

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 12/18/15; Decision Issued: 02/02/16; Agency: VDOT; AHO: Lorin A. Costanzo, Esq.; Case No. 10727; Outcome: No Relief – Agency Upheld; **Administrative Review**: **EDR Ruling Requests received 02/15/16 and 02/18/16; EDR Ruling No. 2016-4305 issued 03/04/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 02/18/16; DHRM Ruling issued: 03/09/16; Outcome: AHO's decision affirmed** Judicial Review: **Appealed to Roanoke County Circuit Court on 04/04/16; Outcome: Hearing Officer's decision affirmed (12/13/16) [CL16-691].**

# **COMMONWEALTH OF VIRGINIA**

## **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION DEPARTMENT OF HUMAN RESOURCE MANAGEMENT DIVISION OF HEARINGS**

### **DECISION OF HEARING OFFICER**

**In the matter of: Grievance Case No. 10727**

**Hearing Date: December 18, 2015**

**Decision Issued: February 2, 2016**

### **PROCEDURAL HISTORY**

Grievant was issued a Group III Written Notice on October 23, 2015 and, effective that date, his employment was terminated.<sup>1</sup> Grievant timely filed a grievance challenging Agency's actions. Undersigned was appointed Hearing Officer, effective November 30, 2015, by the Department of Human Resource Management, Office of Employment Dispute Resolution.

A pre-hearing telephone conference was held 12/01/15 and the Grievance Hearing was held 12/18/15. At hearing written closing arguments were set for submission as follows:

12/28/15 ... Agency's written closing argument due.

01/07/16 ... Grievant written closings argument/reply due.

01/14/16 ... Agency reply/closing argument due.

On December 30, 2015 Agency moved for an extension its 12/28/15 due date for submission of its written closing. There being no objection, Agency's 12/28/15 due date was continued to 12/30/15. All closings arguments were timely filed.

### **APPEARANCES AT HEARING**

Grievant (who was a also witness)

Grievant's attorney

Agency Party Designee

Agency's Attorney

Witnesses

### **ISSUES**

1. Whether the employee engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the disciplinary action taken by the agency 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 reduction or removal

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<sup>1</sup> A. Tab B.

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 Agency to show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.<sup>2</sup>

### **FINDINGS OF FACT**

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

01. Grievant was employed by Agency as a Transportation Operator II and has been employed by Agency since November of 2011.<sup>3</sup> His duties include equipment operation, manual labor, maintaining state highways, and providing traffic control.<sup>4</sup>

02. On October 23, 2015 Grievant was issued a Group III Written Notice, Written Notice Offense Code 32, ("*Violation of Policy 1.80, Workplace Violence*") for *Violence in the Workplace*. Effective October 23, 2015 his employment was terminated.<sup>5</sup>

The Written Notice indicated 14 pages of documentation were attached to the Written Notice including, among other matters, Agency's letter dated 10/23/15 indicating, Grievant's termination from employment would be effective 5:00 pm on October 23, 2015.<sup>6</sup> *Nature of Offense and Evidence* the Written Notice stated:

On August 27, 2015 in the [Area Headquarters], you were quoted saying that "I am the one that everyone should be worried about, on my last day I will come in here and shoot you, you and you" You used finger gestures to act like you were holding a gun and sticking your arm out like you were shooting each one of them. Employees have concerns about your behavior and your threats to harm them and others.

Employees have stated that you have called them names such as "worthless piece of s..t" or "fat a..s". It has been reported that you have made several remarks about sexual activity between two co-workers because they are working and traveling together. This last accusation occurred on September 4, 2015 where you asked a female employee "I thought xxxx would have already wiped the sweat off of your forehead". It is stated that you continue to refer to employees with inappropriate names and have created a disruptive and hostile work environment for employees while making them feel uncomfortable to report to work.

The investigation found that you were in violation of the above mentioned policies. The Workplace Violence policy "shall be subject to corrective action, up to and including termination" under DHRM Standards of Conduct policy 1.60.<sup>7</sup>

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<sup>2</sup> Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

<sup>3</sup> Testimony.

<sup>4</sup> G. Tab 9.

<sup>5</sup> A. Tab B.

<sup>6</sup> A. Ex. B.

<sup>7</sup> G. Tab 9.

03. Grievant has one active Group I Written Notice issued February 6, 2014 for Written Notice Offense Codes 11 (“Unsatisfactory Performance”) and 99 (“Other”). The Written Notice indicated:

This Group I Written Notice is being issued after an internal investigation in response to citizen complaints about a VDOT employee cutting the throat of an injured deer in their presence. During the investigation, you made misleading statements and delayed in admitting the truth about your role in these reported actions, which is a violation of VDOT policies and procedures as stated in the Standards of Conduct policy 1.60 and VDOT’s Code of Ethics. This Group Notice is being issued due to your actions, including; exercising poor judgment during a sensitive situation involving the public which led to a negative impact on the agency; failure to be forthcoming and promptly disclose all details to management during an investigation into citizen complaints: showing a lack of integrity and character when interviewed by management during this investigation; failure to secure communications with a supervisor or manager during a unique and sensitive situation encountered on the road involving citizens; and failure to conduct yourself in a manner that promotes the public’s trust and confidence in VDOT.<sup>8</sup>

