

Issues: Group III Written Notice with termination (threatening behavior), harassment, hostile work environment, retaliation; Hearing Date: 06/01/07; Decision Issued: 07/17/07; Agency: Va. Community College System; AHO: Carl Wilson Schmidt, Esq.; Case No. 8541, 8542, 8543, 8544, 8610; Outcome: No relief – Agency upheld in full. **Judicial Review: Appealed to the Circuit Court in Richmond County; Outcome pending.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8541 / 8542 / 8543 / 8544 / 8610**

Hearing Date: June 1, 2007  
Decision Issued: July 17, 2007

**PROCEDURAL HISTORY**

On November 13, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for threatening a State employee. On November 30, 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. Grievant filed four other grievances which were qualified for hearing and consolidated by EDR Ruling Number 2006-1607. On April 24, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 1, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Counsel  
Witnesses

**ISSUES**

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?
5. Whether the Agency engaged in workplace harassment?
6. Whether the Agency retaliated against Grievant?

### **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. Grievant has the burden of proof to show that the relief he seeks should be granted for those grievances not involving disciplinary action. 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 Community College System employed Grievant as a Trades Technician III until his removal effective November 14, 2006. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant enjoyed collecting certain items. He purchased a number of children's books from the campus library. He kept these books in his desk at work.

Grievant reported to be Supervisor. Grievant and the Supervisor worked well for the first six months of the Supervisor's employment with the Agency. Their relationship began to sour as the Supervisor began questioning the Grievant's work performance. One of Grievant's coworkers, the Grounds Worker, believed Grievant developed hatred towards the Supervisor.

The logbook is a notebook that employees make entries into regarding their work activities for the day. The logbook is typically kept on a table in the break room.

On October 31, 2006, Grievant was riding a lawnmower cutting grass on campus. The Supervisor was standing outside near the area where Grievant was working. Grievant began driving the lawnmower directly towards the Supervisor but turned away approximately 12 feet from the Supervisor. Grievant removed his sunglasses and glared directly at the Supervisor. The Supervisor perceived Grievant's behavior as confrontational. The Supervisor spoke with his supervisor and they decided to transfer Grievant to another campus.

On November 2, 2006, Grievant was informed that he would be transferred to another campus. The Supervisor told Grievant to collect his tools and say his farewells to his coworkers because the following day he would be assigned to another campus. Grievant disagreed with being transferred and expressed his disagreement to the Supervisor. Their interaction became argumentative. After the meeting, Grievant demanded that the Supervisor sign a document. Grievant came to the edge of the Supervisor's desk and the Supervisor backed away from his desk. Grievant demanded that the Supervisor sign the document. The Supervisor told Grievant to leave his office otherwise the Supervisor would call the sheriff. Grievant left the Supervisor's office.

On November 3, 2006, Grievant came to work early in the morning before the Supervisor arrived. Grievant spoke with the Grounds Worker. Grievance said before the day was over he was going to be unemployed or in jail. The Grounds Worker asked Grievant to assure her that he would not do something improper. Grievant responded, "They accused me of assault, so just stand back and watch."

As Grievant was removing the contents from his desk, he noticed a little children's book with the title containing the first name of the Supervisor and the name "Dr. Dave". At the bottom of the cover it read, "A Visit To The Doctor." Grievant picked up the book; he laughed, and put it down. He took a picture of the book. Grievant then put the children's book on top of the logbook in the break room. The Utilities Trades Worker observed Grievant place the children's book on the table in the break room. He told Grievant, "carry the god damned book; it will just cause problems". Grievant did not respond.<sup>1</sup> Grievant left the campus.

At approximately 9:10 a.m. on November 3, 2006, the Supervisor left his office and walked into the break room. He saw the children's book and saw that the title contained his first name. The book was closed. As he picked up the book in open to page that had been dog-eared. The Supervisor read the first sentence which stated, "He took out the shotgun." The Supervisor became upset and concerned regarding his

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<sup>1</sup> In an email drafted on December 1, 2006, the Utilities Trades Worker wrote that he told Grievant, "Take the damn book with you." Grievant responded, "I'm going to leave this on the table so [Supervisor's first name] can see it." See, Agency Exhibit 2.

safety. He was concerned about whether Grievant would harm him. He immediately called and brought the matter to the Agency's attention.

