

Issue: Group I Written Notice with 5-day Suspension (disruptive behavior);
Hearing Date: June 11, 2002; Decision Date: June 12, 2002; Agency:
Department of Transportation; AHO: David J. Latham, Esquire; Case Number:
5451; **Administrative Review: EDR Ruling Request received 06/24/02; EDR
Ruling Date: 09/09/02; Outcome: HO did not abuse discretion or exceed
authority (EDR Ruling No. 2002-140)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5451

Hearing Date:	June 11, 2002
Decision Issued:	June 12, 2002

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Human Resource Analyst
Representative for Agency
Four witnesses for Agency
EDR Observer¹

¹ Section IV.A, *Rules for Conducting Grievance Hearings*, effective July 1, 2001, states, "Because EDR is charged with oversight of the grievance process, the EDR Director or his designee may observe any hearing without first seeking or receiving permission to do so from the hearing officer."

ISSUES

Did the grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group I Written Notice issued for disruptive behavior on March 11, 2002.² As part of the disciplinary action, the grievant was suspended for five workdays from March 12-18, 2002.³ Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Transportation (VDOT) (hereinafter referred to as "agency") has employed grievant as a crew member for four years. His supervisor rates him a very good worker who handles equipment well and works hard. Grievant had two active disciplinary actions on the date the Group I Written Notice was issued. A Group I Written Notice was issued to grievant for disruptive behavior on March 28, 2000.⁴ Another Group I Written Notice was issued to grievant for a conviction of improper driving on September 18, 2000.⁵

The Commonwealth's policy regarding leaves of absence provides, in pertinent part:

- a. Employees should request leaves of absence as far in advance of the desired leave as practicable.
 - b. Employees also should submit requests for leaves of absence in accordance with the specific requirements set forth in the respective leave policies, and which may be set forth in their agencies' procedures for requesting leaves.⁶
2. If the time requested for a leave of absence conflicts with agency operations, the agency has the discretion to approve the employee's request for an alternate time.⁷

Grievant's facility had a long-established practice of requiring that employees desiring annual leave submit their request at least 24 hours in advance. On January 30, 2002, grievant's supervisor counseled grievant in

² Exhibit 7. *Grievance Form A*, filed March 29, 2002.

³ Exhibit 6. Written Notice, issued March 19, 2002.

⁴ Exhibit 5. Written Notice, issued April 3, 2000.

⁵ Exhibit 9. Written Notice, issued September 18, 2000.

⁶ Exhibit 1. Section III.B.1, DHRM Policy No. 4.30, *Leave Policies – General Provisions*, effective September 16, 1993.

⁷ Exhibit 1. Section III.C.2, *Ibid.*

writing about the necessity of following proper procedures when requesting time off from work.⁸

On March 11, 2002, the supervisor conducted a safety meeting with all of his subordinates before the start of the workday. At the end of the meeting, the supervisor repeated to the entire group a statement he had made to the crew at previous meetings – “If crew leaders have any problems with crewmembers doing their assignments, report it to me (the supervisor).” Following the meeting the two crew leaders assigned specific tasks to each crew member for that day. Grievant then told his crew leader that he wanted to take the day off and requested the crew leader to ask the supervisor for permission to take leave that day. The crew leader went to the supervisor and sought permission for grievant to take the day off.

The supervisor asked the grievant into his office and asked him whether there was an emergency. Grievant responded, “No, I just want to be off.”⁹ The supervisor explained the requirement to ask for leave 24 hours in advance and told grievant that his crew was short four crewmembers that day. He then again asked grievant whether everything was okay. Grievant said he was tired of the supervisor threatening him and specifically referenced the supervisor's instruction to the crew leaders (quoted in the preceding paragraph). Grievant became uncooperative, stating, “It is my time, I can use it when I want to.”¹⁰ The supervisor left his office momentarily to bring the crew leader into the office. When he returned, his office door had closed and automatically locked. He asked grievant (who was inside) to open the door but grievant refused and told his supervisor to open the door himself. When the supervisor finally obtained a spare key and reentered his office with the crew leader, he directed grievant to start his job assignment for that day; grievant then got in his truck and drove to the work site on an interstate highway.

As grievant was driving to the work site, he called the Maintenance Manager (two levels above his supervisor). He was so upset that he could not be understood because he was yelling; the Maintenance Manager asked him to call back when he calmed down. It required three calls before grievant could make himself understood to the Manager. Grievant said that he was upset, that he didn't think he could operate the equipment, that he was being placed in an unsafe situation and that he could get killed. The Maintenance Manager then called grievant's supervisor and directed him to drive to the work site and bring grievant back to the office. When grievant entered the supervisor's pickup truck, the supervisor reached across the seat to move his safety equipment and hit grievant's arm as he did so. Grievant again called the Maintenance Manager on his cell phone stating that the supervisor was punching him. The Manager asked to speak with the supervisor but grievant refused to hand the phone to him,

⁸ Exhibit 2. Memorandum of Counseling from supervisor to grievant, January 30, 2002.

⁹ Exhibit 3. Supervisor's memorandum documenting the events of March 11, 2002.

¹⁰ Exhibit 3. *Ibid.*

telling the Manager she would have to speak to the supervisor on his own cell phone. Grievant then told his supervisor to pull the truck to the side of the road so they could, "settle this problem right now." The supervisor continued driving back to the office.

