

Issues: Group I Written Notice (abusive/obscene language) and Group III Written Notice (threatening/coercing behavior); Hearing Date: 12/13/07; Decision Issued: 12/14/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8752; Outcome: No Relief – Agency Upheld In Full; **EDR Administrative Review request received 12/28/07; EDR Ruling #2008-1903 issued 01/15/08; Outcome: Remanded to AHO; Remanded Hearing Decision issued 01/22/08; Outcome: Original decision affirmed; DHRM Administrative Review request received 01/03/08; Outcome pending.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8752**

Hearing Date: December 13, 2007  
Decision Issued: December 14, 2007

**PROCEDURAL HISTORY**

On September 10, 2007, Grievant was issued a Group I Written Notice of disciplinary action for use of obscene language.<sup>1</sup> He also received a Group III Written Notice with removal for threatening and coercing a State employee.

On September 18, 2007, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 13, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 13, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

---

<sup>1</sup> The Group I Written Notice incorrectly states a date of removal from employment.

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 Transportation Crewmember at one of its Facilities. He had been employed by the Agency for approximately 19 years until his removal effective September 10, 2007. Grievant's work performance regularly met or exceeded the Agency's expectations. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On August 17, 2007, Grievant was working as a crew member of a team clearing and removing debris from a job site. At one point, the Crew Leader told Grievant to "hurry up, hurry up!" Grievant believed he knew what he was doing and was proceeding at an appropriate pace. From a distance of approximately 15 feet, Grievant looked at the Crew Leader and told him to "kiss my f—king ass." The Crew Leader responded by asking "What did you say?" Grievant replied, "kiss my f—king ass." The Crew Leader did not respond.

Grievant's comment to the Crew Leader was overheard by several other employees at the job site including Mr. H and the Operator II. Mr. H returned to the residency from the job site and told the Superintendent what Grievant had said to the

Crew Leader. The Superintendent was in an office with the ERT Senior when Mr. H began speaking with the Superintendent. The ERT Senior overheard the conversation between Mr. H. and the Superintendent.

When Grievant returned to the residency, the Superintendent questioned the staff who had been working at the job site about Grievant's comment. Grievant became upset. Grievant did not know who had reported him to the Superintendent. The ERT Senior observed Grievant and realized that Grievant was upset. Grievant told the ERT Senior that Grievant did not know who reported him to the Superintendent. Although the ERT Senior did not mention Mr. H. by name, he told Grievant the names of the employees who had not reported Grievant to the Superintendent. Grievant was able to conclude that it was Mr. H. who likely reported him to the Superintendent.

At approximately 4:30 p.m., the Operator II left the residency and began driving her vehicle home. Grievant was driving his vehicle on the same road behind the Operator II. Grievant passed the Operator II at a high rate of speed. He pulled in front of her and slowed down. In order to avoid Grievant, the Operator II took a shortcut to her house. Before she could take her things out of her vehicle, Grievant drove his vehicle onto her property. As Grievant approached the Operator II, he was mad and loud. Grievant asked her "what [are] you doing telling on me?" She told Grievant that she did not tell on him. The Operator II told Grievant that the Superintendent knew about the incident before they returned to the residency. Grievant said "what goes around comes around". Grievant said, "that damn [Mr. H] must have told it." The Operator II responded, "You said it, I didn't." As the Operator II entered her house, Grievant left her property. The Operator II was scared by Grievant's behavior during their encounter. She believed Grievant actually thought she was the one who had reported him and intended to get even with her. She immediately called the Transportation Operations Manager I and expressed her concerns about Grievant. She told the Transportation Operations Manager I that Grievant had frightened her. She said she had locked the doors to her house and that she was unsure what to do. The Transportation Operations Manager I told her he would call another manager and then call her back.

## **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."<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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

---

<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.

### Group I -- Use of Obscene Language

"Use of obscene or abusive language" is a Group I offense. By saying, "kiss my f--king ass!", Grievant used obscene and abusive language. His demeanor expressed confrontation and anger. His comments were directed to the Crew Leader. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.

Grievant argued that he said "kiss my ass!", but did not say "kiss my f—king ass!" If the Hearing Officer assumes for the sake of argument that Grievant only said "kiss my ass", there remains sufficient evidence to support the issuance of a Group I Written Notice. The phrase "kiss my ass" is an insult and when directed in an angry manner towards another employee, the statement may generate verbal and/or physical conflict.

Grievant argues that the phrase "kiss my ass" was commonly used among crewmembers. This argument fails. Grievant did not show that the phrase was commonly used among crewmembers with the knowledge of Agency managers. Unless the phrase was both used by crewmembers and Agency managers knew of this practice, the Agency has not undermined its right to discipline employees acting inappropriately.

### Group III -- Threatening or Coercing

"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 Operator II as shown by several factors. First, he entered her private property without invitation and without forewarning. Second, his demeanor expressed anger and frustration. Third, he accused the Operator II of reporting him to the Superintendent. Fourth, Grievant said "what goes around comes around" meaning that the person creating difficulty for him would also experience difficulty.

Grievant's threatening behavior was confirmed by the reaction of the Operator II. She became upset because Grievant approached her on her property and threatened her. She immediately called the Transportation Operations Manager I and expressed her fear and concern about Grievant. When the facts of this case are considered as a whole, Grievant threatened the Operator II thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee from employment.

Grievant argues that he went to visit the Operator II in order to apologize to her for having to overhear his comments to the Crew Leader. He denies threatening her. Grievant's testimony conflicts with the testimony of the Operator II. The testimony of the Operator II was credible. She denied that Grievant offered an apology to her. The Operator II called the Transportation Operations Manager I and informed him of what she had experienced. She told the Transportation Operations Manager I of her

conversation with Grievant and said that she was afraid of Grievant. She did not mention to the Transportation Operations Manager I that Grievant had offered an apology to her. The testimony of the Operator II was sufficiently credible to support the Agency's decision to issue a Group III Written Notice.

Grievant argues that he did not threaten the Operator II because at the time he met with her, he already knew that Mr. H was the person who had reported him to the Superintendent. This evidence, however, merely shows that Grievant did not have a logical reason to accuse the Operator II of reporting him. It does not prove that Grievant did not threaten the Operator II.<sup>3</sup> If the Hearing Officer assumes for the sake of argument that Grievant did not intend to threaten the Operator II, Grievant's comment that "what goes around comes around" would have been directed at Mr. H. In other words, Grievant threatened Mr. H, a State employee, and the Operator II was a witness of that threat. The result is the same -- Grievant threatened another State employee thereby justifying disciplinary action.

*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>4</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.

Grievant contends the disciplinary action should be mitigated because of Grievant's length of employment and satisfactory work performance. Although agencies may mitigate disciplinary action based solely on an employee's length of service and satisfactory work performance, these factors, standing alone, do not provide a basis to mitigate under the *Rules for Conducting Grievance Hearings*. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

---

<sup>3</sup> The testimony of the Operator II showed that even if Grievant knew Mr. H had reported him, Grievant accused the Operator II of reporting him.

<sup>4</sup> *Va. Code § 2.2-3005.*

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for obscene or abusive language is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice with removal for threatening or coercing another State employee 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>5</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.





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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8752-R**

Reconsideration Decision Issued: January 22, 2008

**RECONSIDERATION DECISION**

In EDR Ruling 2008-1903, the EDR Director returned this case to the Hearing Officer for additional consideration of Grievant's length of service and satisfactory work performance in the context of mitigation. The EDR Director provided no guidance regarding when an employee's length of service or satisfactory work performance is a mitigating circumstance. The Hearing Officer finds that there are no mitigating circumstances in this case so as to render the Agency's discipline beyond the limits of reasonableness.

In EDR Ruling 2007-1518, the Hearing Officer "determined that the termination should be mitigated because of the Grievant's eleven years of state service, satisfactory work performance, and because the hearing officer did not consider the Grievant's conduct to be among the most serious types a violation of the Alcohol and Other Drugs policy." The EDR Director wrote:

if the agency succeeds in proving (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. [citation omitted] This Department concludes that under the *Rules for Conducting Grievance Hearings*, and in light of the hearing officer's findings of fact and application of policy, the grounds for mitigation cited in the hearing decision do not support a finding that the discipline imposed by the agency exceeded the limits of reasonableness.

In Case 8752, neither the Grievant's length of service nor his otherwise satisfactory work performance are so extraordinary as to justify mitigation of the

Agency's decision to terminate the Grievant for conduct that was determined by the Hearing Officer to be terminable, i.e., a Group III offense. Upon consideration of all facts in the record of this case including the length of service and satisfactory work performance, the Hearing Officer finds that the Agency's disciplinary action does not exceed the limits of reasonableness.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*S/Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer