

Issue: Group III Written Notice with termination (threatening behavior); Hearing Date: 01/11/11; Decision Issued: 01/18/11; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9482; Outcome: No Relief – Agency Upheld; **Administrative Review**: AHO Reconsideration Request received 02/02/11; Outcome pending; **Administrative Review**: DHRM Ruling Request received 02/02/11; Outcome pending.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9482**

Hearing Date: January 11, 2011  
Decision Issued: January 18, 2011

**PROCEDURAL HISTORY**

On August 30, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for threats and intimidating behavior toward another employee.

On September 24, 2010, 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 December 20, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 11, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 an Operation Crewmember Lead at one of its Facilities. She had been employed by the Agency for over 30 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing. Except with respect to the facts giving rise to this grievance, Grievant's work performance was satisfactory to the Agency.

Mr. J worked as a Traffic Controller at one of the Agency's Facilities. He was responsible for sitting in front of a monitor and observing the flow of traffic and observing areas near the Facility. When he needed to communicate with other employees working on roads or in other parts of the Facility, he would use a radio. All employees carrying radios could overhear Mr. J's comments including the employee to whom Mr. J's comments were directed. Many employees working with Mr. J sometimes perceived his comments made over the radio to be abrasive. Although Mr. J did not supervise other employees, he often spoke to them in a manner to suggest he held a superior position. For example, on occasion he would use the radio and order another employee to accomplish a specific task. He would use a stern voice that many other employees perceived as "talking down" to them. In 2006, a coworker, Mr. M, was so offended by the manner in which Mr. J spoke to him over the radio that he threatened to harm Mr. J. He was unsuccessful and ultimately removed by the Agency for his behavior directed towards Mr. J.

On August 4, 2010, the Supervisor was away from the Facility taking a class. Grievant assumed the Supervisor's duties. This meant that Mr. J reported to Grievant. At approximately 8:40 a.m., Mr. J received a call from the maintenance staff who indicated they wished to move office furniture from one location to another. Mr. J called the Manager and asked what to do. Following that conversation, Mr. J called Grievant on the radio. Mr. J demanded that Grievant immediately stop what she was doing and go to another area to pack her belongings so the office furniture could be moved. Grievant responded that she was almost finished with her task. Mr. J demanded "no, stop and go now!" Grievant was offended by Mr. J's tone and disrespectful manner.

Grievant drove her vehicle on the service road at a high rate of speed towards the area where Mr. J worked. She came through a gate and into the building and room where Mr. J was seated in front of his monitor. Sitting to Mr. J's left was Mr. C who was speaking on the telephone to Mr. O. Grievant was angry. She stood a short distance from Mr. J's right side and began yelling at them. She asked if he had a problem with her. Mr. J did not respond. Grievant demanded that Mr. J not talk to her the way he did on the radio a few minutes earlier. She told Mr. J "[D]on't be calling me over the radio like that! Don't be doing that sh-t!" Mr. J did not respond to Grievant. Grievant said that she was "tired of his ... ass" and "I'm not going to do like that guy -- I'm gonna f—k you up!" Grievant was referring to Mr. M who threatened to physically harm Mr. J but was not successful in doing so. By saying "I'm gonna f—k you up", Grievant was conveying that she intended to physically harm Mr. J. Mr. J did not respond to Grievant, he continued to look at his monitor. Mr. O could hear Grievant yelling while he was trying to speak with Mr. C on the telephone. Mr. O asked what was going on. While Grievant was yelling, Mr. C turned to his right to see who was yelling and why. After a few minutes, Grievant left the control room.

## **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>1</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.<sup>2</sup> On August 4, 2010, Grievant threatened to physically harm Mr. J when she stated that she would "f—k him up." The Agency has presented sufficient evidence to support the issuance of a Group III Written

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that she was provoked by Mr. J's abrasive radio call. She argued that when other employees had complained about Mr. J, the Agency had taken no action against him to change his behavior.

Mr. J's demeanor over the radio on August 4, 2010 was inappropriate. He was arrogant and condescending. He failed to show the appropriate level of deference and respect to a coworker serving as an acting supervisor. Grievant was justified in leaving her work site and driving to Mr. J's location to speak with him regarding his inappropriate behavior. Although it was appropriate for Grievant to address Mr. J's behavior, very little about how she addressed that behavior was appropriate. Grievant should not have approached Mr. J while she was angry. She should not have yelled at him. She should not have referred to a previous employee who had attempted to fight Mr. J. She should not have threatened to harm Mr. J. The Agency's failure to properly manage Mr. J's behavior despite numerous complaints from other employees, would not justify the method by which Grievant attempted to correct Mr. J's inappropriate radio call on August 4, 2010.

Grievant argued that Mr. J's testimony should not be believed. Grievant presented a witness who testified that in the spring of 2010, Mr. J said "I can't stand her and I will get even with her, that bitch." Although the relevant portions of Mr. J's testimony were credible, if the Hearing Officer disregards Mr. J's testimony, the outcome of this case does not change. Mr. O testified that he had overheard Grievant use curse words. He testified Grievant use words to the effect of "if you think somebody would do something like that, then you think that they were bad, wait until I finish with your ass!" Grievant admitted during her testimony that when she referred to "that man" she was referring to Mr. M because she felt that Mr. J would understand what she was talking about. The only significance of Mr. M was that he had attempted to fight Mr. J but was unsuccessful. There is sufficient evidence to support the Agency's case even if the testimony of Mr. J is disregarded.

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>3</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>3</sup> Va. Code § 2.2-3005.

consistently applied disciplinary action among similarly situated employees, and (3) the 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.

## 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.
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>4</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>4</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.