Issue: Group II Written Notice (failure to follow policy and insubordination); Hearing Date: 12/08/08; Decision Issued: 12/15/08; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8965; Outcome: Full Relief.

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8965**

Hearing Date: December 8, 2008
Decision Issued: December 15, 2008

## PROCEDURAL HISTORY

On June 23, 2008, Grievant received a Group II Written Notice of disciplinary action for failure to comply with policy, insubordination, and disruptive behavior. On July 22, 2008, Grievant filed a grievance challenging the Agency's action. The Third Step Response was not satisfactory to Grievant and he requested a hearing. On October 20, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 8, 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:

Virginia Commonwealth University employs Grievant as a Sergeant in its Police Department. He has been employed by the Agency for approximately 22 years. No evidence of prior active disciplinary action against him was introduced during the hearing.

Grievant reports to the Direct Supervisor who reports to the Lieutenant. Grievant had a series of long-standing disputes with the Lieutenant. In March 2008, Grievant wrote a six-page letter to the Lieutenant outlining Grievant's concerns regarding the Lieutenant's management style.

Grievant assisted Officer P by drafting an e-mail describing information regarding an incident that occurred on campus. Officer P told Grievant incorrect information about the incident including incorrectly identifying the name of the student injured. On May 5, 2008, Grievant sent the e-mail to several employees in the Police Department including the Lieutenant as well as to other departments in the University. Officer P realized he had made a mistake and informed Grievant of the correct information regarding the incident. Approximately 1.5 hours after sending the first e-mail, Grievant sent a second e-mail correcting the first e-mail and asking the recipients to disregard the prior e-mail.

The Lieutenant read his e-mails in the order in which he received them. Thus, he first read Grievant's incorrect e-mail. The Lieutenant noticed that the e-mail was incorrect and replied to Grievant as follows:

> I have just completed reading the report concerning [student name]. The report indicates that [student name] was assaulted by an unknown black male after being approached when leaving the [location]. The report that references the sick case should have been [numbers], not [other numbers]. The victim is [name of another student], which indicates that the only information that is correct in your e-mail is that a student cut his hand. Again wrong information has been distributed to university officials. Now a [retraction] has to be sent by me. These are the types of mistakes that make other departments/officials think we don't know what we are doing.

As the Lieutenant read his remaining emails, he noticed that Grievant had sent a second e-mail correcting the first e-mail Grievant sent. The Lieutenant then sent Grievant a second e-mail advising Grievant to disregard the Lieutenant's prior e-mail which pointed out the errors in Grievant's first e-mail to the Lieutenant.

Although Grievant had received the Lieutenant's second e-mail instructing Grievant to disregard the Lieutenant's first e-mail, Grievant remained incensed. On May 6, 2008 at approximately 3:40 a.m., Grievant sent the Lieutenant an e-mail stating, in part:

> It is with deep regret that I am continuing to receive, and hear that other supervisors continue to receive critical/ "Nasty" e-mails sent by you. It is apparent that the six page letter I submitted a few months ago failed to have an impact on premature corrective judgment against subordinates when a mistake is made. Your previous e-mail to me in regards to my submission of a sick case to you and university officials implies to me that I don't know what I'm doing.
> ***
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> Your previous e-mail submitted at 9:03 a.m. on May 5, 2008 and others like it, is stressful to subordinates. Needless to say, it creates a hostile environment which is contrary to positive leadership, production, and professionalism of this agency. Your argument in your e-mail is that, "These are the types of mistakes that make other departments/officials think we don't know what we are doing." Nevertheless, from the White House to the poor house, we all make mistakes. Do not be mistaken, I certainly rank among the highest in this agency in wanting the best in reaching the highest peak of professionalism and productivity. Therefore, please do not take my writing to you offensively.
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> In conclusion, I invite anyone in this university from [the President] on down to a roundtable discussion, IF THEY ARE THAT NARROW AND HIGH MINDED to believe that we are perfect and without error from time-to-time. Managers and supervisors need to stand against the unfair and demoralizing criticism that disrupts productivity, irrespective of its genesis.

> We sent numerous emails from incidents that occurred this past weekend, it is not unlikely, nor unprofessional that one may be with error. I thank you for the corrective follow-up emails, however, with respect to you, your position, and this agency, may I suggest that all means/efforts are exhausted before concluding judgment against others.

