

Issue: Group II Written Notice (workplace harassment); Hearing Date: 09/25/12;  
Decision Issued: 11/19/12; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9878; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9878**

Hearing Date: September 25, 2012

Decision Issued: November 19, 2012

#### **PROCEDURAL HISTORY**

On April 30, 2012, Grievant was issued a Group II Written Notice of disciplinary action for workplace harassment.

On May 10, 2012, 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 August 20, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 24, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency's 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 employs Grievant as a Transportation Operator II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to Mr. A. Mr. A reported to Mr. J. Mr. S was a 45 year old African American male who worked with Grievant.

Sometime in 2006, when only Mr. A and Grievant were working in the office, Mr. A took rope with a diameter of approximately 3/8 of an inch and tied a slipknot with enough rows to make it appear as a miniature hangman's noose. He tied a second noose and gave it to Grievant.

Mr. S worked for a temporary employment agency providing employees to work for the Agency. The temporary employment firm sent two white and two African American employees to be interviewed for a position working with Mr. A and Grievant. Mr. A and Grievant selected Mr. S because they believed he was the best qualified employee for the position.

Mr. A was absent from work shortly after Mr. S was hired. Mr. S worked primarily with Grievant for approximately three weeks. Grievant treated Mr. S with respect and encouraged Mr. S to offer suggestions regarding how they could do their jobs better.

When Mr. A returned to work on approximately December 5, 2012, Grievant and Mr. S left the office to “work in the field.” Mr. A continued working on his computer most of the day.

On approximately December 6, 2011, Mr. S called Mr. A and asked for sick leave. He said he wanted to leave to check on his niece who was pregnant and “ran off” in the night. Mr. A said Mr. S should go because Mr. A had plenty of paperwork to do.

On approximately December 7, 2011, Mr. S followed Mr. A into the office at about 6:50 a.m. and told Mr. A that he had personal problems and wanted to resign. Mr. A asked Mr. S why he was resigning. Mr. S pointed to the miniature noose on the wall behind Mr. A’s seat near the wall calendar. Mr. A said the noose was to hold up an old Adopt A Highway sign and let the citizens easily swing them down when they were picking up the routes. Mr. S pointed out a noose hidden under a calendar behind Grievant’s desk. Mr. S said that he had spoken with his uncle about the items and that his uncle was “Old School” and that the nooses bothered him also. Mr. A apologized for the nooses and said they were not intended to offend anyone and that he had forgotten they were hanging in the office. Mr. S told Mr. A that he had been riding with Grievant in the previous week and that Grievant made a comment that concerned him. Mr. A asked Mr. S to wait and let Grievant explain the comment. Mr. A again apologized and took the nooses out of Mr. S’s sight. Mr. S left.

Mr. A’s supervisor, Mr. J, asked Grievant about the comment he had made to Mr. S. During the prior week, Grievant and Mr. S were driving in a rural area where few people lived. Grievant made the comment that “Back in here you are so far out someone could get killed and never be found.” Grievant was referring to the fact that they were far “back into the woods.” Grievant did not possess any weapons when he made the statement and took no action that would indicate he intended to harm Mr. S. Grievant and Mr. S both laughed at the comment. Grievant’s and Mr. S’s working relationship was cordial and professional. Nevertheless, Mr. S presumed that Grievant intended his comment as a threat to Mr. S. Mr. S later told a newspaper reporter that he, “basically just concluded to let the job go. I feared for my life.”

## **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.”

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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.

“The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability.” DHRM Policy 2.30 defines workplace harassment as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

The presence of the nooses in the workplace was unwelcome to Mr. S. The nooses had no material or significant workplace function at the time Mr. S observed them. American history shows that nooses have symbolized hatred and violence against African Americans because of their race. The effect of displaying nooses in the workplace was to unreasonably interfere with Mr. S's work performance. He resigned because he believed he could no longer work in an office displaying nooses. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for engaging in Workplace Harassment.

Grievant argued that he did not associate nooses with racial hatred. There is no reason to dispute this assertion. The Agency does not contend that Grievant left the nooses displayed as an expression of racial intolerance. Mr. A created the nooses because he liked to tie different knots and he wanted to create a western scene at the office. No African Americans were working with Mr. A and Grievant when the nooses were created and first displayed. The Agency, however, provided Grievant with training regarding workplace harassment and diversity and identified its concern regarding how employees treat employees of different races. At some point, Grievant should have realized that the nooses might be offensive to African Americans and then removed the nooses. Although the Agency's training did not specifically mention the inappropriateness of nooses in the workplace, the Agency had the right to expect Grievant to take the lessons he learned in training and apply them to his workplace. Virginia's public schools teach American and Virginia history including the mistreatment of African Americans through lynching. American's celebrate Black History Month every February. For decades, newspapers have reported complaints involving nooses and racial hatred.<sup>2</sup> It should be a matter of common knowledge that nooses have been used to kill and/or intimidate African Americans and that some African Americans may be offended by the symbolism of a noose in the workplace. It is difficult for the Hearing Officer to believe that Grievant should not have been aware that a noose might be offensive to an African American employee.

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<sup>2</sup> Indeed, Mr. S was quoted by a local newspaper regarding his concerns with finding a noose in his workplace.

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 Human Resource Management ....”<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 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 II Written Notice of disciplinary action 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the

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<sup>3</sup> Va. Code § 2.2-3005.

specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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 EDR before filing a notice of appeal.