04. On September 14, 2015 management met with Grievant and he was placed on pre-disciplinary leave with pay (effective 9/15/15). Agency, by letter of this date to Grievant, confirmed the meeting, certain matters discussed, and the intent to apply the DHRM Standards of Conduct, 1.60 for unprofessional, disruptive, threatening and inappropriate work related conduct.<sup>9</sup>

05. By letter dated September 17, 2015 Grievant was informed of Agency’s intent to impose corrective action under Policy 1.60 for inappropriate and threatening comments made in the workplace in violation of Policy 1.80 and the Agency’s Violence in the Workplace Policy. The letter addressed matters occurring 8/27/15, name calling, and making remarks concerning sexual activity between two co-workers. The letter stated, in pertinent part:

On August 27, 2015 in the [Headquarters], you were quoted as saying that “I am the one that everyone should be worried about, on my last day I will come in here and shoot you, you and you.” You used finger gestures to act like you were holding a gun and sticking your arm out like you were shooting each one of them. Employees have concerns about your behavior and your threats to harm them.

Prior to taking any action, I want to give you an opportunity to submit any relevant explanation in writing that could influence the decision that will be made regarding formal corrective action. This information must be submitted to me by Tuesday, September 22, 2015 4pm at the VDOT Transportation Operations Center (TOC) on 1596 Deborah Lane, Salem, VA.” We will meet again to discuss the final course of action.<sup>10</sup>

06. A meeting between Grievant and management was set for September 22, 2015 however, due to his arrest, Grievant was not able to attend.<sup>11</sup> By letter to Grievant dated October 2, 2015, Agency extended to October 9, 2016 an opportunity for Grievant to respond to Agency’s intent to take disciplinary action. In the letter management indicated:

... I want to give you an opportunity to submit any relevant explanation in writing that could influence the decision that will be made regarding formal corrective action under the Department of Human Resource Management (DHRM) Standards of Conduct policy 1.60 (Attachment) for inappropriate and threatening comments made in the workplace. ...

This information must be submitted to me in writing by Friday, October 9, 2015. ....<sup>12</sup>

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<sup>8</sup> G. Ex. 4.

<sup>9</sup> A. Tab C and Testimony.

<sup>10</sup> A. Tab B.

<sup>11</sup> A. Tab B and Testimony.

<sup>12</sup> A. Tab C.

07. Grievant, by his letter of October 7, 2015, provided his written response to Agency. His 8/7/15 letter referenced Agency's 9/17/15 and 10/2/15 letters to him. Also, in his letter, Grievant indicated, among other matters:

- Agency was directly responsible for his inability to meet on 9/22/15.
- A response to the alleged threats set forth in Agency's letter of 9/17/15.
- He was provided a copy of Policies 1.60 and 1.80 but he was not provided Attachment A to Policy 1.60. Agency has not provided fair notice of how the threats alleged in the 9/17/15 letter violated either Policy 1.60 or 1.80 and the notice of proposed action was therefore inadequate and a violated due process.
- Regarding his 8/27/15 statement and gestures, he did not threaten to shoot anyone with a gun. Also, he did not bring a gun to work on 8/27/15 and he never expressed any intent, present or otherwise, to harm anyone. With respect to the reference to "my last day" he was not eligible to retire for at least seven years.
- "Anything that I may have said was said in a joking manner (my coworkers and I often joke with one another at work) and could not possibly have been taken any other way by my coworkers. You have taken my alleged words out of context."
- Matters concerning mitigating circumstances including, working for VDOT for nearly five years, matters as to his prior disciplinary matter, and Agency has not considered any alternatives to termination.<sup>13</sup>

08. Grievant's letter of October 7, 2015 was received by Agency and taken into consideration by Agency prior to the issuance of discipline.<sup>14</sup>

09. On September 22, 2015 Grievant was arrested on four misdemeanor charges. At trial on November 19, 2015 Grievant plead "Not Guilty" to each of the four charges and was found "Not Guilty" as to each of the four charges. Warrants/charges were issued for:<sup>15</sup>

- Violation of §18.2-57 of the Code of Virginia (Assault). It was alleged that on or about 8/27/15 Grievant did assault **[TO#3]**.
- Violation of §18.2-57 of the Code of Virginia (Assault). It was alleged that on or about 8/27/15 Grievant did assault **[TO#2]**.
- Violation of §18.2-60.3 of the Code of Virginia. It was alleged that on or about 1-1-2015 to 8-27-2015 Grievant did:  
on more than one occasion engage in conducted directed at **[TO#3]** with the intent to place, or when the accused knew or reasonably should have known that the conduct placed, such person in reasonable fear of death, criminal sexual assault, or bodily injury to that person or to that person's family or household member.
- Violation of §18.2-60.3 of the Code of Virginia. It was alleged that on or about 1-1-2015 to 8-27-2015 Grievant did:

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<sup>13</sup> A. Tab B.

<sup>14</sup> Testimony M.O. Manager and A. Tab B.

<sup>15</sup> G. Ex. 1 and 2.

on more than one occasion engage in conducted directed at [TO#2] with the intent to place, or when the accused knew or reasonably should have known that the conduct placed, such person in reasonable fear of death, criminal sexual assault, or bodily injury to that person or to that person's family or household member.

