

Issues: Group III Written Notice (threatening/coercing behavior) and Suspension;  
Hearing Date: 02/19/08; Decision Date: 02/22/08; Agency: VDOT; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 8787; Outcome: No Relief – Agency Upheld in Full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8787**

Hearing Date: February 19, 2008  
Decision Issued: February 22, 2008

**PROCEDURAL HISTORY**

On November 21, 2007, Grievant was issued a Group III Written Notice of disciplinary action with a 10 work day suspension for threatening or coercing persons associated with a State agency.

On December 14, 2007, 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. On January 28, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 19, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
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?

### **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 employs Grievant as an Equipment Repair Manager at one of its Facilities. He has been employed by the Commonwealth for approximately 30 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency encourages individuals who suspect that fraud, waste, or abuse is being committed in the Agency to call the State Employee Fraud, Waste, and Abuse Hotline. The Agency posts notices throughout the Facility listing the telephone number to call and stating that the call is anonymous, non-traceable, and toll-free.

Several years ago someone began abusing the State Hotline to make false complaints against Grievant. These false complaints caused Grievant a great deal of stress and frustration. In Grievant's evaluation dated October 23, 2006, the evaluator wrote, "Once again this year [Grievant] was faced with several hotline complaints about his actions. All of these calls have gone unfounded. We suspect that these calls are directed from a disgruntled ex-employee."<sup>1</sup>

On April 12, 2007, one of Grievant's subordinates, Mr. W, approached Grievant and said he had heard that Grievant was being investigated for stealing scrap metal from VDOT. Mr. W said to Grievant, "you in trouble again; you got another Hotline call

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<sup>1</sup> Grievant Exhibit 5.

again; [the allegation is that] you've been stealing steel and selling it to [another person]".<sup>2</sup> Grievant called an auditor and verified that a hotline call had been made about him. Later that day, Grievant called Mr. W and asked him who started the rumor. Mr. W said he had overheard the rumor while in the shop. On April 13, 2007, Grievant met Mr. W on the job site. Grievant repeatedly asked Mr. W who was spreading the rumor about him. Grievant asked Mr. W if Mr. W had called the Hotline. Grievant told Mr. W that he felt that the rumor and the hotline call were related. Mr. W felt threatened by Grievant because Grievant conducted Mr. W's performance evaluations.

On April 16, 2007, Grievant told his Supervisor that another Hotline call had been made against him. In the evening after his work ended, Grievant drove his personal vehicle to the home of the Operator II. Grievant asked the Operator II if he had heard rumors about Grievant. Grievant asked the Operator II if the Operator II had started a rumor about Grievant.<sup>3</sup> The Operator II said "no". The Operator II said he had overheard a conversation between Mr. S and Mr. W in which Grievant was discussed.

On April 17, 2007 at approximately 7:30 a.m., Grievant called Mr. S as Mr. S was about to leave to go to the job site. Grievant asked Mr. S if Mr. S had been spreading a rumor about Grievant.<sup>4</sup> Mr. S said he might have heard something from the bridge crew or the construction crew.

Grievant contacted Mr. S's supervisor and asked permission to speak with Mr. S in person. The supervisor said it would be okay to do so. Grievant went to speak with Mr. S at the job site at approximately 9 a.m. on April 17, 2007. Grievant asked Mr. S who told Mr. S about the allegation that Grievant had taken metal from a dump truck. Mr. S said he would not reveal his source.<sup>5</sup> Grievant persisted in his questioning until Mr. S revealed that his source was Ms. L.<sup>6</sup>

Ms. L is not a VDOT employee. She is employed by the Vendor. The Vendor has a contract with VDOT. As part of that contract, Ms. L is responsible for locating parts requested by VDOT employees and providing those parts to the appropriate shop or area headquarters. Ms. L was in the VDOT Facility shop one day putting her lunch away when she overheard some employees discussing an allegation against Grievant.

On April 17, 2007 at approximately 9:00 a.m., Grievant went to the Vendor's office where Ms. L worked. He walked through the main door and stood at the counter

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<sup>2</sup> Mr. W was trying to let Grievant know that another rumor was "floating around" and Grievant should not worry about it.

<sup>3</sup> Grievant did not ask the Operator II if he had called the Hotline to seek an investigation of Grievant.

<sup>4</sup> Grievant did not ask Mr. S if he had called the Hotline about Grievant.

<sup>5</sup> Mr. S testified he did not want to reveal his source because he did not want to be a "snitch."