When they arrived at the office, grievant placed another call on his cell phone, this time to the EEO manager. By this time, the Maintenance Manager and the Transportation Operations Manager (to whom grievant's supervisor reports) had arrived at the scene. They met in an office with grievant and grievant's supervisor. Grievant was loud, uncooperative, belligerent and insisted that the EEO manager had told him he could go home.¹¹ Grievant called his supervisor a big liar because the supervisor denied punching him. Grievant was advised that the EEO manager was not in his chain of command and had no authority to grant him leave. Because the grievant was so upset and on the verge of being out of control, the Maintenance Manager decided to send grievant home for the rest of the day.¹² He was then placed on suspension for the next five workdays from March 12 through March 18, 2002.

Grievant had previously been counseled in writing when he threatened to fight with an employee.¹³ In addition, the Written Notice issued on March 29, 2000 was for a threat grievant made against the same employee with the statement, "I will get you."¹⁴

On three occasions, the agency has offered the grievant an opportunity to receive anger management counseling but grievant has refused to participate.

APPLICABLE LAW AND OPINION

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. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

¹¹ The EEO manager told grievant that he should follow whatever instructions the Maintenance Manager gave him.

¹² See Exhibit 8, p.5, *Second Step Resolution Response*, for a description of grievant's inability to recognize how others perceive his angry behavior.

¹³ Exhibit 4. Counseling memorandum from transportation maintenance superintendent to grievant, January 10, 2000.

¹⁴ Exhibit 5. Memorandum from transportation maintenance superintendent to grievant, March 29, 2000.

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent 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 employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹⁶ promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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 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. Section V.B.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses include acts and behavior considered the least serious among all offenses. One example of a Group I offense is disruptive behavior.¹⁷

The agency has demonstrated, by a preponderance of the evidence, that grievant's behavior was disruptive on March 11, 2002. The grievant's version of what occurred is similar in most major respects to the testimony of the agency's four witnesses. However, there are three differences worthy of mention. First, grievant contends that the supervisor's statement at the end of the safety meeting was a threat to grievant. The statement itself is undisputed; the difference is that grievant interpreted the statement as being a personal threat against him. A reasonable interpretation of the supervisor's statement does not reveal any overt or covert threat. It was merely a conditional instruction to the two crew leaders that they should not attempt to resolve any assignment disputes themselves, but should instead refer the matter to the supervisor.

¹⁵ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.

¹⁶ Now known as the Department of Human Resource Management (DHRM).

¹⁷ Exhibit 12. Section V.B.1.e, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

Second, grievant contends that his supervisor punched him hard enough to cause pain, while the supervisor maintains that he only accidentally hit grievant while moving safety equipment on the seat of his pickup truck. In such a situation, a blow to the arm may seem inconsequential or painful depending upon the musculature of the recipient, the exact point of contact, the speed of the blow, the size of the striker's hand and other factors. Since only the grievant and his supervisor were present, there is no independent, objective witness to shed light on the forcefulness of the contact. It is not necessary to resolve this question in order reach a decision in this case. The hearing officer will assume that the blow to grievant's arm did cause pain. However, even if the supervisor's blow caused grievant discomfort, this does not excuse the grievant's disruptive behavior on the morning of March 11, 2002.

Finally, grievant does not acknowledge that his behavior was disruptive. However, the testimony of four agency witnesses substantially outweighs grievant's failure to perceive the seriousness of his own behavior. Grievant's disruptive behavior began when he insisted on taking a day of leave despite the fact that he had not requested leave 24 hours in advance and despite the fact that he had no emergency. Although the agency did not discipline grievant for this specific incident, it was unnecessarily disruptive since grievant had been repeatedly told about the proper procedure for requesting leave. After he left to go the job site, grievant made angry telephone calls to several people including the maintenance manager and the EEO manager. The subsequent meeting disrupted the workdays of grievant's supervisor, the maintenance manager, and the transportation operations manager. This type of disruption was completely unnecessary and inappropriate because grievant should not have expected to have leave granted when he had failed to follow proper procedure for requesting the leave.

Even more egregious than grievant's disruptive behavior were the other, more serious offenses he committed that morning. The facts in this case document that grievant was insubordinate when he refused to open the supervisor's office door, and when he refused the maintenance manager's instruction to hand the phone to his supervisor. Insubordination (failure to follow a supervisor's instructions) is a Group II offense. Further, grievant admits that he threatened to fight with his supervisor when he told him to stop the truck so they could get out and settle the matter. Threatening a state employee is a Group III offense, which warrants immediate termination of employment. Moreover grievant had been given unambiguous written warnings on at least two prior occasions when he had threatened another employee.

Grievant believes he should not be disciplined because he does not think that his supervisor was disciplined. However, grievant has no knowledge off whether the agency took any corrective action against the supervisor. Moreover, the evidence in this case does not demonstrate that the supervisor committed any offense that would require corrective action. The only allegation against the

supervisor is that he punched grievant. However, the evidence in this case is insufficient to conclude that the blow to grievant's arm was intentional.

Moreover, the uncontradicted testimony established that grievant's supervisor had taken grievant under his wing and has done all he could to help advance grievant's career. The supervisor feels a certain closeness to grievant because the supervisor's father and grievant both have a similar learning disability. The supervisor praised grievant's abilities, skills and willingness to work hard when grievant is on the job. Accordingly, not only has the grievant shown no motivation for the supervisor to be unfair or punitive, but the evidence supports a finding that the supervisor had treated the grievant quite favorably.

Given grievant's past disciplinary record and his behavior on March 11, 2002, the agency would have been justified in issuing a Group III Written Notice and immediately dismissing grievant from state employment. However, the agency considers grievant a good worker and decided to discipline only his disruptive behavior. Under the circumstances, the agency was exceedingly forgiving to this grievant.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for disruptive behavior and the five-day suspension issued to grievant on March 19, 2002 are hereby AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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 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.

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.

David J. Latham, Esq.
Hearing Officer