10. On 8/26/15 a shooting occurred involving a local television station's personnel. The shooting was in the news and a topic of discussion and concern among both Agency management and employees at work. The daily safety meetings on 8/26/15 and 8/27/15 addressed the shooting incident and workplace violence concerns.<sup>16</sup>

11. Grievant testified as to the incident of 8/27/15 that occurred in the workplace. As lunch was winding down he was in the breakroom with at least 6 other employees present and admitted saying:

Well hell, you ain't got to worry about him. I'm the one you need to worry about. My last day I'm liable to come in here and shoot you, you, and you". Grievant further testified he made a gesture with his finger toward [TO#4] [TO#5] and [name].<sup>17</sup>

Grievant further testified he was joking when he said this.<sup>18</sup> Grievant's statements were heard by other employees and his gestures were observed by other employees.

12. In Grievant's EWP (effective date: October 25, 2012) his *Overall Rating Earned* was "Contributor".<sup>19</sup> In his EWP (effective date: October 25, 2013) his *Overall Rating Earned* was "100% Contributor". And in his EWP (Performance Year ending October 24, 2012) Grievant had the Overall Rating of "Contributor" and his probationary Progress Review was a "Contributor" rating.<sup>20</sup>

13. Grievant, on 11/24/11 acknowledged by his signature receiving VDOT'S Policy on Preventing Violence in the Workplace, his responsibility for reading the same, and his being subject to its provisions.<sup>21</sup>

### **CONCLUSIONS OF POLICY:**

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) addresses the Virginia grievance procedure and provides, in 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 employee disputes which may arise*

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<sup>16</sup> Testimony of Supervisor and TO Manager.

<sup>17</sup> Testimony of Grievant.

<sup>18</sup> Testimony of Grievant.

<sup>19</sup> G. Ex. 3.

<sup>20</sup> G. Ex. 6.

<sup>21</sup> A. Tab E.

between state agencies and those employees who have access to the procedure under §2.2-3001.

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management (“DHRM”) promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*.<sup>22</sup> The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

The *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. 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 would warrant termination. This policy further provides that the examples of offenses set forth are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. The *Standards of Conduct* provides:

*Examples of offense, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense **not specifically enumerated**, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this ....*<sup>23</sup>

**DHRM Policy 1.80 - Workplace Violence:**<sup>24</sup>

DHRM Policy Number 1.80 entitled *Workplace Violence* (effective date: 5/01/02) prohibits violence in the workplace. This policy provides employees violating Policy 1.80 will be subject to disciplinary action under the *Standards of Conduct, Policy Number 1.60*, up to and including termination based upon the situation. Policy 1.80 provides the following definition of “Workplace Violence”:

Workplace Violence ... 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, 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.

DHRM Policy No. 1.80 indicates prohibited conduct includes, but is not limited to:

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

**SP 1-005 – PREVENTING VIOLENCE IN THE WORKPLACE (issued October 18, 2010).**<sup>25</sup>

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<sup>22</sup> A. Tab G.

<sup>23</sup> A. Tab G.

<sup>24</sup> A. Tab G.

<sup>25</sup> A. Tab G.

Safety Policy 1-005 (“SP 1-005”), Violence In The Workplace (issued October 18, 2010). provides that Agency does not tolerate workplace violence and its objective is to provide a work environment which is free from violence or threats of violence.

SP 1-005 requires all individuals on the agency’s premises conduct themselves in a professional manner consistent with good business practices and in absolute conformity with non-violence principles and standards. Furthermore, SP 1-005 provides, “The agency strictly prohibits the use of threats of violence in the workplace and will treat such incidents in a serious and professional manner.”

§ 6.1 of SP 1-005 defines “Threat” and “Workplace Violence” as:

**Threat:** Words or actions that could reasonably be construed to constitute a threat, goal, or intent to cause physical and/or psychological harm, destruction, or punishment to oneself or another or their property. The individual or group to whom a threat is directed need not feel in danger or be afraid in order for the communication or event to be assessed as a threat.

**Workplace Violence:** Any act of property destruction, physical assault, intimidation, or act having the effect of intimidation, verbal abuse, swearing-in anger, harassment, pranks designed to elicit a fear response, or threatening behavior that causes others to feel unsafe. This includes encouraging others to engage in such conduct.

*Prohibited Behaviors* under SP 1-005 include not only Violent behavior but also Threatening behavior. SP-1-005 provides, in pertinent part:

**Threatening behavior includes, but is not limited to:**

- Verbal - voiced threats of violence towards persons or property, making statements reflecting the intent or desire to injure or to kill oneself or any other person, the use of vulgar or profane language towards another, derogatory comments or slurs, biased-based incidents, intimidation, bullying, excessive criticism or name calling, and harassing or threatening phone calls and voice mail messages
- Visual - threatening or intimidating writings, electronic communications, posters, graffiti, cartoons, publications, drawings or gestures

SP 1-005 provides any behavior that is contrary to this policy may result in formal discipline, including suspension and/or termination of employment.