On May 7, 2008 at 3:13 a.m., Grievant sent the Lieutenant and other e-mail stating, in part:

> I will not continue to battle with you over this matter through e-mail. I'm not surprised by your response. It is clear to me and others that share your antiquated views of police management that you find it appropriate to rule with an iron fist. You think that you are too important to be corrected by anyone. And yet, you are totally ignorant to the fact that it is a sin and GOD'S eyes (your maker) to refuse to be corrected by others (see your Pastor).
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> It is this kind of narrow-minded thinking that causes people to act like fools thinking that their position in life is who they are. Needless to say, [Lieutenant] it's way deeper than that, and it's sad that you don't know. Well, I hate to be the bearer of bad news, because [Grievant] has had it with this kind of stupidity/ignorance that creates unnecessary stress in the workplace. You see, God gave me this job, not you, or anyone else.
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> Also, let it be known that I made it clear to the Chief, and I thought you were clear on the same that I do not, and will never as long as I live agree with the bias finding of my letter. If you think, or anyone else thinks that I'm ignorant to the process, don't fool yourself, you see, this is not about what you think or anyone else in this agency thinks about [Grievant], it is what [Grievant] knows that's right in life and what's wrong, and apparently you don't.
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> I say this to you, and everyone else that needs to know, I don't fear no man, and that certainly includes you. Let it be clearly known that I am sick and tired of you and people like you with your antiquated, and nasty ways, and you expect me to accept that ignorance. I could care less what you think of me and, I don't agree with nothing you wrote in response to me, because I know the truth.
> ***
>
> Please, don't think for one minute that I'm bluffing nor perceive this as a threat. I suggest that you seriously stop and think about the hatred you have created in others, and myself over the past years. You have told me in the past that you don't care about me. Be that which it may, I am prepared to spend my last dime fighting against you, if that's what it takes. I will never bow down to your ignorant actions against me in my

> workplace. Think for a second, you have a boss, every boss has a boss, and bosses boss have a boss. I am prepared to take this to the highest of bosses if needed to reveal the truth. I stand for righteousness and that's the bottom line.

## CONCLUSIONS OF POLICY

Grievant's emails are contrary to the Agency's Policy 0522 governing conduct by its employees. This policy requires employees to "[a]void completely the use of profane or insulting language or menacing gestures towards other employees and the public." It also requires employees to "[a]lways strive to create a loyal working attitude. With this purpose in mind, employees should avoid statements, which could lower morality and diminish public respect." Grievant insinuates that the Lieutenant is narrow-minded, ignorant, antiquated and nasty, and is a fool. Grievant insulted the Lieutenant. Grievant's actions are insubordinate because thhe directly challenge the Lieutenant's authority and leadership. The Lieutenant is a ranking officer.

Grievant's response to the Lieutenant is emotional, arrogant, and abrasive. Every point that Grievant wished to convey could have been conveyed in a professional manner without using such offensive language and tone.

Even though Grievant's emails are offensive and inappropriate in the workplace, they are protected speech under the rulings of the EDR Director.

In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation:

> The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline).

Virginia Code § 2.2-3000(A) states:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The EDR director concluded:

> Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."

The EDR Director has broadly interpreted Virginia Code § 2.2.-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

In EDR Ruling 2009-2128, the EDR Director narrowed the protection as follows:

> This protection, however, is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness.[1] The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis.[2] Further, under analogous Title VII retaliation case law, it is important to note that:
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> > [a]lmost every form of 'opposition to an unlawful employment practice' [the "protected act" under Title VII] is in some sense 'disloyal' to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies. Otherwise the conduct would not be 'opposition.' If discharge or other disciplinary sanctions may be imposed

[1] *Cf.* Equal Employment Opportunity Commission (EEOC) Compliance Manual, Section 8, "Retaliation," at 8-7, at http://www.eeoc.gov/policy/docs/retal.html (protected acts under Title VII must be "reasonable" for the anti-retaliation provisions to apply). While Title VII is not at issue in this case, its retaliation analysis is analogous to other "protected act" retaliation claims.

[2] The agency appears to argue that the Grievant's e-mail was misconduct because it circumvented a "communication protocol" by communicating directly with the Board. Regardless of whether this conduct was actually charged on the Written Notice, the hearing officer found that the Board was part of agency management. Consequently, communication to the Board is conduct generally protected by Va. Code § 2.2-3000 ("employees shall be able to discuss freely, and without retaliation, their concerns with . . . management"). As such, an employee's failure to comply with an agency "communication protocol" barring complaints to management does not constitute "misconduct" and thus would not justify discipline, unless the employee's communication was somehow unlawful or otherwise exceeded the limits of reasonableness.

> simply on 'disloyal' conduct, it is difficult to see what opposition would remain protected.[3]
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> The same can be said for the ability of an employee to raise their workplace concerns with management, which the General Assembly has protected in Virginia Code § 2.2-3000.

Grievant's two e-mails are protected because they are an attempt to discuss his concerns with his supervisor. Grievant does not engage in any unlawful behavior by sending the e-mails and the e-mails do not otherwise exceed the limits of reasonableness. Although Grievant threatens the Lieutenant, Grievant's threat appears to be to utilize lawful means of complaint such as speaking with the Lieutenant's supervisors. Because Grievant's e-mails are protected, the disciplinary action against them must be reversed.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**.

## 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 14th St., 12th 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

[3] Dea v. Wash. Suburban Sanitary Comm'n, 11 F. App'x 352, 363 (4th Cir. 2001) (quoting EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1014 (9th Cir. 1983)).

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
600 East Main St. STE 301
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.[4]

[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

[4] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.