

Issues: Group III Written Notice (threatening another employee) and Suspension;  
Hearing Date: 11/10/08; Decision Issued: 11/12/08; Agency: DMHMRSAS; AHO:  
Carl Wilson Schmidt, Esq.; Case No. 8966; 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: 8966**

Hearing Date: November 10, 2008  
Decision Issued: November 12, 2008

**PROCEDURAL HISTORY**

On August 7, 2008, Grievant was issued a Group III Written Notice of disciplinary action with a 30 work day suspension for threatening a coworker.

On August 12, 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 October 7, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 10, 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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Food Service Tech. at one of its Facilities. She has been employed by the Agency for approximately 33 years. The purpose of her position is:

To accurately retrieve bulk food ingredients and process them into finished food products for transfer to individual meals.

To serve individual portions onto trays in accordance with the nutritional needs of clients.

To package individual meals for shipment to client residential areas.

To perform continuous sanitation measures in assigned work areas and on utensils and other food service equipment. HIPPA Level Four: No access. Utilization of information will be in accordance with HIPPA regulations regarding use limitation, disclosure and requests of PHI.<sup>1</sup>

No evidence of prior active disciplinary action was introduced during the hearing.

Grievant and Ms. J, a coworker, have not liked one another for several years. On July 25, 2008, Grievant and Ms. J were working in the same building at the Facility. Grievant was holding a lid to a pan she obtained from the dish room. Grievant began walking. As she walked, she tapped the lid on her hip. Ms. J observed this and

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<sup>1</sup> Agency Exhibit 3.

believed Grievant was tapping the lid on her rear end. Ms. J construed this as an expression by Grievant that Ms. J should kiss Grievant's rear end. Ms. J complained to her supervisor about Grievant's behavior.

Grievant met with Ms. J, two supervisors and the Manager in the Manager's office. Ms. J said Grievant was tapping the lid on her rear end as an insult to Ms. J. Grievant became irate. Grievant said that Ms. J was lying and that Grievant was tired of Ms. J lying about Grievant. Grievant said that if Ms. J kept messing with Grievant, she would get someone to beat Ms. J. Grievant then said that Grievant would get her daughter to do something to Ms. J at 3 p.m.<sup>2</sup> Ms. J perceived Grievant's comments as a threat of physical harm against her. The Manager instructed Grievant to calm down. Ms. J left the meeting. The Manager spoke with Grievant and Grievant apologized to the Manager. She also apologized in her written statement.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>3</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[T]hreatening others" is a Group III offense. Grievant threatened to harm Ms. J, a co-worker. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for threatening Ms. J. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment. In this case, the Agency chose to mitigate the disciplinary action to a 30 work day suspension in lieu of removal. The Agency's suspension must be upheld because it is authorized by the Standards of Conduct.

*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

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<sup>2</sup> Grievant's daughter ended her work-shift at 3 p.m.

<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.

<sup>4</sup> *Va. Code § 2.2-3005.*

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 she did not mean what she said. She made her threat out of anger. The Agency replies that Grievant’s apology and length of service are reasons why the discipline was reduced from termination to a 30 day suspension. Based on these facts and the facts of this case, the level of discipline chosen by the Agency is consistent with the Standards of Conduct and does not exceed the limits of reasonableness. 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 30 day work 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>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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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