***Informed:***

TO#1 called the ARA to discuss some matters and in the conversation mentioned what he had heard from another employee. He repeated what TO#2 had told him about there being something that was really bothering TO#2. He related that TO#2 had indicated what was bothering him was Grievant’s having come in and his saying he was going to shoot up everybody. TO#2 was described as being really concerned and this was bothering him. It was related also that TO#2 stated he was being stressed because Grievant was saying he and a female employee were having an affair.<sup>26</sup>

TO#1 later filed with Agency a handwritten statement with his Workplace Violence form (copy admitted into evidence). This writing indicated matters told to him by TO#2 including:

Things [Grievant] had said to him one was bothering him most was that [Grievant] had come into the breakroom pointing his fingers like a gun at [TO#2] and said the one they better worry about going off here is me and still pointing told [TO#2] he would

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<sup>26</sup> Testimony of TO#1.



shoot him then [TO#3] and whoever else while pointing and [TO#2] said that it really bothered him also [Grievant] had been accusing [TO#2] and [TO#5] of having an affair...

ARA called MO Manager on September 9, 2015 concerning the report of bullying, threats of violence in the workplace, and some sexual allegations. Upon receipt of this call MO Manager began looking into matters and started calling employees. He contacted the Human Resources Department and made additional calls and in-person interviews, including interviews/speaking with TO#1, TO#2, TO#3, and TO#5. Management spoke with TO#4 however MO Manager wasn't present.

MO Manager conducted an interview of TO#3 on 9/14/15 with HR and a supervisor present. He was informed of an incident where, after working through the night sweeping, Grievant made a statement concerning *did you guys rock the truck a lot* to the two employees. TO#3 discussed fear about coming to work or being at work and that the atmosphere was hard sometimes. He expressed concern about further inciting Grievant and noted there to be a pecking order at work and addressed bullying by Grievant and name calling.<sup>27</sup>

MO Manager was present when TO#1 was interviewed and expressed concerned as to him becoming very emotional during the interview and his stating he concerned for his safety. He was also present when TO#5 was interviewed and when asked if anything had gone on she just said no and didn't say much else.

As a result of his calls and in-person interviews MO Manager was concerned with a number of matters including that it appeared the work group of employees were a very tight knit group and there appeared to be a reluctance to discuss matters and breaking a bond. He noted that certain of the interviewed employees:

- Expressed concern teammates may ostracize the employee for something like this;
- Expressed worry about safety for the employee and/or family;
- Did not appear comfortable discussing matters, did not appear to want to bring up matters, and/or were trying not to bring up matters;
- Expressed concern as to retaliation and/or intimidation;
- Expressed a concern or having fear at coming to work or being at work;
- Expressed concern the atmosphere was hard sometimes at work;
- Expressed concern about bullying and the bullying would be greater;
- Expressed or appeared to exhibit emotional distress; and
- Expressed concern as to verbiage being used and called names, stupid, and bullying.

**Statements and Gestures:**

On 8/26/15 a shooting involving a local television station's personnel occurred. This was a topic of strong concern and discussion for employees at work. The morning safety meetings on 8/26/15 and 8/27/15 addressed the shooting, workplace violence, and how quick it can happen.<sup>28</sup>

During lunchtime, in the break room at work on 8/27/15, "postal"/"going postal" was being discussed by employees with a number of meanings of the term being offered. An employee wanted to know what postal/going postal really meant and Grievant gave his explanation of the term. There also was discussion in the lunch room as to how open the area in the Residence was and that if anyone had a grudge they could come in and do something.<sup>29</sup> The subject of a disgruntled employee, fired a few years ago, was raised. Further discussion occurred as to a

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<sup>27</sup> Testimony of MO Manager.

<sup>28</sup> Testimony of Supervisor and TO Manager.

<sup>29</sup> Testimony of TO Manager.

possibility of a disgruntled employee doing the same thing that happened 8/26/15 and there was discussion as to the need to keep an eye out on the matter.

As lunch was ending there were about seven employees sitting in the breakroom. Grievant was talking and stated, "Well hell, you ain't got to worry about him. I'm the one you need to worry about. My last day I'm liable to come in here and shoot you, you, and you". His statement was heard and his hand gestures (described as pointing his finger like a gun) were observed by a number of the employees present in the room.

Grievant testified he made a gesture with his finger toward three named employees as the statement was being said, however, he indicated he was only joking.<sup>30</sup>

TO#1 was not present in the breakroom when the statements and gestures were made on 8/27/15.<sup>31</sup> He did receive information from TO#2 which was related to management. He indicated in his handwritten statement that he had observed Grievant name calling daily calling and calling TO#2 and TO#4 fat asses, sorry bastards, and dumb countless times.<sup>32</sup>

TO#2 was present at the incident on 8/27/15 and, while he did not remember the exact statement, indicated Grievant stated something to the effect of *I'm the one everybody should be worried about*. He indicated a number of people were in the breakroom on August 27, 2015. He remembered he discussed the matter with TO#1 but also indicated he didn't remember what he said during that discussion. TO#2 acknowledged Grievant making statements about him and TO#5. TO#2 heard Grievant made statements about him and TO#5 having an inappropriate relationship. While he indicated this was said as a joke he also noted, "... there was a few times that I thought maybe you know it would be taken as accusatory". He noted at the time his marriage was struggling. He thought other people probably overheard Grievant saying this. TO#2 had a prior conflict with names that Grievant would call him things he took offense to but noted that after they had a conversation the matters didn't re-occur.

In the wintertime, around early 2015/late 2014, TO#2 heard Grievant make statements about going postal and killing people at VDOT. He observed Grievant pointed out several different people in the group and said that he would kill this person or that person. He noted that Grievant kind of pointed around the room and Grievant said that he would shoot this person in the head or that person in the chest, so forth.<sup>33</sup>

The first time he heard Grievant's statements (i.e. wintertime) TO#2 wasn't really sure how to interpret what Grievant said. He received assurances from a supervisor that there was nothing to worry about and decided not to push the matter. The second time he heard Grievant's statements (i.e. 8/27/15) he believed it to be more of a joking demeanor. He did note that, in other conversations, Grievant had made comments about owing a gun.<sup>34</sup>

TO#3 was present but did not hear what was said on 8/27/15, however, he had heard two other times Grievant commented along the lines of "going postal". Other people were there when it was said and one of the times he made gestures like the shape of a gun out of his hand, when he said it. The first time TO#3 indicated didn't really think much about it but the second time it made him feel uneasy. The second time it made him wonder whether Grievant was serious or not. After

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<sup>30</sup> Testimony of Grievant.

<sup>31</sup> Testimony of TO1.

<sup>32</sup> A. Ex. F.

<sup>33</sup> G. Ex. 2.

<sup>34</sup> G. Ex. 2, Testimony TO#2.

the two comments he heard, TO#2 indicated he didn't feel comfortable working with Grievant.<sup>35</sup> TO#3 also noted hearing Grievant refer to TO#5 as a *bitch*.

TO#4 heard Grievant, on August 27, 2015, state in the break room, *Well, you ain't got to worry about somebody else coming in here, I might come in here and go postal*. He observed Grievant making his hand into a type of gesture, and making a gun gesture around.<sup>36</sup> He noted he didn't know if anyone else got offended but he thought it was said in a joking manner. He also stated that he takes everything Grievant says as a joke. TO#4 did note that one employee discussed the incident with him and that employee wasn't sure how to take Grievant. He felt the other employee wasn't sure how to take Grievant because he doesn't know Grievant.<sup>37</sup>

TO#5 heard Grievant's 8/27/15 statement. When asked if she had heard Grievant say anything about shooting anyone or going postal on his last day, other than this incident, she indicated it's possible and noted we all say comments that we probably shouldn't, but we do. She indicated she was not offended by the statement regarding wiping the sweat of her brow.

Grievant indicated there was name calling occurring on an almost daily basis but mostly with a certain few. As to making remarks about sexual activity between two co-workers Grievant didn't know anything other than one comment about the sweat. He indicated stating, "Well, I figured he would have wiped the sweat off your head by now." He testified he had no recollection about comments as to a truck "rocking" taking place with him and that it does not surprise him those comments were made. He noted while he didn't start the Spongebob and Patrick comments he just used it.

**November 19, 2015:**

Special Agent with Virginia State Police testified during the 11/19/15 General District Court trial as to certain information provided him by Grievant and that Grievant informed him he didn't remember the exact comments made or making the comments.

Q. Okay. And did you ask **[Grievant]** about some comments he had made the end of August in the VDOT break room?

A. Yes, sir; I did.

Q. All right. And did he tell you what his comments were.

A. He told me what his friend **[TO#4]** had told him his comments were. **[Grievant]** said he doesn't remember the exact comments that were made or making the comments.

Q. All right. But did he acknowledge that he probably said something very close to that?

A. He did, he said it sounded like something that he would say and he probably said it. Actually, I believe the words, he said I'm sure I said that, that sounds like something I would say, but I don't remember saying that.

Q. Okay. And what was it that he believed he said?

A. The exact phrase, he told me **[TO#4]** told him he said was, "I'm the one they need to be worried about because I'm the one that's going to come here and go postal. Boom, boom."

And as he was explaining that to me he took his fingers and made a gun motion like his hand was a gun (indicating).

Q. Okay. Now, did **[Grievant]** say whether or not he thought people maybe took that out of context?

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<sup>35</sup> G. Ex 2.

<sup>36</sup> G. Ex. 2.

<sup>37</sup> Testimony of TO#4

A. [Grievant] did say that the conversation he was having that day was between him and [TO#4] and he did not intend for anybody else to be involved in the conversation, and it was a joke that he had made to [TO#4], and he did reiterate several times that he doesn't remember every joke that he tells.<sup>38</sup>

Special Agent was asked if Grievant acknowledged certain individuals in the room may have thought he was serious?<sup>39</sup> After an objection was resolved by the Court and being asked look to a certain page, Special Agent testified Grievant did state to him that a certain could have felt intimidated by the statement but Grievant said he believed there was no reason to be intimidated.

A. Yes, sir. What he said, and this is typed up off a recording of the interview so it's accurate. "[Grievant] stated that knowing [TO#2's] personality he would take the comment the way he took." And that's the way the statement was relayed from [Grievant] to me.

Q. All right. And did he also state that [TO#2] could have felt intimidated?

A. Yes sir; he said "[TO#2] could have felt intimidated by the statement but there is no reason to be intimidated."<sup>40</sup>

**Policy:**

*Policy 1.80 and SP 1-005 prohibit violence in the workplace and provide violations can lead to a Group III and to a termination.*

The definition of *Workplace Violence* set forth in Policy 1.80 includes any threatening behavior or verbal abuse occurring in the workplace by employees and threatening to injure an individual is listed under *Prohibited Conduct* in Policy 1.80.I

Prohibited behaviors under SP 1-005 include, but are not limited to, voiced threats of violence towards persons, making statements reflecting the intent or desire to injure or kill any other person, intimidation, bullying, and threatening or intimidating gestures. The list provided is not all inclusive.

