

Issue: Group I Written Notice with 3-day Suspension and Transfer (disruptive behavior); Hearing Date: June 28, 2002; Decision Date: July 3, 2002; Agency: Department of Transportation; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5471



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5471**

Hearing Date: June 28, 2002  
Decision Issued: July 3, 2002

**PROCEDURAL HISTORY**

On April 30, 2002, Grievant was issued a Group I Written Notice of disciplinary action with three workdays suspension and transfer for disruptive behavior. On May 6, 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 June 11, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 28, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Representative  
Transportation Manager  
Receptionist  
Human Resource Manager  
Fitness for Duty Coordinator  
Equipment Service Manager

## **ISSUE**

Whether Grievant should receive a Group I Written Notice of disciplinary action with suspension and transfer.

## **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 Virginia Department of Transportation employs Grievant as a crew member at one of its Facilities. He has been employed by the Agency for approximately four years and received satisfactory evaluations. As of April, 30, 2002, Grievant had two prior active group notices. He received a Group I Written Notice on September 18, 2000 for conviction of improper driving.<sup>1</sup> He received a second Group I Written Notice with seven day suspension on March 19, 2002 for disruptive behavior.<sup>2</sup>

On April 23, 2002, Grievant was to return to his former work location. He had been working temporarily at another location for several months. Before working at the temporary location, Grievant alleged that his supervisor had hit him in the arm. Grievant did not wish to be returned to his former work location because he would begin reporting to the supervisor who he believed hit him. The Agency had offered to transfer him to another location, but he declined the transfer.

The Agency realized that it may be difficult for Grievant to begin working for the Supervisor again. An early morning meeting was held at the work site with the Human Resource Manager, Grievant, the Supervisor, and the Transportation Manager.<sup>3</sup> The purpose of the meeting was to help Grievant and the Supervisor begin working anew with a "clean slate."

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<sup>1</sup> Agency Exhibit 10.

<sup>2</sup> Agency Exhibit 7.

<sup>3</sup> The Supervisor reported to the Transportation Manager.

During the meeting, Grievant would not look at the Supervisor. When the Supervisor spoke to Grievant, Grievant pointed his finger and said "You speak to him (referring to the Human Resource Manager) and not to me!" Grievant positioned his body so that he was not facing the Supervisor. At the conclusion of the meeting, the Human Resource Manager believed that the tension between Grievant and the Supervisor had been reduced to the point where they would work together.

At approximately 11 a.m., Grievant was in a State vehicle sitting next to the Supervisor. Grievant used his mobile phone to call the Receptionist for the district's office. He asked to speak with Mr. C. Grievant wanted to complain to Mr. C that the Agency should not have forced him again to report to the Supervisor. Mr. C was not in the office at that time so the Receptionist asked Grievant if she could take a message for him. In a loud and sharp tone, Grievant demanded to speak to Mr. C "now!" The Receptionist put Grievant on hold and attempted to reach Mr. C by cell phone, but was unable to contact Mr. C. She asked Grievant if there was someone else he could speak with. Grievant responded that he had "to talk with someone today, now." He said he did not want to speak with the Human Resource Manager because he had tried to talk to the Human Resource Manager and "no one is listening to me." He added, "Someone has to listen to me." "[the Human Resource Manager] put me back here where my supervisor punched me and I don't think I can stay here." "Talking about violence in the workplace, if they leave me here, there will be violence and I can't help it." "Nobody is listening to me." "I'm trying to talk to them and they are not listening." The Receptionist attempted to contact another human resource office employee but was unable to reach that employee. She told Grievant that she would have someone call him as soon as possible. Grievant responded "Just listen to me, I have to talk to someone now." "No one is listening to me; somebody has to listen to me." "After something happens they will be saying why didn't someone listen to him?" "I keep trying to tell them, but they don't listen." "There is going to be violence if someone doesn't listen." The Receptionist found another employee who was available and acceptable to Grievant and she transferred his call to that employee's telephone extension. A different employee picked up the call and spoke with Grievant briefly and offered to help. Grievant declined to speak with that employee and ended the call.

## **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).<sup>4</sup> 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

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<sup>4</sup> The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM) setting forth Standards of Conduct for State employees.

of such a serious nature that a first occurrence should normally warrant removal.” P&PM § 1.60(V)(B)(3).

“Disruptive behavior” is a Group I offense. Webster’s New Universal Unabridged Dictionary defines “disrupt” as “to cause disorder or turmoil.” Grievant’s behavior was disruptive because he caused the Receptionist and others in the human resource office to believe there was a realistic possibility that he intended to engage in physically violent behavior. The urgent tone of his voice suggested that he might engage in violent behavior at any moment.<sup>5</sup>

“Upon the accumulation of three active Written Notices for Group I offenses, the employee normally should be suspended without pay for no more than five workdays.”<sup>6</sup> With the Written Notice issued on April 30, 2002, Grievant has three active Group I Written Notices. A three day suspension is appropriate.

Grievant contends that the Agency should not have returned him to a location where he would report to a supervisor who previously hit him.<sup>7</sup> By doing so, the Agency created the environment where his behavior would be problematic, according to Grievant. This argument is untenable. The Agency recognized that Grievant may have difficulty working for the Supervisor and offered to let him transfer to another location. Grievant declined to do so and knew the consequence would be to return to his prior work site. Following issuance of the April 30, 2002 Written Notice, Grievant was transferred<sup>8</sup> to the location originally recommended by the Agency. This transfer has worked well for Grievant and the Agency. Grievant’s mandatory transfer must be upheld and the evidence suggests he should have taken the Agency’s original offer of transfer.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action with suspension and transfer is **upheld**.

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<sup>5</sup> Grievant’s objective of contacting human resource staff regarding his concern was appropriate. The problem with Grievant’s behavior is the way in which he attempted to express his concern to human resource staff.

<sup>6</sup> P&PM § 1.60(VII)(D).

<sup>7</sup> Grievant presented a mental health evaluation stating he “is capable of returning to work especially if he stays [at] his new job site where the unresolved issues of his perception of being assaulted by [the Supervisor] are not present.” Grievant interprets this evaluation to prohibit his return to his former work site. The wording of the evaluation does not support that conclusion. Even if Grievant’s interpretation of the evaluation was correct, the Agency gave Grievant the opportunity for transfer, but he declined that offer.

<sup>8</sup> The Agency did not reduce Grievant’s compensation as part of the transfer. The Hearing Officer will not address the appropriateness of this action because it was not raised at the hearing.

## 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 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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer