

Issue: Group III Written Notice with Termination (threatening and coercing behavior);
Hearing Date: 06/04/02; Decision Date: 06/17/02; Agency: James Madison
University; AHO: Carl Wilson Schmidt, Esq.; Case No. 5442



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5442

Hearing Date: June 4, 2002
Decision Issued: June 17, 2002

PROCEDURAL HISTORY

On March 26, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Threatening or coercing persons associated with any state agency.

On April 1, 2002, 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 May 9, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 4, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Fiscal Assistant
Manager
Assistant Professor Psychology

Associate Professor
CSAT Internship Coordinator
Assistant Professor
Director, Science and Computing
Network Systems Administrator
Laboratory Operations

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:

James Madison University employed Grievant in its computer technical support unit until his removal on March 26, 2002. He was a very capable, talented, and hardworking employee. On August 30, 2000, Grievant received a Group I Written Notice for an unspecified offense.¹ On July 14, 2002, Grievant received a Group II Written Notice for unauthorized use or misuse of state property or records and for threatening or coercing persons associated with any State agency.

The University does not provide adequate parking to its employees, guests, and students. Inadequate parking has been an ongoing source of contention among numerous employees forced to park outside of areas reserved for them. The University issues parking tickets for vehicles parked improperly such as in fire lanes.

On March 21, 2002, Grievant drove his vehicle to a University location to attend to a service call. Upon returning to his vehicle, he found a parking ticket for illegally parking in a fire lane. He did not believe he had illegally parked. He had observed University trucks and vendor service trucks park in the same place where he parked, yet

¹ The University's exhibits are incomplete regarding the basis for the disciplinary action.

those trucks were not ticketed. He felt he was being singled out. He decided to let University officials know of his displeasure with being ticketed. He immediately went to the University's Parking Services office. Inside the office are teller windows. Several students were waiting in line to register their vehicles or attend to other business. Grievant walked to the front of the line and told the Fiscal Assistant "I want to speak to [Manager] and I want to speak to her now!" His voice was shaky and above a normal level. The Fiscal Assistant walked back to the Manager's office and told her that Grievant was demanding to see her and that Grievant appeared very agitated, that his hands were shaking and his voice was quivering.

The Manager walked out of her office to where Grievant was standing several feet away from the teller lines. Under normal circumstances, the Manager would have invited Grievant back into her office to discuss his concerns but because of his demeanor she decided to meet with him in the public area of the offices. Grievant was visibly upset. His hands were shaking and his voice was quivering. Grievant began speaking loudly and aggressively to the Manager about his concerns. He began pointing at her. He told her that his service tag allowed him to park anywhere but fire lanes, handicapped spaces, meters, and clinic spaces. Grievant told her that "this had better stop", "this had better not happen again", "the ticket was not valid", and to "stop harassing him" among other things.

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." P&PM § 1.60(V)(B).² 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." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

"Threatening or coercing persons associated with any state agency (including, but not limited to, employees, supervisors, patients, inmates, visitors, and students)" is a Group III offense.³ Grievant threatened the Manager with further reprisals if she continued ticketing his vehicle. His actions were designed to coerce the Manager into instruct her staff into being more lenient when deciding whether to issue parking tickets to Grievant. Grievant's behavior rises to the level of a Group III offense.

² The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM") setting forth Standards of Conduct for State employees.

³ P&PM § 1.60(V)(B)(3).

Grievant's frustration with the inadequate parking available from the University is understandable. On the one hand, the University expects its employees to function efficiently, yet it creates its own barriers to employee success by failing to provide adequate parking. Grievant's frustration, however, is shared by other employees who are able to make their complaints without coercing or threatening other University staff.⁴ Although Grievant's frustration with the University is appropriate, his actions to address that frustration were not appropriate in a professional setting.

Grievant contends the Agency has not established that the Manager was truly threatened or coerced. He argues his statements of "you better not do this again" are too general to constitute a threat. Based on the testimony of the Manager and the Fiscal Assistant,⁵ however, the Hearing Officer finds that when Grievant's words are considered together with his physical demeanor and agitated state, he threatened and coerced the Manager as alleged by the University.

Although Grievant is a capable employee, there is no basis to mitigate the disciplinary action against him. His prior disciplinary actions reflect a pattern of failing to control his temper and an inability to resolve disputes without disrupting others. This pattern of behavior is what ultimately caused Grievant to be removed from employment.

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 three 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

⁴ Grievant states in his grievance response, "It is a fact of life at JMU, everyone gets parking tickets, everyone complains."

⁵ Grievant did not testify and, thus, the University's evidence regarding Grievant's demeanor and statements is un rebutted. Grievant's denials in his written grievance response are insufficient to overcome the University's evidence.

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 Resource 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.

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 DHRM, 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