It is argued that, as Grievant was joking and did not intent to harm anyone, SP 1-005's definition of "Threat" precludes a finding that his words and/or gestures on 8/27/15 violated SP 1-005. However, the definition includes words that could reasonably construed to constitute a threat, goal, or intent to cause not only physical but also psychological harm to another. This policy also provides the individual or group to whom a threat is directed need not feel in danger or be afraid in order for the communication or event to be assessed as a threat.

Agency has clearly stated its objective to provide a work environment free not only from violence but also free from threats of violence. Management investigated and reviewed the statements, gestures, and circumstances surrounding the incident on 8/27/15. Management did assess Grievant's actions to be a threat to cause physical and/or psychological harm to another and to be threatening behavior and/or verbal abuse occurring in the workplace by an employee which threatened to injure another.

While Grievant contends the statement and gesture were made as a joke to a friend, there is evidence that other employees in the breakroom at work also heard the words spoken and saw

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<sup>38</sup> G. Ex. 2 (Transcript pg. 40 - 41).

<sup>39</sup> G. Ex. 2 (Transcript pg. 42 line 12-14)

<sup>40</sup> G. Ex. 2, Transcript pg. 42 - 43).

the gestures made. There is a strong concern as to the words he spoke and the gestures he made. Both his words and gestures were communications he decided to make in public at the workplace.

Concern is expressed the shooting occurred only about a day before the statements and gestures were made. Management had discussed matters of safety and workplace violence that very morning. Grievant was aware of the impact the 8/26/15 shooting was having on employees, how much it was being discussed at work, and how management was attempting to address safety and workplace violence concerns. There is a strong concern with the totality of the circumstances leading up to and surrounding Grievant's choices as to the words, gestures, timing, location, and audience present when such statement was made.

Clearly Policy 1.80 and SP-1-005 prohibit *Threatening Behavior*. SP-1-005 provides *Threatening Behavior* include, but is not limited to, voiced threats of violence towards persons, making statements reflecting the intent or desire to injure or kill any other person, intimidation, bullying, threatening gestures, and intimidating gestures. The definition of "*Threat*" in SP 1-005 includes words or actions that could reasonably be construed to constitute a threat, goal, or intent to cause not just physical but also psychological harm. This definition specifically sets forth that the individual or group to whom a threat is directed need not feel in danger or be afraid in order for the communication or event to be assessed as a threat.

Grievant's statements of 8/27/15 and the accompanying gestures are consistent with the above policy definitions "Workplace Violence".

***Due Process/Failure to Follow Policy:***

Issue was raised as to whether Grievant was afforded due process. The Standards of Conduct - Policy 1.60(E) addresses due process and provides:

Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

It wasn't until September 9, 2015 Agency became award of matters. The following timeline of events occurred in this matter:

09/09/15	ARA and MO Manager informed of statements alleged made by Grievant. <sup>41</sup>
09/10/15	Matter reported to Agency's Threat Assessment Team <sup>42</sup> .
09/14/15	Letter of this date re pre-disciplinary leave. <sup>43</sup>
09/17/15	Letter of this date from Agency to Grievant. <sup>44</sup>
09/22/15	Grievant arrested in route to meeting (Grievant later found not guilty at trial)
10/02/15	Letter of this date to Grievant. <sup>45</sup>
10/07/15	Letter of this date from Grievant re: Proposed Notice of Termination of [Grievant]. <sup>46</sup>
10/23/15	Written Notice issued this date.

The evidence indicates Grievant was informed on September 14, 2015 he was suspended with pay. At that time Grievant indicated he voiced some concerns. A meeting was arranged to discuss mitigation and other matters on 9/22/15. However, on the way to the 9/22/15 meeting Grievant was arrested. Grievant testified he has not sat down and met with any Agency official

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<sup>41</sup> Testimony of MO Manager.

<sup>42</sup> Testimony of MO Manager.

<sup>43</sup> A. Tab C.

<sup>44</sup> A. Tab B.

<sup>45</sup> A. Tab C and A. Tab E.

<sup>46</sup> A. Tab B.

and the hearing was the first time since September 14<sup>th</sup> that he had been able to tell his side of the story to anyone”.

