

Issues: Group III Written Notice (workplace violence), and Termination; Hearing Date: 01/23/09; Decision Issued: 04/20/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9005; Outcome: Partial Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9005**

Hearing Date: January 23, 2009  
Decision Issued: April 20, 2009

**PROCEDURAL HISTORY**

On September 23, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace violence. On October 19, 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 he requested a hearing. On December 3, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 23, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
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?
5. Whether the Agency retaliated against Grievant?

### **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 Crewmember at one of its Facilities. He had been employed by the Agency as a full time classified employee for approximately 16 years. Grievant had prior active disciplinary action. On December 10, 2007, Grievant received a Group II Written Notice regarding receiving personal calls on his Agency cell phone.<sup>1</sup>

On October 26, 2007, Grievant received a performance evaluation. Grievant's Supervisor wrote:

During this period, [Grievant] has engaged in two verbal altercations with two different employees at this Headquarters which disrupted the work force. [Grievant] was counseled for each incident; documentation was forwarded to Human Resources. In the interest of promoting safety and confidence among crewmembers, [Grievant] should make an effort to work as part of a team by controlling his temper and discussing issues as they arise rather than participating in verbal confrontations.<sup>2</sup>

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<sup>1</sup> Agency Exhibit 8.

<sup>2</sup> Agency Exhibit 9.

Grievant received several evaluations with favorable comments about his strong work ethic. For example, his 2004 evaluation states that Grievant is “an exceedingly hard worker with impeccable crew management skills.”<sup>3</sup>

On May 31, 2007, Mr. F held a staff meeting which included Grievant to inform staff about the Agency’s workplace violence policy. He mentioned that employees should “watch your remarks.”

Grievant and Mr. J had an ongoing conflict and dislike of one another.

Grievant worked as a member of a crew. On July 11, 2008, Grievant’s crew began asphalt milling and patchwork on a road in the locality. Grievant was late to work and the crew had already arrived at the worksite and started working.<sup>4</sup> The TOM III, Mr. H, and the Superintendent, Mr. F, were approaching the worksite to inspect the work activities which were ongoing prior to their arrival. Grievant also approached the work site. Mr. H questioned Grievant as to why he was late.<sup>5</sup> Grievant responded that this was the first time he was late and that he is otherwise never late. Mr. H responded, “Well, you better go get with the crew since you are late.” Grievant went to the work zone and as soon as he got there, he picked up a broom. The broom was approximately six feet in length. It had a foot and a half steel brush. Mr. J noticed Grievant’s late arrival and said sarcastically and loudly, “Oh, so you are going to work today?” Grievant said, “What, the hell are you talking about?” Mr. J said, “You sat in the truck all day yesterday. Now that the Big Boss<sup>6</sup> is here, you are going to do some work?” Mr. J’s intent was to embarrass Grievant in front of the “Big Boss” and Grievant’s co-workers. Grievant became angry. Grievant began yelling. Grievant said, “F—k that! I am not going to listen to this!” Grievant threw the broom across the street. He threw the broom in a direction towards Mr. F but away from Mr. J. Mr. J got down from a piece of equipment and began moving towards Grievant. Grievant started to move in the direction towards Mr. J and yelling, “This is bullsh-t!” Mr. H told Grievant to calm down. Mr. H intervened to block Grievant’s advancement towards Mr. J.<sup>7</sup> Mr. H said, “Hold on, let’s calm down and discuss this.” Mr. H again instructed Grievant to calm down. Grievant continued to yell and curse at Mr. J. Grievant yelled that he could not work with Mr. J. Mr. H again told Grievant to calm down. Mr. H was concerned that a physical fight might occur between Grievant and Mr. J. Mr. H concluded Grievant and Mr. J could not work together so he separated them for the rest of the day. Mr. H sent Mr. J back to Headquarters to work elsewhere. Mr. H told Grievant that Grievant should have ignored Mr. J and walked away to let the supervisors address Mr. J.

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<sup>3</sup> Grievant Exhibit 15.

<sup>4</sup> Grievant had called the Supervisor to advise him that Grievant would be late that day.

<sup>5</sup> Grievant and Mr. H were approximately 100 yards from the work site when they had their discussion.

<sup>6</sup> Mr. J was referring to Mr. H as the big boss.

<sup>7</sup> Mr. J perceived that Grievant was going to attack him.

The Agency issued Mr. J a Group I Written Notice for disruptive behavior. Mr. J had not been disciplined for disruptive behavior in the past and Mr. H did not believe Mr. J intended to physically fight Grievant.

## 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>8</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.”

DHRM Policy 1.80 defines workplace violence 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 under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual’s position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;

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<sup>8</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

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.

VDOT's Workplace Violence policy provides that the Agency has zero tolerance for acts or threats of violence against employees. Workplace violence includes, any act of violence, harassment, intimidation, or other threatening behavior that occurs in the workplace. Violation of VDOT's Workplace Violence policy may result in disciplinary action including termination.

Grievant engaged in workplace violence by throwing a tool in anger and turning to continue a confrontation with Mr. J. Grievant was unable to control his anger even after repeatedly being asked to calm down. Grievant was yelling as he approached Mr. J and Mr. H had to intervene to prevent further confrontation. Grievant intended to be intimidating and threatening towards Mr. J. The Agency has presented sufficient evidence to establish that Grievant engaged in workplace violence.

Grievant argues that he was trying to diffuse the situation by leaving. This assertion is unsupported by the evidence. Mr. H repeatedly attempted to calm down Grievant. It was necessary for Mr. H to place himself between Grievant and Mr. J because Mr. H believed the two men might fight. If Grievant had been attempting to deescalate the situation, it would not have been necessary for Mr. H to separate Grievant and Mr. J.

Grievant contends the Agency did not engage in progressive discipline. Although the Standards of Conduct encourages progressive discipline, State agencies are not required to establish progressive discipline as a precondition to issuing formal disciplinary action.

*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

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<sup>9</sup> *Va. Code § 2.2-3005.*

disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Mitigating factors exist to reduce the Group III Written Notice to a Group II Written Notice. First, although the Agency has consistently disciplined its employees for the most part, several examples were presented where it does not appear that the Agency properly addressed violent behavior. In particular, Mr. W got into several confrontations with other employees and the consequences for him were only counseling or a Group I Written Notice.<sup>10</sup> Second, Mr. J provoked Grievant's behavior. It is not clear that Agency supervisors at the worksite reacted to Mr. J to stop his behavior as quickly as they could have done so. There were three supervisors at the worksite. Several of those supervisors knew of the history of confrontation between Grievant and Mr. J and could have recognized that Mr. J was provoking Grievant. Third, Grievant had been employed by the Agency as a full time classified employee for approximately 16 years. He has received performance evaluations rating his overall performance as "Contributor."

The Agency contends aggravating circumstances exist to counter any mitigating circumstances. On September 17, 2008, when Grievant was presented with a notice of intent to issue him a Group III Written Notice with removal, he reacted violently by throwing a table, cursing, and kicking chairs as he exited the Agency's Facility. Grievant's behavior on September 17, 2008 would give rise to a separate disciplinary action. Grievant's behavior on September 17, 2008 was not a part of his behavior on July 11, 2008. It was not a factor that would have increased the severity of his behavior on July 11, 2008 or increased the hardship on the Agency. Grievant's behavior on September 17, 2008 does not serve as an aggravating circumstance to eliminate the mitigating circumstances in this case.

Although the Hearing Officer will reduce the Group III to a Group II Written Notice, Grievant has an active existing Group II Written Notice. With the accumulation of a second Group II Written Notice there remains a sufficient basis to uphold the Agency's decision to remove Grievant from employment.

Grievant argued that the Agency was slow to issue the Written Notice. This has no bearing on the outcome of the case. The Agency's delay was not unreasonable.

As a result of removal, Grievant has experienced several personal and financial hardships. Although Grievant's difficulties are real and unfortunate, the EDR Director has not authorized hearing officers to consider these problems as mitigating factors.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>11</sup> (2) suffered a

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<sup>10</sup> On one occasion, Mr. W took a radio from another employee who was holding it. A significant confrontation followed.

<sup>11</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the

materially adverse action<sup>12</sup>; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>13</sup>

Grievant engaged in a protected activity. Grievant's Supervisor, Mr. K, operated a private part time business. He would use the Agency's Facility to park some of his equipment overnight. Grievant reported this activity to Mr. H. Mr. H told Mr. K to discontinue his practice of using Agency facilities for his private business. Grievant suffered a materially adverse action because he received a Written Notice. Grievant has not established a nexus between his protected activity and the materially adverse action. Grievant's Supervisor was not the primary force and decision maker behind issuing the Group III Written Notice with removal. Mr. H was that person. There is no reason to believe that Mr. H perceived Grievant's report about the Supervisor as anything but helpful to the Agency. Mr. H decided to take disciplinary action against Grievant because he 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 is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

## 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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General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>12</sup> On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

<sup>13</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).



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  
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.<sup>14</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>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.