<sup>6</sup> Mr. S testified that he did not feel threatened by Grievant but believed Grievant was persistent in his questioning.

in front of Ms. L who was alone at the time. Grievant asked if he could speak with Ms. L and she said "yes". Grievant asked Ms. L why she was spreading lies and rumors about him. He wanted to know why she would say such a thing and from whom she had heard the rumor. Ms. L. responded that she had overheard the rumor but did not know who started it. Grievant asked Ms. L if she had called the Hotline. Ms. L said she had not called the Hotline. Grievant continued to demand that Ms. L answer his questions about who was the source of her information. As she continued to deny knowing the source, Grievant became angry and his voice became louder. Grievant was standing only a few feet from Ms. L as he spoke to her. At one point, Grievant placed his arms on the counter and leaned toward Ms. L in an intimidating manner. Ms. L moved her chair back abruptly to increase the distance between her and Grievant. Grievant told her that he would talk to her supervisor and her District Manager about her. Ms. L interpreted Grievant's comment to mean that Grievant intended to place in jeopardy her job with the Vendor. After several minutes of questioning Ms. L, Grievant left the office.

Ms. L was upset during her encounter with Grievant and began to cry. Grievant continued to question her and Ms. L continued to be upset. After Grievant left, Ms. L remained upset and began to feel ill. She had to leave her workspace to calm down. Several VDOT employees observed Ms. L when she was upset. Ms. L was unable to properly attend to her duties for the remainder of the day.

Grievant later spoke with the Vendor's District Manager about Ms. L spreading rumors.

## **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>7</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."

"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 coerced Mr. S by repeatedly asking Mr. S for information about the source of the rumor. Mr. S informed Grievant he did not wish to reveal the information. Grievant continued questioning Mr. S until Mr. S provided Grievant with the

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<sup>7</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

information Grievant sought. Grievant coerced Ms. L<sup>8</sup> by repeatedly demanding that she tell him the source of the rumor about him. His physical demeanor reflected anger and frustration with Ms. L. Grievant had no authority over Ms. L, yet he admonished her about spreading rumors. Grievant threatened Ms. L by telling her that he would complain to her District Manager about her behavior. Ms. L reasonably concluded that Grievant intended to jeopardize her job with the Vendor. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for threatening or coercing persons associated with a State agency. Upon the issuance of a Group III Written Notice, a suspension of up to 30 workdays is authorized under the Standards of Conduct. Accordingly, Grievant's ten workday suspension is upheld.

*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>9</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 the level of discipline is too harsh. The Agency has met its burden of proof to show that Grievant threatened and coerced persons associated with a State agency. Because the Agency has met its burden of proof, the Hearing Officer must give deference to the Agency's level of discipline unless that level exceeds the limits of reasonableness. In this case the level of discipline does not exceed the limits of reasonableness.

Grievant contends that he was not aware that he was prohibited by Executive Order 12<sup>10</sup> from attempting to determine who called the Hotline to complain about him. He adds that once he learned that doing so was prohibited, he immediately ceased.<sup>11</sup>

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<sup>8</sup> Ms. L was a person associated with a State agency because she was employed by the Vendor who had a contract with VDOT and provided services to VDOT employees.

<sup>9</sup> *Va. Code § 2.2-3005.*

<sup>10</sup> Executive Order 12 states, in part, "Under no circumstances shall any one, directly or indirectly, attempt to identify or retaliate against someone suspected of calling or cooperating with the Hotline. This includes threatening to effect any reprisals; or taking, or directing others to take, or recommending, processing, or approving, any such personnel action, or any other retaliatory actions, or attempt to do the same. Any such actions will be subject to appropriate disciplinary actions under the Standards of Conduct."

<sup>11</sup> Grievant was provided a copy of Executive Order 12 on April 23, 2007.

Whether Grievant was aware that he could not attempt to determine the source of the Hotline calls is not controlling in this case. Grievant was disciplined for engaging in threatening and coercing behavior under the Standards of Conduct. Grievant had adequate notice of the Standards of Conduct.

Grievant argues that his behavior resulted from his frustration with the Agency's inability to stop the false Hotline calls made against him. Although this may explain Grievant's behavior, it does not excuse it. The Hotline is intended to permit individuals to report information anonymously. The Agency is not in a position to stop frivolous Hotline calls. All the Agency can do is respond to calls in accordance with his customary procedures.

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 III Written Notice of disciplinary action with a ten workday suspension 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>12</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>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.