The text of the two pages of the book read:

He took out the shotgun. He got busy doing something with it.  
[Supervisor's first name] knew what was going to happen. But he knew one thing -- he wouldn't even say "Ouch!" This time.  
"Old enough to stand a pinprick?" said Dr. Dave. "Brave enough?"  
[Supervisor's first name] closed his eyes and thought about being big and brave.  
"All over!" said Dr. Dave.  
All over! [Supervisor's first name] grinned. He had not even felt it happened!

Because one of the pages was dog-eared, the portion of the page folded inward covered the word "not". With the word "not" covered, the paragraph read, "All over! [Supervisor's first name] grinned. He had even felt it happened!"

Because the word "not" was covered, the Supervisor read the text to mean that it had happened with "it" being use of a shotgun.

Agency managers summonsed law enforcement officers to the Agency's second campus. Once Grievant arrived there he was removed from the Agency's grounds.

## **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>2</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).

### Workplace Violence DHRM Policy 1.80

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

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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;
- 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 threatened to injure the Supervisor. He communicated his threat by placing a children's book that he owned in a place where the Supervisor would easily see the book. The book was dog-eared so that when opened to pages containing Grievant's threat. This page referred to taking out a shotgun, that a person with the Supervisor's first name "knew what was going to happen", and that "he had even felt it happen!"

"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. Grievant threatened the Supervisor thereby justifying the issuance of a Group III Written Notice with removal.

Grievant argues he did not threaten the Supervisor because the book was a harmless children's book and that no rational person reading the book could construe it as conveying a threat. Grievant's argument fails. Grievant clearly intended to convey a message to the Supervisor. Grievant used the children's book to convey that message. Grievant has offered no credible explanation as to why he left the children's book on the table in the break room as he removed his remaining children's books and other personal belongings from his desk. This is especially true given that the Utilities Trades Worker noticed what Grievant was doing and told Grievant to take the children's book with him. Grievant ignored that comment.

*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>3</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### Alleged Workplace Harassment

Grievant filed a grievance on November 2, 2006 in which he alleged harassment and a hostile work environment. DHRM Policy 2.30 prohibits Workplace Harassment. Workplace Harassment is defined as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Grievant has not presented any credible evidence showing that the Agency took action against him because of his race, sex, color, national origin, religion, sexual orientation,

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<sup>3</sup> *Va. Code § 2.2-3005.*

age, veteran status, political affiliation, or disability. Accordingly, Grievant's request for relief is denied.<sup>4</sup>

### Alleged Threat Against Grievant

Grievant filed a grievance in which he alleged that the Supervisor threatened to do bodily harm to him November 2, 2006. No credible evidence was presented to support Grievant's allegation that the Supervisor threatened him. Grievant's request for relief is denied.

### Alleged Hostile Work Environment and Retaliation

On November 7, 2006, Grievant filed a grievance alleging hostile work environment and retaliation.<sup>5</sup> A hostile work environment is a form of workplace harassment prohibited by DHRM policy 2.30. As discussed above, Grievant has not presented any evidence showing the Agency violated DHRM policy 2.30.

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>6</sup> (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant engaged in a protected activity because he filed a series of grievances. Some were filed prior to and some were filed after his removal. Grievant suffered a materially adverse action because he was transferred and removed from employment.

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<sup>4</sup> Grievant also alleged that the Vice President made verbal threats and false allegations against him. No credible evidence was presented to support this allegation.

<sup>5</sup> Grievant alleged that the Vice President stopped Grievant while Grievant was walking on a sidewalk on campus. Grievant alleged the Vice President made hostile comments regarding an EDR ruling. Although the Vice President admitted to speaking with Grievant regarding the EDR ruling, no credible evidence was presented to support Grievant's allegation that the conversation was improper.

<sup>6</sup> See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.



Grievant has not established any connection between his protected activity and the materially adverse actions. Grievant was transferred because of conflicts between Grievant and his supervisor. Grievant was not transferred because he filed grievances. Grievant was removed from employment because he threatened his supervisor. Grievant was not removed from employment because he filed grievances. Accordingly, the Agency did not retaliate against Grievant.

### Alleged Hostile Work Environment and Threat

On November 14, 2006, Grievant filed a grievance alleging harassment and a hostile work environment based on verbal threats and false accusations. As discussed above, Grievant has not presented any credible evidence showing that the Agency took action against him because of his race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Accordingly, Grievant's request for relief is denied.

### **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 **upheld**. Grievant's request for relief in his grievances is **denied**.

### **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>7</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>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.