

Issues: Group III Written Notice (threatening another employee), and Termination;  
Hearing Date: 06/04/08; Decision Issued: 06/05/08; Agency: DMV; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 8855; 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: 8855**

Hearing Date: June 4, 2008  
Decision Issued: June 5, 2008

**PROCEDURAL HISTORY**

On February 25, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for confronting another employee and causing fear of injury and emotional distress.

On February 29, 2008, 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 May 6, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 4, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
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 Department of Motor Vehicles employed Grievant as a Customer Service Generalist Senior at one of its Facilities. She had been employed by the Agency for approximately 7 years prior to her removal effective February 25, 2008. The purpose of her position was:

Performs customer service transactions, administers vision, knowledge and road tests for driver licensing, and issues DMV credentials. Performs daily essential management functions as assigned in management absence and performs other senior level functions as assigned. All programs and services are administered in a customer service focused manner and in accordance with statutory and administrative procedural requirements such as the Motor Vehicle Code of Virginia, DMV policies, procedures, rules and regulations, the Privacy Protection Act and the Freedom of Information act.<sup>1</sup>

No evidence of prior active disciplinary action against Grievant was introduced during the hearing. Grievant presented evidence showing that she performed her specific job duties well. For example, Grievant had received numerous certificates of achievement and recognition during her tenure with the Agency.

On September 11, 2007, Grievant received a written counseling memorandum regarding an August 27, 2007 incident when Grievant became very angry and made offensive comments to the Assistant Manager. Grievant was advised that, "Your anger

---

<sup>1</sup> Agency Exhibit 4.

and offensive comments are to stop immediately. This will not be tolerated in the work place. Any further incidents of this nature will be dealt with under “Standards of Conduct.”<sup>2</sup>

On February 15, 2008, Grievant was working at the information desk at one of the Agency’s offices. She paged another employee so that someone could come to take over her duties while she took a ten minute break to go to the restroom. The employee who was supposed to take over for Grievant was delayed while working with a customer. Grievant had to wait until another employee came to relieve her.

Once the other employee assumed Grievant’s duties, Grievant left the information desk and walked towards the back of the office area. She was angry because her break had been delayed. She said out-loud that she had had “enough of this f—king sh-t”. A customer turned to determine the source of the cursing. Grievant walked past the desk of Ms. B who was seated at desk working. Grievant spoke out-loud so that Ms. B would hear her and said, “What the f—k, do you have to be pregnant to get a bathroom break around here!”

Grievant walked out of the restroom and remained angry. As Grievant walked past Ms. B’s desk and was several steps away, Ms. B asked Grievant if she was referring to Ms. B since Ms. B was the only pregnant woman in the office. Grievant stepped quickly towards Ms. B and leaned forward over Ms. B’s desk. Grievant gestured with her hands and said, “If I was talking to you bitch, I would have said it to your face!” Ms. B said she did not have anything to do with sending someone to relieve Grievant to go to the restroom. Grievant said, “When you come to me you better come correct!” Ms. B asked Grievant to “get out of my face.” Grievant did not move back. Grievant continued to talk and said she was not scared of Ms. B. Ms. B asked Grievant to move away two more times, but Grievant refused. Grievant said “I will take care of you and your baby will be gone away from here too.” Ms. B felt threatened by Grievant’s words and demeanor. Ms. B stood up from her desk and said “what did you say about my baby?” Grievant responded again that she was not scared of Ms. B. Ms. A observed what Grievant had said to Ms. B and Ms. B’s reaction. Ms. A approached Ms. B and stood in front of her to separate her and Grievant. Ms. A told Ms. B it was not worth fighting with Grievant and she needed to concentrate on herself and her baby. Grievant moved even closer to Ms. B and called Ms. B a bitch and said she would take care of her and her baby. Ms. J moved between Ms. B and Grievant and grabbed Grievant. Ms. F also grabbed Grievant and told Grievant to get back to her service window. As Ms. A was helping move Grievant away, Ms. B picked up a plastic square pencil holder and threw it at Grievant. Instead of hitting Grievant, the pencil holder hit Ms. A in the head.

## **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

---

<sup>2</sup> Agency Exhibit 4.

require correction in the interest of maintaining a productive and well-managed work force.”<sup>3</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.”

Department of Human Resource Policy 1.80 addresses Workplace Violence. Workplace violence is defined 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 include “engaging in behavior that creates a reasonable fear of injury to another person” and “engaging in behavior that subjects another individual to extreme emotional distress.”

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.”

Group III offenses under DHRM Policy 1.60, Standards of Conduct, include, “threatening or coercing persons associated with any state agency (including, but not limited to, employees, ....”

Grievant engaged in workplace violence that rose to the level of a Group III offense. Grievant’s statement that she would “take care of” Ms. B and her baby was intended to threaten physical harm to Ms. B and her baby. Grievant maintained an intimidating physical presence as she interacted with Ms. B. Grievant created extreme emotional distress for Ms. B to the point that Ms. B was willing to throw a pencil holder at Grievant. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment.

Grievant denies threatening Ms. B and contends the Agency’s witnesses were untruthful regarding what they observed. She contends she was acting in self-defense. The Hearing Officer finds that the Agency’s witnesses were credible. Given the number of credible witnesses who offered similar testimony showing Grievant’s behavior, the Agency has presented sufficient evidence to support its issuance of a Group III Written Notice with removal.

---

<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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 based on her length of service and otherwise satisfactory work performance. Grievant has been promoted by the Agency and values her position. Upon consideration of these factors, the Hearing Officers finds that they are not sufficiently mitigating to reduce the disciplinary action under the *Rules*.

Grievant contends the Agency’s disciplinary action against her was intended to serve as retaliation against her for her prior complaints about how the Facility was being operated. No credible evidence was presented showing that the Agency took disciplinary action against Grievant in order to retaliate against her for engaging in a protected activity. Indeed, it is clear that the Agency took disciplinary action against Grievant because it believed Grievant engaged in workplace violence.

## 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**.

## 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

---

<sup>4</sup> Va. Code § 2.2-3005.

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.