The evidence indicates Grievant was notified by the letter of 9/17/15 that Agency intended to take action under Policy 1.60 for inappropriate and threatening comments made in the workplace in violation of Policy 1.80 and the Agency’s Violence in the Workplace Policy. This letter described incidents and statements of August 27, 2015 which were of concern and concerns as to Grievant had called employees names and made remarks about sexual activity between co-workers.<sup>47</sup>

Agency’s 9/17/15 letter stated Grievant was afforded, “an opportunity to submit any relevant explanation in writing that could influence the decision that will be made regarding formal corrective action.” The letter also stated, “This information must be submitted to me **by** Tuesday September 22, 2015 4pm at the VDOT Transportation Operations center (TOC) on 1596 Deborah Lane, Salem, VA.”<sup>48</sup> (*emphasis added*)

Grievant raises his concerns as to the timing of his arrest and his arrested preventing him from presenting his response to allegations. However, the evidence indicates that he was afforded an initial opportunity to submit information to management from receipt of the letter of 9/17/15 until 4:00 p.m. on 9/22/15. Noting Grievant could not attend the 9/22/15 meeting, by its letter of October 2, 2015 to Grievant, Agency provided additional opportunity, until 10/9/15, for Grievant to respond. This letter stated:

Since you were not available to meet that date and prior to taking any action, I want to give you an opportunity to submit any relevant explanation in writing that could influence the decision that will be made regarding formal corrective action under the Department of Human Resource Management (DHRM) Standards of Conduct policy 1.60 (Attachment) for inappropriate and threatening comments made in the workplace. ...

This information must be submitted to me in writing by Friday, October 9, 2015. ....

Grievant, by his letter of October 7, 2015, did respond in writing to Agency’s letter of October 2, 2015 and in his letter addressed/referenced Agency’s letter of September 17, 2015. Grievant contended in his letter that Agency was responsible for his inability to meet on 9/25/15 and addressed the alleged threats set forth in Agency’s letter of 9/17/15. He acknowledged being provided a copy of Policy 1.60 and 1.80 but raised a failure to provide Attachment A to Policy 1.60 contending failure to provide fair notice of how the threats alleged violated policy. In the letter he further contended notice of proposed action is inadequate and violates due process. Grievant pointed out he did not bring a gun to work on 8/27/15 and contends he never expressed any intent, present or otherwise, to harm anyone. He further indicated, “Anything that I may have said was said in a joking manner (my coworkers and I often joke with one another at work) and could not possibly have been taken any other way by my coworkers. You have taken my alleged words out of contest ...) Grievant addressed mitigating circumstances and working for VDOT for nearly five years. He addressed his prior Group I and also raise his contention Agency has not considered any alternatives to termination.<sup>49</sup>

Based upon evidence presented at hearing, there is insufficient evidence to find violation of due process or a failure to follow policy. The evidence indicates that, prior issuance of Written Notice and termination, Grievant was given oral or written notification of the offense, an

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<sup>47</sup> A. Tab B.

<sup>48</sup> A. Tab B.

<sup>49</sup> A. Tab B.

explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

Even if the Hearing Officer were to have found a lack of pre-disciplinary due process, based upon full post-disciplinary due process being provided to Grievant, a lack of pre-disciplinary due process is cured. *Administrative Review of Director, Ruling Number 2011-2877, April 29, 2011* indicated, in pertinent part:

However, assuming without deciding that such pre-disciplinary process was withheld, because the grievant was afforded full post-disciplinary due process explained below, we believe that any potential violation would have been adequately cured by the full post-disciplinary grievance hearing.

Grievant received ample notice of the charges against him in the Written Notice. Grievant had a full hearing, opportunity to call witnesses and present evidence at hearing, opportunity to confront and cross-examine agency witnesses at hearing, and was represented by counsel who was present at hearing. A full Post-Disciplinary Due Process was provided Grievant

Upon consideration of the evidence in this cause and for the reasons stated above the Hearing Officer finds there is insufficient evidence to find Grievant suffered a due process violation or that policy was not followed.

***Not properly characterized:***

Grievant contends he was joking on 8/27/15 and the statement he made was not a threat but if it were to be characterized as a threat it could not be properly characterized as a Group III. He contends it would be at most a Group I offense. Moreover, he argues that even if it were determined to be a Group III offense termination would not be warranted and appropriate.

As discussed more fully above, Policy No. 1.80 and Policy "SP 1-005 specifically address Agency's objective to provide a work environment which is free from not only violence but also threats of violence.

The hearing officer has reviewed the evidence and observed the demeanor of the witnesses. Looking at the totality of the circumstances surrounding the testimony of witnesses and statements and gestures Grievant made on 8/27/15 the Hearing Officer is not persuaded by Grievant's argument that the statement and gestures were meant as a mere joke.

The evidence in this case indicates that employees have addressed to each other and to management concerns over the matter of name calling, threats, and bullying at work. The evidence indicates that the 8/27/15 incident was not the first time at work that Grievant has told other employees he may go postal and/or shoot others. The evidence indicates that this has had an effect on at least one employee. Evidence of instances of bullying and name calling by Grievant at work are taken into consideration as well as evidence of concerns expressed for safety and being ostracized. Grievant's actions at work have affected the workplace and his fellow employees.

Management has raised employee concerns of being ostracized when addressing matters management was investigating. Management heard employee concerns about name calling, including fat ass, sorry bastard, dumb and bullying. Management testified to concerns employees have expressed as to their safety and being bullied.

Not all violations of Policy No. 1.80 and/or Policy "SP 1-005 warrant a Group III and/or termination. Management is charged with providing a safe work environment free from violence and free from the threat of violence. The evidence does not indicate that the statement and gesture Grievant made on 8/27/15 were merely a joke or that they should be ignored. Grievant's

actions were not done in a vacuum and were not an isolated instance to be explained away as a mere joke or as just joking. While Grievant indicates he was joking to another employee, his words were heard and his gestures were observed, by intent or otherwise, by a number of employees who were at work and in the breakroom. While he testified as to what he meant by his "last day he was liable to come in here and shoot" his statement did not reflect what he meant when he referenced his "last day". The words spoken were very serious and of themselves implied a danger to others. Evidence was further presented as to two prior occasions of him talking about going "postal" at work and evidence indicate prior talk of shooting others. Evidence addressed the circumstances of a recent television station shooting, discussions at work of violence in the workplace, and concern at work expressed as to the shooting. Evidence also addressed Grievant's bullying and name calling with expressions received by management of fear for safety.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. 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 would warrant termination.

