

Issue: Group III Written Notice with Termination (threatening an employee); Hearing Date: 08/16/11; Decision Issued: 08/19/11; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 9656; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9656**

Hearing Date: August 16, 2011  
Decision Issued: August 19, 2011

**PROCEDURAL HISTORY**

On April 1, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for threats of violence against two other employees.

On April 27, 2011, 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 July 13, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 16, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant 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 Health employed Grievant as an Environmental Health Specialist until his removal effective April 1, 2011. He began working for the Agency in May 2003. Grievant earned an overall rating of "Contributor" for his September 2010 performance evaluation. Grievant had prior active disciplinary action. On September 30, 2010, Grievant received a Group I Written Notice for failing to properly identify himself to the owner of a restaurant he was inspecting as required by Virginia Food Regulations.

On March 18, 2011, Grievant met the Supervisor in a hallway at the Agency's building. Grievant led the Supervisor into the Supervisor's office and shut the door. Grievant was upset. Grievant walked around the corner of the Supervisor's desk and stood approximately 2 to 3 feet from the Supervisor. Grievant demanded to know "what the hell was wrong with [Employee J] and [Employee T]." Employee J and Employee T were supervised by the Supervisor. Grievant said that the Health Director had confronted him regarding negative comments she heard him make about a newly hired Business Manager. Grievant explained that Employee J and Employee T must have helped start this confrontation earlier in the week by informing Ms. H about the negative comments made by Grievant. Grievant was trying to restrain his voice so that no one could hear his conversation with the Supervisor but was showing his anger with facial expressions which the Supervisor considered to be bizarre and by throwing his hands back-and-forth in the air. The Supervisor felt uncomfortable and decided to let Grievant vent his anger.

Grievant cursed and said that Employee J and Employee T were “a bunch of f—king bastards and pussys.” Grievant said “I am not going to mess with [Employee J] because he may beat my ass but, I can handle [Employee T] and, if I can’t, I got something to take care of things.” Grievant reach towards his back pocket and said “knife”. The Supervisor told Grievant not to start any confrontation or make any threats. Grievant said he would not do that, but he would protect himself if necessary. Grievant left the Supervisor’s office. After Grievant left, the Supervisor called Employee T and told him of Grievant’s threat and told him to contact Employee J and let Employee J know not to confront Grievant.

The Supervisor did not observe that Grievant actually possessed a knife on March 18, 2011. The Agency later learned that on December 28, 2010, Grievant purchased online a “Bullseye Extreme Ops” knife with a 4.1 inch blade.

### **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.”

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;

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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.

- 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.

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. In addition, "threatening others" is a Group III offense under the DHRM Standards of Conduct.<sup>2</sup>

On March 18, 2011, Grievant threatened to harm Employee T by saying that "I can handle [Employee T] and, if I can't, I got something to take care of things" and then saying "knife". The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. 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 he did not use the word knife but instead said "wife" and that the Supervisor was hard of hearing and misunderstood what he said. Grievant's assertion is not supported by the evidence. The Supervisor testified that he was not hard of hearing and his demeanor during the hearing showed he did not have difficulty hearing. Grievant was standing two to three feet from the Supervisor and the Supervisor heard Grievant say "knife".

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-

<sup>2</sup> See, Attachment A, DHRM Policy 1. 60.

<sup>3</sup> Va. Code § 2.2-3005.

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 his behavior on March 18, 2011 was influenced by an unknown and undiagnosed medical condition. Grievant presented a statement from a Psychiatrist who evaluated Grievant beginning March 30, 2011 and concluded, "I believe [Grievant] suffers from a form of Bipolar Disorder that unfortunately had not been diagnosed before these unfortunate events which have caused this intelligent and ambitious man to lose his job. \*\*\* to a reasonable degree of medical certainty, I see [Grievant's] recent behavior, including the expressions of violence, as caused by psychiatric symptoms of Bipolar Disorder."

Grievant's Bipolar Disorder may help explain why Grievant behaved as he did on March 18, 2011. It is not sufficient, however, to mitigate the disciplinary action against him. No evidence was presented that Grievant's medical condition was so severe as to remove his ability to control his behavior on March 18, 2011. It is not enough that Grievant can show that his medical condition influenced his behavior; he must show that his medical condition dominated his behavior such that he had little or no control over the events giving rise to the disciplinary action. Grievant has not done so.

Grievant argued that disciplining Grievant for the symptom of an illness (making a threat of violence) is the same as disciplining Grievant for having an illness (Bipolar Disorder) and that doing so was discriminatory. Grievant's argument fails. The Americans with Disabilities Act covers individuals with disabilities. In Jones v. Am. Postal Workers Union, 192 F.3d 417, 429 (4<sup>th</sup> Cir. 1999), the Court held:

The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability.

To the extent Grievant's Bipolar Disorder may be considered a disability protected under the Americans with Disabilities Act, the Agency is not prevented from taking disciplinary action against Grievant even if his threat related to his disability.

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].

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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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer