

Issue: Group I Written Notice (abusive language/disruptive behavior); Hearing Date: 09/09/02; Decision Date: 09/16/02; Agency: Virginia Department of Transportation; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5504



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5504

Hearing Date: September 9, 2002
Decision Issued: September 16, 2002

PROCEDURAL HISTORY

On February 11, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

Abusive Language/Disruptive Behavior

On February 24, 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 August 15, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 9, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Two Crew Members
Transportation Operator II
Transportation Operator III

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action.

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. No evidence of prior disciplinary action against Grievant was presented.

On January 20, 2002, Grievant and several other crew members spent the day removing snow from roadways. They had finished most of their shift and were at the Agency worksite cleaning and storing equipment. Crew Member SZ and Crew Member BM were inside a truck shed talking about an upcoming meeting Crew Member BM had with a supervisor to discuss an incident involving Grievant. Grievant walked into the back of the shed and overheard the two other crew members talking. Grievant interjected himself into the conversation by telling Crew Member BM that he knew Crew Member BM intended to be a witness against Grievant at the upcoming meeting. Crew Member BM responded that Grievant’s accusation was true and that he would tell the truth about Grievant during that meeting. Grievant believed Crew Member BM intended to lie during that meeting so Grievant said to Crew Member BM, “you are a mother f—king liar.” Crew Member BM responded with some obscenities. Grievant made some additional accusations. Crew Member BM balled his fist and aggressively walked towards Grievant. Crew Member BM told Grievant that if Grievant called him a mother f—king liar again, he would “knock him on his ass.” Crew Member SZ believed Grievant and Crew Member BM were about to fight so he stepped in between them. He then directed Crew Member BM towards the nearby locker room so the parties would settle down.

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.” DHRM § 1.60(V)(B).¹ 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.” DHRM § 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.” DHRM § 1.60(V)(B)(3).

“Use of obscene or abusive language” and “Disruptive behavior” are Group I offenses.² Webster’s New Universal Unabridged Dictionary defines “abusive” to include, “1. using, containing, or characterized by harshly or coarsely insulting language.” By calling Crew Member BM, a “mother f—king liar.” Grievant’s words were harsh and intended to insult Crew Member BM. The Agency has met its burden of proving Grievant should be issued a Group I Written Notice.³

Grievant contends the Agency is retaliating against him and attempting to restrict his freedom of speech. No credible evidence was presented to support these contentions. Grievant’s request for relief must be denied.

Grievant established that other employees working within the unit used profanity on occasion. An occasional use of profanity by an employee is different from Grievant’s behavior. Grievant used profanity while speaking to an employee with the intent to insult that employee. Grievant created a risk of violence. In some circumstances, however, use of profanity not directed at anyone may not rise to the level of abusive language. Grievant’s defense is insufficient to excuse his behavior.

DECISION

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

APPEAL RIGHTS

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

² DHRM § 1.60(V)(B)(1)(c) and (e).

³ The Hearing Officer does not find that Grievant’s behavior was disruptive beyond use of abusive language. Crew Member BM contributed to the near fistfight by balling his fist and approaching Grievant in an aggressive manner. Had Crew Member BM retained his composure, the incident would have remained as one of abusive language by Grievant.

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.