

Issue: Group III Written Notice with termination (threatening or coercing an employee);
Hearing Date: September 27, 2001; Decision Date: October 9, 2001; Agency:
Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number:
5295



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5295

Hearing Date: September 27, 2001
Decision Issued: October 9, 2001

PROCEDURAL HISTORY

On April 10, 2001, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Threatening or coercing a state employee. On April 9, 2001, you did threaten by approaching a state employee and made physical contact with him by putting your hands on his chest.

On April 24, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 13, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 27, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Captain

Corrections Officer
Lieutenant
Officer
Assistant Manager

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

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 Corrections Officer. He was responsible for maintaining security, custody, and control over inmates.¹ On May 2, 2000, he received a Group II Written Notice for failure to follow supervisor's instructions, and on March 12, 2001, he received a Group I Written Notice for excessive tardiness.²

Grievant's supervisor requires his subordinates to provide a doctor's excuse when an employee is absent from work due to illness. On April 9, 2001, Grievant returned from an absence due to illness and presented the Lieutenant with a doctor's note. The note excused Grievant from March 28, 2001 to April 8, 2001. Some question arose regarding whether the excuse should have read through April 9, 2001, a day later. Grievant became concerned that the excuse would not cover his full absence. The Lieutenant spoke with the Captain who took the doctor's note and read it. Grievant asked that the note be returned to him immediately. He wanted to take the note back the doctor and have the correct date listed. The Captain refused to give Grievant the

¹ Agency Exhibit 4.

² Agency Exhibit 6.

note. The Captain said he would take the note and make a copy and return the copy to the Grievant. This was not acceptable to Grievant. He demanded that the original doctor's note be returned to him immediately. The Captain repeated that Grievant could have a copy of the note. Grievant repeated his demand that the note be returned to him. The Captain ordered Grievant to report to the Watch Commander's office where he could receive a copy of the note. Grievant loudly cursed and yelled at the Captain. The Captain then ordered Grievant to go to the Major's office and the Captain began to walk away in order to diffuse the conflict. Grievant then raised his forearm and placed his forearm in the Captain's chest in order to prevent the Captain from leaving. The Captain attempted to walk around Grievant but Grievant positioned himself in front of the Captain and again raised his forearm and placed it in the Captain's chest to block the Captain from leaving. The Captain backed up and instructed Grievant not to put his hands on the Captain again. The Lieutenant ordered Grievant to report to the Major's office and Grievant walked away. The Captain felt threatened by Grievant and believed there was a real risk that Grievant would begin a fistfight.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

Group III offenses include "[a]cts of physical violence or fighting" and "[t]hreatening or coercing persons associated with any state agency". Grievant yelled and cursed at the Captain while blocking his movement. Grievant's intent and actions demonstrate physical violence intended to coerce the Captain in to giving Grievant the doctor's note. Grievant's behavior rises to the level of a Group III offense.

Grievant contends the Captain should have returned the doctor's note to Grievant thereby avoiding any conflict. Once Grievant tendered the note as his excuse for being absent it became an official State record and, thus, the Captain could reasonably refuse to return the original note. Even if the Hearing Officer assumes for the sake of argument that the Captain should have returned the note to Grievant, the Captain's refusals does not justify Grievant attempting to manhandle the Captain into returning the note.

Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an

employee's long service with a history of otherwise satisfactory work performance. DOCPM § 5-10.13(B).

Given that Grievant has an active Group II Written Notice for refusing to follow supervisor's instructions, and an active Group I Written Notice for excessive tardiness, there are no mitigating circumstances warranting reduction of 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

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set 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.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer