

Grievant argues that the Bridge Inspector overstated his concern about Grievant's behavior because one of the factors the Bridge Inspector considered was Grievant's reddened face. Grievant's facial expression, however, is normally reddened. Grievant is correct that the Bridge Inspector overstated his concern based on Grievant's reddened face. If the Hearing Officer disregards the Bridge Inspector's reaction based on Grievant's reddened face, however, there remain sufficient facts upon which the Bridge Inspector could reasonably conclude Grievant intended to harm him.

Grievant argues he was walking to the back of his van to ask the Bridge Inspector to move otherwise he would not be able to back up the van. This argument fails because Grievant did not ask or suggest to the Bridge Inspector that he should move. There is no reason to believe that Grievant walked to the back of the van because the Bridge Inspector was blocking Grievant's van.

*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..."<sup>5</sup> 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

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<sup>5</sup> *Va. Code § 2.2-3005.*

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."

Grievant contends the disciplinary action should be mitigated. He argues he did not intend to harm the Bridge Inspector and was merely "blowing off steam." He point to his 26 years of good work performance.

To the extent mitigating circumstances exist, the aggravating circumstances counter those mitigating circumstances. In particular, Grievant's Supervisor twice counseled Grievant to refrain from the type of behavior giving rise to this disciplinary action. Grievant simply ignored the Supervisor's counseling. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action is **upheld**.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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