Upon consideration of the above discussed policies, the words and gestures being made at work in the presence of other employees, the actual words and gestures themselves, the severe action stated in Grievant's spoken words and in his gestures, Grievant prior name calling and bullying, and the obligation to provide for a safe working environment for all employees free from threats of violence and free from violence it is the finding of the Hearing Officer that Agency's actions in issuing a Group III offense and in terminating Grievant are appropriate, warranted under the circumstances, and consistent with law and consistent with policy.

***Unequal, unfair or misapplication of policy:***

Grievant contends he was treated unfairly and subjected to an unequal or misapplication of policy by management. He contends he was treated differently than other employees who have made the same or similar statements and/or threats and were not disciplined as he was.

To find unfair, unequal, or misapplication of policy it is necessary to determine whether management violated a mandatory provision of policy, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

In this case there is insufficient evidence to find that management violated a mandatory provision of policy or find Grievant was treated differently than other employees in the same or similar circumstances were treated. No evidence was presented as to a threat of the same or similar nature and/or circumstances being made and of that employee being treated differently.

When questioned if he was aware of a case where an Agency employee made a threat and was suspended TO Manager testified, he thought he heard something about a threat or something. He further indicated what he got was all hearsay and didn't know a lot about it. There is insufficient evidence/no evidence presented in this case to find that any other employee was treated differently than Grievant when that employee was in the same or similar circumstances.

There is insufficient evidence in this cause to find unfair, unequal, or misapplication of policy.

***Mitigation:***

§ 2.2-3005 of the Code of Virginia provides Hearing Officers have the power and 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 Human Resource Management pursuant to § 2.2-1202.1.

The Hearing Officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness.<sup>50</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 the 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 the mitigation. A nonexclusive 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

The normal disciplinary action for a Group III offense is a Written Notice and discharge from state employment. In lieu of discharge the agency may: (1) suspend without pay for up to 30 workdays, and/or (2) demote or transfer with disciplinary salary action.<sup>51</sup> Policy further provides for a reduction of discipline if there are mitigation circumstances such as conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity or an employee's long service or otherwise satisfactory work performance.

The Grievant offered as mitigating grounds the fact that he has been an employee for the agency, over 4 years, since November 2011,<sup>52</sup> has received recognition leave, and that his Employee Work Profiles indicated he was a good employee<sup>53</sup>. Grievant further offers the fact that he was "joking" and did not intend to harm anyone nor did he have a weapon as mitigating factors. Additionally, Grievant has raised due process concerns (discussed above). Grievant has one active Group I at the time of being issued his Group III Written Notice and at the time of his termination from employment.

Upon consideration of the totality of the evidence including, but not limited to, consideration of evidence as to the nature of the words stated and the gestures made, the surrounding circumstances, and Agency's responsibilities for matters occurring in the workplace, the offered grounds for mitigation are not sufficient to cause the Hearing Officer to mitigate the issuance of a Group III Written Notice or to mitigate the termination of Grievant from employment. The Hearing Officer has considered all grounds for mitigation that could be found in the documentary evidence and in the testimony presented at hearing and does not find sufficient reason to mitigate Agency's action.

Upon consideration of the evidence admitted in this cause the Hearing Officer concludes that the agency's disciplinary action was within the tolerable limits of reasonableness.<sup>54</sup>

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<sup>50</sup> §VI. .B. of the *Rules for Conducting Grievance Hearings*, Office of Employment Dispute Resolution

<sup>51</sup> DHRM Policy 1.60.

<sup>52</sup> Testimony.

<sup>53</sup> G. Ex. 6.

<sup>54</sup> Cf. *Davis v. Dept. of Treasury*, 8 M.S.P.R.317, 1981 MSPB LEXIS 305, at 5-6 (1981) holding that the Board "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

## DECISION

For the reasons stated above, the Agency has proven by a preponderance of the evidence that:

- Grievant engaged in the behavior described in the Written Notice.
- The behavior constituted misconduct.
- The disciplinary action taken by the Agency was consistent with law (e.g. free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).
- There were not mitigating circumstances justifying reduction or removal of the disciplinary action.
- The Agency's action was warranted and appropriate.

Furthermore, for the reasons stated above, the Agency's actions in issuing Grievant a Group III Written Notice and in terminating Grievant are **UPHELD**.

## APPEAL RIGHTS

As the *Grievance Procedure Manual (effective date: July 1, 2012)* 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.

### **A. Administrative Review:**

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

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

**2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR.** This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing

officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is [edr@dhrm.virginia.gov](mailto:edr@dhrm.virginia.gov)).

**B. Final Hearing Decisions:**

A hearing officer's 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.

**C. Judicial Review of Final Hearing Decision:**

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

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Lorin A. Costanzo, Hearing Officer