

Issues: Group III Written Notice (threatening another employee) and Termination;  
Hearing Date: 06/18/08; Decision Issued: 06/19/08; Agency: VDOT; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 8866; Outcome: No Relief – Agency Upheld in Full;  
**Substituted Decision issued 06/20/08.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8866**

Hearing Date: June 18, 2008  
Decision Issued: June 19, 2008

**PROCEDURAL HISTORY**

On March 21, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for threatening or coercing persons associated with any State agency.

On April 2, 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 15, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 18, 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 employed Grievant as a Tunnel Patroller at one of its facilities until her removal effective March 21, 2008. She had been employed by the Agency for approximately 11 years. Her work performance had been satisfactory to the Agency.<sup>1</sup> No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On January 11 or 12, 2008, Grievant and another VDOT employee, Mr. C, went out on a date. They consumed alcohol. According to Mr. C, the date ended amicably. According to Grievant, Mr. C made an inappropriate sexual advance toward her which angered her. On the following Monday, January 14, 2008, Mr. C was working at the Facility. He worked near vehicle traffic making it difficult for him to use his personal cell phone or the Agency's land line. Grievant was not working that Monday.

Beginning at 10:20 a.m. and ending at approximately 2:46 p.m., Grievant left approximately 14 messages on Mr. C's cell phone.<sup>2</sup> Each message reflected a hostile demeanor towards Mr. C. The messages expressed Grievant's intent to intimidate Mr. C. The messages contained several threats. For example, at 10:20 a.m., Grievant stated, in part:

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<sup>1</sup> See Grievant's Exhibit 1.

<sup>2</sup> Grievant also spoke with Mr. C on an Agency land line.

And I will never forget it, or forgive it and I'm going to [Mr. C's Supervisor] and I'm pressing charges against you. Do you understand what I said? I'm pressing charges against you. For slander, attempted rape and everything else. You stay out of my life you drunk no good son of a bitch.

At 1:35 p.m., Grievant stated, in part:

I'm going to shoot your [slang word for penis] right off your f--king legs. Do you understand? I think you understand that in plain English. I will shoot your [slang word for penis] right off your plain god damn ugly fat worthless legs.

At 1:39 p.m., Grievant stated, in part:

But I don't like you because I had [Mr. K], and [Mr. K] comes back into the picture loud and clear saying you get f--ked, because I'm gonna f--k you up. You're gonna wish to God you never seen my face when I'm done with you, you piece of sh-t abusive mother f--ker. You used me and my credit card, I'm going to f--k you up. You ain't seen sh-t till I'm done with you. I'm going to destroy you.

The remaining messages contained threats and/or offensive comments.

When Mr. C listened to his messages he feared for his personal safety. He did not know what actions Grievant intended to take against him. He was concerned the Grievant intended to report him to his supervisor. Mr. C did not recall meeting or knowing Mr. K. Mr. C was fearful of Mr. K because Mr. C did not know whether Mr. K was willing or capable of harming Mr. C. Mr. C immediately reported his concern to the Agency.

## 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>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."

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<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.

"Threatening or coercing persons associated with any state agency (including, but not limited to, employees, supervisors, patients, and inmates, visitors, and students)" is a Group III offense. Grievant made numerous threats to Mr. C including that she would shoot his penis and "f—k him up". The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

Grievant argues that her statements were not that serious because she did not actually intend to harm Mr. C. She is not the kind of person who would actually physically harm another person. This argument fails because the Standards of Conduct focus on the act of threatening another person and not the likelihood that Grievant will carry out the threat. Grievant argues that Mr. C did not actually feel threatened by her comments. Following a criminal court proceeding against Grievant, Mr. C approach Grievant and hugged her and said he was sorry that she had lost her job. Mr. C testified at the hearing that he did not want Grievant to lose her job. This argument fails because the evidence showed that at the time Mr. C first listened to his messages on January 14, 2009 he was fearful of Grievant's and Mr. K's possible actions against him. The fact that Mr. C's fear of Grievant has diminished over time does not undermine the Agency's evidence showing that a serious threat was made on January 14, 2008.

Grievant argues she cannot be disciplined for behavior while she was not working at the Agency. Nothing in the Standards of Conduct requires this precondition. Grievant's behavior related to her employment because her actions were directed at a State employee while that employee was working thereby interfering with his work performance. Grievant's behavior affected the Agency and jeopardized her working relationship with another employee. The Agency has established that Grievant's behavior was sufficiently connected to her employment so as to justify taking disciplinary action against her.

*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 her otherwise satisfactory work performance and her 11 year length of service. These

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<sup>4</sup> *Va. Code § 2.2-3005.*

factors are not sufficiently mitigating under the *Rules* to reduce the disciplinary action against Grievant.

Grievant presented evidence<sup>5</sup> that she is receiving counseling for bipolar disorder and alcoholism.<sup>6</sup> Her medical provider testified that Grievant's bipolar disorder did not likely cause Grievant to make the offensive phone calls. The medical provider believed Grievant's telephone calls might have been influenced by her consumption of alcohol. The medical provider had not heard the telephone calls but based her conclusion on Grievant's representation that Grievant had consumed alcohol. After listening to the recordings of Grievant's telephone messages, the Hearing Officer finds that Grievant's demeanor is not consistent with someone who is intoxicated. Her words are clear, consistent, and reflect the demeanor of someone who is angry, not someone who is intoxicated. The Hearing Officer does not believe that any alcohol Grievant may have consumed on January 14, 2008 materially contributed to causing the telephone calls she made to Mr. C that day.<sup>7</sup> 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 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.

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<sup>5</sup> The Agency was unaware of Grievant's medical condition prior to the taking of disciplinary action. Grievant presented a statement from her mental health professional as part of the grievance step process.

<sup>6</sup> To the extent the Americans with Disabilities Act or the Family Medical Leave Act apply to Grievant, the outcome of this case is unaffected. Neither the ADA nor FMLA prohibits the enforcement of legitimate disciplinary action against employees. In this case, Grievant was not disciplined for behavior that might be considered protected leave under the FMLA.

<sup>7</sup> Also contributing to this conclusion was Grievant's subsequent behavior on May 28, 2008. No evidence was presented suggesting Grievant had consumed alcohol on that date. Grievant called the Operations Superintendent who had been involved in Grievant's disciplinary action and left a message saying that the ACLU was behind her and that the Operations Superintendent was a "f—king bitch."

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>8</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>8</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**

**SUBSTITUTED DECISION OF HEARING OFFICER**

In re:

**Case Number: 8866-S**

Hearing Date: June 18, 2008  
Decision Issued: June 20, 2008

**PROCEDURAL HISTORY**

On March 21, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for threatening or coercing persons associated with any State agency.

On April 2, 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 15, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 18, 2008, a hearing was held at the Agency's regional office.

This Substituted Hearing Decision replaces the decision issued on June 19, 2008 to include discussion of an additional issued identified during the hearing.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses



## **ISSUES**

5. Whether Grievant engaged in the behavior described in the Written Notice?
6. Whether the behavior constituted misconduct?
7. 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)?
8. 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 Tunnel Patroller at one of its facilities until her removal effective March 21, 2008. She had been employed by the Agency for approximately 11 years. Her work performance had been satisfactory to the Agency.<sup>9</sup> No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On January 11 or 12, 2008, Grievant and another VDOT employee, Mr. C, went out on a date. They consumed alcohol. According to Mr. C, the date ended amicably. According to Grievant, Mr. C made an inappropriate sexual advance toward her which angered her. On the following Monday, January 14, 2008, Mr. C was working at the Facility. He worked near vehicle traffic making it difficult for him to use his personal cell phone or the Agency's land line. Grievant was not working that Monday.

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<sup>9</sup> See Grievant's Exhibit 1.

Beginning at 10:20 a.m. and ending at approximately 2:46 p.m., Grievant left approximately 14 messages on Mr. C's cell phone.<sup>10</sup> Each message reflected a hostile demeanor towards Mr. C. The messages expressed Grievant's intent to intimidate Mr. C. The messages contained several threats. For example, at 10:20 a.m., Grievant stated, in part:

And I will never forget it, or forgive it and I'm going to [Mr. C's Supervisor] and I'm pressing charges against you. Do you understand what I said? I'm pressing charges against you. For slander, attempted rape and everything else. You stay out of my life you drunk no good son of a bitch.

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The remaining messages contained threats and/or offensive comments.

When Mr. C listened to his messages he feared for his personal safety. He did not know what actions Grievant intended to take against him. He was concerned the Grievant intended to report him to his supervisor. Mr. C did not recall meeting or knowing Mr. K. Mr. C was fearful of Mr. K because Mr. C did not know whether Mr. K was willing or capable of harming Mr. C. Mr. C immediately reported his concern to the Agency.

## **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>11</sup> Group II offenses "include acts and behavior which are more severe in nature

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<sup>10</sup> Grievant also spoke with Mr. C on an Agency land line.

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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, and inmates, visitors, and students)" is a Group III offense. Grievant made numerous threats to Mr. C including that she would shoot his penis and "f—k him up". The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

Grievant argues that her statements were not that serious because she did not actually intend to harm Mr. C. She is not the kind of person who would actually physically harm another person. This argument fails because the Standards of Conduct focus on the act of threatening another person and not the likelihood that Grievant will carry out the threat. Grievant argues that Mr. C did not actually feel threatened by her comments. Following a criminal court proceeding against Grievant, Mr. C approach Grievant and hugged her and said he was sorry that she had lost her job. Mr. C testified at the hearing that he did not want Grievant to lose her job. This argument fails because the evidence showed that at the time Mr. C first listened to his messages on January 14, 2009 he was fearful of Grievant's and Mr. K's possible actions against him. The fact that Mr. C's fear of Grievant has diminished over time does not undermine the Agency's evidence showing that a serious threat was made on January 14, 2008.

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*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>12</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

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<sup>12</sup> *Va. Code § 2.2-3005.*

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 her otherwise satisfactory work performance and her 11 year length of service. These factors are not sufficiently mitigating under the *Rules* to reduce the disciplinary action against Grievant.

Grievant presented evidence<sup>13</sup> that she is receiving counseling for bipolar disorder and alcoholism.<sup>14</sup> Her medical provider testified that Grievant's bipolar disorder did not likely cause Grievant to make the offensive phone calls. The medical provider believed Grievant's telephone calls might have been influenced by her consumption of alcohol. The medical provider had not heard the telephone calls but based her conclusion on Grievant's representation that Grievant had consumed alcohol. After listening to the recordings of Grievant's telephone messages, the Hearing Officer finds that Grievant's demeanor is not consistent with someone who is intoxicated. Her words are clear, consistent, and reflect the demeanor of someone who is angry, not someone who is intoxicated. The Hearing Officer does not believe that any alcohol Grievant may have consumed on January 14, 2008 materially contributed to causing the telephone calls she made to Mr. C that day.<sup>15</sup>

Grievant presented evidence that one employee threatened harm to another employee but the employee making the threat remained employed by the Agency with no disciplinary action being taken against that employee. This example does not show the inconsistent application of disciplinary action by the Agency because the facts underlying that case were in dispute. Only the two employees were involved in the altercation and the employee alleged to have made the threat denied making the threat. The Agency could not determine who was telling the truth, so it did not take disciplinary action. In Grievant's case, there is no dispute that she made the threats.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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<sup>13</sup> The Agency was unaware of Grievant's medical condition prior to the taking of disciplinary action. Grievant presented a statement from her mental health professional as part of the grievance step process.

<sup>14</sup> To the extent the Americans with Disabilities Act or the Family Medical Leave Act apply to Grievant, the outcome of this case is unaffected. Neither the ADA nor FMLA prohibits the enforcement of legitimate disciplinary action against employees. In this case, Grievant was not disciplined for behavior that might be considered protected leave under the FMLA.

<sup>15</sup> Also contributing to this conclusion was Grievant's subsequent behavior on May 28, 2008. No evidence was presented suggesting Grievant had consumed alcohol on that date. Grievant called the Operations Superintendent who had been involved in Grievant's disciplinary action and left a message saying that the ACLU was behind her and that the Operations Superintendent was a "f—king bitch."

## 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:

4. 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.
5. 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  
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6. 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:

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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>16</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>16</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.