Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 06/21/10; Decision Issued: 06/28/10; Agency: VDOT; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9348; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9348

Hearing Date: June 21, 2010
Decision Issued: June 28, 2010

PROCEDURAL HISTORY

On March 16, 2010, Grievant, an engineering technician with the Department of Transportation, was issued a Group III Written Notice of disciplinary action, with termination, for violation of Department of Human Resource Management ("DHRM") Policy 1.80, Workplace Violence.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On May 24, 2010, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on May 28, 2010. The parties scheduled the grievance hearing for the first date available between the parties and the hearing officer, Monday, June 21, 2010, on which date the grievance hearing was held, at the Agency's headquarters facility.

The Agency submitted documents for exhibits that were, with one objection from the Grievant, admitted into the grievance record, and will be referred to as Agency's Exhibits. The Grievant objected to Agency Exh. 3, the investigation report, to the extent it contained factual assertions without witness foundation. Agency Exh. 3 was admitted into the grievance record over the Grievant's objection. The Grievant submitted documents for exhibits that were, without objection, admitted into the grievance record. All evidence presented has been carefully considered by the hearing officer.

APPEARANCES

Grievant
Counsel for Grievant
Representative for Agency
Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group III Written Notice and reinstatement to her position, with back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> 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 which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

DHRM Policy 1.60, Standards of Conduct, defines Group III offenses to include types of act and behavior of such a serious nature that a first occurrence normally should warrant removal. This level is appropriate for offenses that, for example, endanger others in the workplace or other serious violations of policies, procedures, or laws. Agency Exh. 7. One such example stated in the policy is "threatening others." *Id.*

DHRM Policy 1.80, Workplace Violence, defines "workplace violence" as follows:

> 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.

According to the policy, 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;
- 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.

The policy further states that "[e]mployees violating this policy will be subject to disciplinary action under Policy 1.60, Standards of Conduct, up to and including termination, based on the situation." Agency Exh. 5.

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as an engineering technician with over 23 years tenure with the Agency. The Grievant's employment record has no other active Written Notices, and all of the Grievant's performance evaluations through the years were at least "contributor."

As part of the Agency's required budget cuts, the Grievant was notified in January 2010 that her position was targeted for layoff effective April 25, 2010. The Grievant was an

"outspoken" employee of the Agency, and she expressed her emotion regarding this layoff, which she had not expected. The Agency had an option for laid off employees to apply for other available placements, and the Grievant was optimistic of getting a placement. Part of the Grievant's outspoken history included making several referrals to the state's fraud and abuse hotline. The Grievant testified that her outspokenness led the Agency to target her for layoff and to fabricate the threat allegations.

According to Agency witnesses, after learning of her layoff, on at least two occassions, the Grievant voiced to other Agency employees some variation of the statement that someone needs to put a bullet into a certain member of senior management. One of the witnesses was concerned after hearing the comments and notified her manager who recommended notifying the Agency's human resources, which started an investigation. The Grievant testified that this complaining witness held resentment against her. The Agency's employee relations manager, being unsure of the level of the threat, referred the complaint to the Capitol Police, from which an officer investigated. The officer testified at the grievance hearing that the matter did not rise to the level of a criminal charge.

The other witness who overheard a separate but similar comment testified that it raised no alarm and he did not take it seriously. Other witnesses testified to the Grievant being "vocal" about the layoff and hearing the Grievant describe the layoff as leading her to consider suicide, either by driving in the path of a tractor trailer or staring down a "9 millimeter." While recognizing the Grievant's outspokenness, no witnesses testified that the Grievant had any prior history or inclination of violent or threatening behavior.

The Grievant adamantly denied all of the comments regarding bullets and suicidal ideation. The Grievant admitted to stating during a Christmas party (before the layoff notice) that if she were laid off she would have to pitch a tent in one of the director's yards with a homeless sign blaming the Agency.

The employee relations manager testified that she was concerned about the safety of the alleged target of the bullet comments and other employees, and the Agency needed to follow the policy to protect the Agency's employees. The employee relations manager testified that she offered the Grievant access to the employee assistance program, but, while denying the comments, the Grievant refused the service. The employee relations manager testified to the consistent good performance evaluations that lacked any mention over the years of errant behavior by the Grievant. Witnesses testified to the Grievant's good work ethic and competence. Six managers and co-workers provided letters of recommendation to the Grievant. Grievant's Exh. 6. The employee relations manager testified to a zero tolerance approach to threats under Policy 1.80 and that the Grievant's work tenure and good work record did not mitigate against discharge.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing

officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

As referenced above, the offense of workplace violence falls squarely within the Group III category of offenses. The Agency, however, has the burden of proving the offense and justifying the discipline. The discipline was based on a described "zero tolerance" of any conduct deemed to fall under the workplace violence policy.

