

Issue: Group III Written Notice with Termination (threatening another employee);  
Hearing Date: 07/08/14; Decision Issued: 07/09/14; Agency: DOC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 10383; 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: 10383**

Hearing Date: July 8, 2014

Decision Issued: July 9, 2014

#### **PROCEDURAL HISTORY**

On May 6, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for threatening another employee.

On May 8, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 3, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 8, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
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 Department of Corrections employed Grievant as a Water/Wastewater Operator II. He had prior active disciplinary action. On September 24, 2013, Grievant received a Group I Written Notice for computer/internet misuse. On February 11, 2014 Grievant received a Group II Written Notice for failure to follow instructions.

On April 28, 2014, Grievant met with the Manager and was presented with a counseling memorandum. Two other employees attended the meeting. Grievant disagreed with the counseling memorandum. Grievant asked to read the memorandum. The Manager handed the memorandum to Grievant and Grievant read the memorandum. Grievant signed and dated the memorandum and wrote "I disagree with this 'assessment' of my interactions or professionalism." Grievant looked at the Manager and said he felt sorry for the Manager and his family for what was going to happen next. The Manager asked what Grievant meant. Grievant responded that the Manager "would find out soon enough." Grievant then asked if he could leave and go back to work. The Manager told him he could leave.

The Manager perceived Grievant's comments as a threat of harm. Two other employees were attending the meeting and heard Grievant's comments. They also perceived Grievant's comment as a threat to the Manager.

Following the meeting, the Manager called his wife and told her of Grievant's comments and expressed his concern about what Grievant might do. When his children

returned home from school later in the day, the Manager told them to avoid encounters with any vehicles matching the description of the vehicles usually driven by Grievant.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”<sup>1</sup> Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>2</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>3</sup>

“[T]hreatening others” is a Group III offense.<sup>4</sup> On April 28, 2014, Grievant met with the Manager and received a counseling memorandum. He objected to the counseling memorandum and told the Manager that he felt sorry for the Manager and the Manager’s family for what was going to happen next. The Manager asked Grievant for clarification of what he meant, but Grievant said the Manager would “find out soon enough.”

Grievant threatened the Manager. Grievant’s statement of “what was going to happen next” suggested Grievant knew of an event or action within Grievant’s control that would happen to the Manager and the Manager’s family. By saying he felt sorry for the Manager and his family, Grievant indicated that the event would be negative. The Manager construed Grievant’s comment as a threat of harm to him and his family. The Manager’s conclusion was passed in part of Grievant’s past behavior of being aggressive and abrasive at times. The Manager’s interpretation of Grievant’s comments as a threat was reasonable and was supported by the perceptions of the two other witnesses in the meeting. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for threatening the Manager. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency’s decision to remove Grievant must be upheld.

Grievant argued that his comments were “taken WAY out of context.” Grievant’s argument fails. It is not necessary for the Agency to show that Grievant actually intended to carry out his threat. The Manager gave Grievant an opportunity to explain what he meant by his comments. Grievant responded that the Manager “would find out soon enough.”

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(V)(D).

<sup>4</sup> See, Attachment 2, DOC Operating Procedure 135.1.

Grievant argued that the Employee Relations Manager was biased against him and did not listen to his explanation and basis for mitigation. Whether the Employee Relations Manager was biased against Grievant when she presented him with due process documents does not affect the outcome of this case. Grievant had the opportunity to present at the hearing any facts or defenses that the Employee Relations Manager should have more fully considered if she had been acting in accordance with Grievant's expectations.

Grievant argued that he had expressed concern for the Manager and his family on several occasions in the past about losing his job. The Manager denied Grievant made such a statement and if Grievant had made such a statement it would have been a threat at that time. The Manager's testimony was credible.

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>5</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.

Grievant argued that "[t]his was a wrongful termination as a result of 10 months of almost continual harassment, retribution, recrimination, falsehoods and retaliation, initiated and directed by [the Manager]." Grievant presented witnesses who described conflict between Grievant and other employees. Grievant asserted he was not the cause of the conflict. Other employees testified Grievant was the source of the conflict. If the Hearing Officer assumes for the sake of argument that Grievant was treated inappropriately by Agency employees, the treatment Grievant received would not have justified his threat to the Manager.

## 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**.

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<sup>5</sup> Va. Code § 2.2-3005.

## 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 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>6</sup>

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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