

Issue: Group III Written Notice with Termination (threats); Hearing Date: 07/22/19; Decision Issued: 08/12/19; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11348; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling request received 08/27/19; EDR Ruling No. 2020-4976 issued on 09/17/19; Outcome: AHO's decision affirmed.**



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 11348**

Hearing Date: July 22, 2019  
Decision Issued: August 12, 2019

#### **PROCEDURAL HISTORY**

On March 14, 2019, Grievant was issued a Group III Written Notice of disciplinary action with removal for making threats.

On April 2, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 22, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 22, 2019, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Social Services employed Grievant as an Administrative Assistant Senior. She had been employed by the Agency for approximately two years. No prior active disciplinary action was introduced during the hearing.

Grievant and Ms. C sat in adjoining office cubes. If Grievant and Ms. C stood up, they could speak over the wall to their office cubes.

On February 14, 2019, Grievant approached Ms. C at her desk at approximately 10 a.m. Grievant said, "Can I ask you a question?" As Ms. C was about to say "Yes", Grievant wrote on a note pad, "Do you like [Mr. K's first name]?" Ms. C said, "He is fine with me. I do not have problems with anyone in the office." Grievant erased her writing on the paper and said, "He has one more time." Ms. C asked, "One more time for what?" Grievant did not answer. Ms. C said that if something was going on with Mr. K, Grievant should speak with a supervisor. Grievant said, "I'm from New Jersey and will handle it the way we do it there." Ms. C interpreted Grievant's statement as suggesting Grievant would do something violent. Ms. C asked Grievant what she meant. Grievant replied, "Take it to the streets." Ms. C interpreted Grievant's comment to mean she intended to physically harm Mr. K. Ms. C said "Don't take it into your own hands; speak with a supervisor." Ms. C interpreted Grievant's behavior as a credible threat of harm to Mr. K. Grievant was angry as she spoke about Mr. K.

At approximately 1 p.m., Grievant returned to Ms. C and showed Ms. C a message Grievant had written on a sticky note. The message said, “[Mr. K’s first name] is going to get his ass beat.” Grievant said, “He has one more time.” Ms. C asked, “What is he doing to you?” Grievant responded, “He is doing something.” Ms. C told Grievant to talk to her supervisor. Grievant asked Ms. C if Grievant said something to Mr. K outside of the building would she get in trouble. Ms. C said not to do anything on her own but to talk to a supervisor. Grievant asked Ms. C if Grievant walked beside Mr. K to the bus stop but not touch him while cursing him out, would she get in trouble. Ms. C told Grievant that was verbal assault. Grievant asked was verbal assault a “real thing”. Ms. C said it was. Grievant said she was glad Ms. C told her that.

Ms. C later contacted the Supervisor. Ms. C felt that if she did not contact the Supervisor and Grievant harmed Mr. K without Ms. C saying anything, it would be on her conscience.

### **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.”

Threatening others” is a Group III offense.<sup>2</sup> On February 14, 2019, Grievant was frustrated with Mr. K. Grievant told Ms. C that Grievant was from New Jersey and would handle it the way they handled it there by taking it to the streets. Ms. C reasonably believed Grievant was threatening Mr. K with physical harm. Grievant later wrote that Mr. K was going to get his ass beat which Ms. C understood to be physical harm to Mr. K. The Agency has presented sufficient evidence to show that Grievant threatened physical harm to Mr. K thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Grievant denied threatening Mr. K. The Agency presented sufficient evidence to supports its claim against Grievant. Ms. C’s testimony was credible. Grievant offered no motive for Ms. C to be untruthful.

Grievant asserted she did not have any communication with Mr. K on February 14, 2019 and that she did not cause or intend to cause any harm to Mr. K. It is not

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

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

necessary for the Agency to establish that Grievant intended to carry out her threat. Grievant threatened to harm Mr. K and that threat is enough to support the Agency's disciplinary action.

Grievant claimed she suffered from anxiety disorder and panic attacks. No credible evidence was presented showing Grievant's physical condition or medications influenced her behavior on February 14, 2019.

*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 III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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.

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<sup>3</sup> Va. Code § 2.2-3005.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</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>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.