Based on the manner, tone, demeanor, and corroboration of all the witnesses, I find the Grievant made the offending remarks and that the remarks constitute either of the following examples enumerated in Policy 1.80 or conduct of a similar vein:

- engaging in behavior that creates a reasonable fear of injury to another person;
- threatening to injure an individual or to damage property;

The enumerated conduct covered by the policy is not all inclusive. The comments that someone should use a bullet is more of an indirect threat rather than direct. However, based on the manner, tone, demeanor, and corroboration of all the witnesses, I find the Grievant's denials of the bullet and suicidal comments to be incredible. The weight of the multiple and unconnected witnesses' testimony show by a preponderance of the evidence that the Grievant made the comments about someone putting a bullet in a certain senior director and suicidal ideation. The Grievant's outright denials are not reconcilable with the weight of the testimony. With that stated, however, the Agency still has to prove that the threat was serious enough to warrant discharge under all the circumstances. The investigating police considered the threat unworthy of a criminal charge, and multiple witnesses testifying to the comments did not take them seriously. While the Agency can point to its obligation to guard the safety of the workplace, it has the obligation to make a reasonable assessment of the threat when determining the level of discipline. The Agency's application of a zero tolerance requiring discharge in this and all circumstances is not supported by the policy. However, the Grievant's conduct of denial certainly did not help the cause of the Agency's investigation or the Grievant's defense.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." The Agency's witness testified that mitigation was considered, namely the Grievant's long tenure and good performance evaluations. However, the Agency stated there was a zero tolerance for instances of workplace violence, indicating that termination was the only option. While the hearing officer

must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness. The applicable policy does not declare a zero tolerance position that mandates termination in every case. The policy specifically states that employees will be subject to discipline "up to and including termination, based on the situation." There is no evidence of notice to the Grievant of a zero tolerance policy.

Here, the Agency does not advance any position that it meaningfully considered mitigating circumstances. The workplace violence policy does not anticipate or require a single sanction discipline of termination. When considering the claimant's tenure, work record, and the emotional whirl the news of an unexpected layoff can create, offhand remarks and "venting" such as happened here is certainly regrettable. The Grievant should have better controlled her outspoken nature in this instance. However, the complaining witness voiced some hesitation about the seriousness of the comment. The other independent witness who testified to the second instance never considered the comment to be serious. The investigating police officer deemed the threat not to rise to the criminal level. Combined with the relative lack of seriousness of those actually hearing the threat comment, the Grievant's long tenure and consistently good performance evaluations should have been considered by the Agency as mitigating circumstances. The level or seriousness of the threat should have been evaluated when considering whether to discharge the Grievant. The workplace violence policy explicitly anticipates a continuum of discipline for violations, depending on the circumstances. The Agency did not follow the policy by making a meaningful assessment of the circumstances. Accordingly, the termination is found to exceed the limits of reasonableness.

On the other hand, this finding that the Agency has not met its full burden to prove that discharge was within reasonable bounds creates a dichotomy, as it is in direct conflict with the Grievant's testimony that she absolutely did not say the offensive statements. This presents aggravating circumstances by the Grievant that temper the relief to which she is entitled. The Grievant's denial of making the offending comments during the investigation stage may have hampered the Agency's ability to exercise discretion and assessment of the threat level. The Grievant's testimony at the grievance hearing is found to be incredible and less than forthright. Normally, a party can rise no higher than her own testimony and cannot adopt a theory of recovery supported by other evidence when such other evidence is contrary to or inconsistent with her own testimony. *Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922). However, here, the Agency has the burden of proof, regardless of the Grievant's testimony. I find that the Grievant's denial of the "bullet" statements to be incredible, and, because of this finding of aggravating circumstances, this conduct and circumstance mitigates against full relief.

Retaliation

To establish a *prima facie* case of retaliation, the grievant must show that: (1) she engaged in protected activity; (2) she suffered a materially adverse employment action; and (3) a causal connection exists between the protected activity and the materially adverse employment action. *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001). Only certain activities are protected activities under the state grievance procedure. They include "use of or participation in

the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law." *See* Va. Code § 2.2-3004(A). The grievance statute also provides that it is "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." Va. Code § 2.2-3000.

The Grievant engaged in protected activity, *i.e.*, her multiple complaints to the state's fraud and abuse hotline. If the grievant makes a *prima facie* case of retaliation, the agency merely has to proffer a legitimate, non-discriminatory reason for the discipline, which it did. In cases where a plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the agency to articulate some legitimate, nondiscriminatory reason for the agency's action. *See McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802, 803 (1973). The agency needs only to proffer a legitimate, non-discriminatory reason; it is not required to prove it. Put another way, the burden is one of production, not persuasion; it "can involve no credibility assessment." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). The burden of proof is at all times with the grievant. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). (The ultimate burden of persuading the trier of fact remains at all times with the plaintiff).

As stated above, for the Grievant to show retaliation, she must show that (1) she engaged in a protected activity; (2) she suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the employee must then present sufficient 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. On this issue, I find the Grievant has not borne her burden of proving the Agency's issuance of the Group III Written Notice was merely pretextual.

DECISION

For the reasons stated herein, 1) the Agency's issuance of a Group III Written Notice is **upheld**; 2) the Agency's termination is **reversed** because of mitigating circumstances; 3) the Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position (recognizing that the Grievant is facing layoff[1]). Because of the Grievant's conduct in denying the errant remarks and her lack of forthrightness in her defense, I find extenuating circumstances that make an award of back pay unwarranted. Thus, the reinstatement is **without back pay**. Finally, because of the aggravating circumstances resulting

[1] Although the Grievant voiced complaints about the layoff plan, this grievance decision has no effect on the Agency's layoff plan.

in no back pay, I find the same to constitute special circumstances that make an award of attorney's fees unjust.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer