

Issue: Group III Written Notice with termination (threatening and coercing supervisory staff); Hearing Date: 10/04/02; Decision Date: 10/07/02; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5528



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5528

Hearing Date: October 4, 2002
Decision Issued: October 7, 2002

PROCEDURAL HISTORY

On April 5, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for threatening and coercing supervisory staff. On July 9, 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 September 4, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 4, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Two Grievant's Representative
Agency Party Designee
Legal Assistant Advocate
Manager
Supervisor
Operations Manager

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for threatening and coercing persons associated with a state agency.

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 employed Grievant as a Transportation Bride Crew Member from November 1999 until his removal on March 20, 2002. Grievant reported to the Supervisor who reported to the Manager. Grievant received a Group II Written Notice on March 20, 2002 and a Group I Written Notice issued on December 8, 2000.

On March 20, 2002, at approximately 11:45 a.m., the Manager asked Grievant to meet in his office. Grievant's Supervisor was also present for the meeting. The three men sat in chairs positioned in the form of a triangle with the Manager at the top, the Supervisor on the left, and Grievant to the right. Grievant and the Manager were sitting approximately six feet apart. The Manager handed Grievant a Group II Written Notice for failure to report to work, failure to follow supervisor's instructions, and failure to comply with established written policy. Grievant was asked to sign the Written Notice. He said he would not sign the notice until he had a chance to speak with an employment dispute counselor. Grievant then started to leave the office. The Manager instructed Grievant to sit back down because the meeting was not finished. The Manager intended to further discuss the written notice with Grievant. Instead of sitting down, Grievant charged towards the Manager and stood a few inches away from the seated Manager. Grievant's face was red and his two fists were clinched and positioned in front of the Manager's face. Grievant said words to the effect of "he had had enough of this sh-t" and "you won the first one but you will not win this one and you can take it to the bank." The Manager could not move without bumping into Grievant. He feared that Grievant may strike him.

After a short period of time, Grievant moved away from the Manager and went to the desk next to the Supervisor and picked up the Written Notice. He wrote on the

notice, "I Did not Refuse to Sign. Stated Wanted to Discuss Matter with DERC" and signed his name and dated his signature. Grievant then indicated he needed to take sick leave due to illness and asked if that would be permitted. The Manager said Grievant could take sick leave, but Grievant had to bring a doctor's excuse upon his return to work.

CONCLUSIONS OF LAW AND POLICY

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).

"Threatening or coercing persons associated with any state agency (including, but no limited to, employees, supervisors, patients, inmates, visitors, and students)" is a Group III offense.² Grievant's behavior rises to the level of threatening or coercive action subject to disciplinary action. By quickly positioning himself above the seated Manager with his fists clinched as if to strike, Grievant threatened physical violence against the Manager. Until Grievant backed away, the Manager had reason to believe Grievant was likely to strike him.

An individual may communicate using oral statements as well as physical behavior. On March 20, 2002, Grievant communicated far more relying on his physical behavior than using his oral expressions. When Grievant's oral statements are considered alone, they reflect Grievant's expression of disgust with the Agency's actions against him. His oral threat is to engage in the appropriate behavior of filing and winning a grievance against the Agency. His oral statements, considered separately, are not of concern.

Grievant's physical behavior on March 20, 2002 is a far more serious matter. He charged the seated Manager. Grievant positioned himself in a manner that prevented the Manager from rising without making contact with Grievant. Grievant's face was reddened since he was flushed with anger while speaking to the Manager in an elevated tone. His fists were clinched as if to strike and positioned in the Manager's face. The Manager's fear of injury was understandable. Grievant brought the matter to

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)(3)(k).

the precipice of a fight. The incident can be best summed up by the Supervisor's expression that he thought there would be "an ass whipping."

Grievant denies he engaged in the physical behavior attributed to him.³ Based on the demeanor of the witnesses, the Hearing Officer finds that the assertions by Agency's witnesses were more credible than the denial by Grievant. Although there may be some minor differences between the eyewitness accounts of the Supervisor and the Manager, the significant portions of their testimony were consistent.

Grievant contends that there are mitigating circumstances that explain his behavior. He learned earlier in the morning of March 20, 2002 that he suffers from hypertension. As an otherwise healthy person, this diagnosis surprised and upset him. He began to feel poorly after the doctor's visit and wished to take sick leave. When the Manager presented him with the Group II Written Notice, it came as a surprise to him and resulted in behavior inconsistent with his customary behavior.

Although Grievant may have been upset at learning he had hypertension, this fact is insufficient to excuse his behavior. The Hearing Officer finds no mitigating circumstance to reduce the disciplinary action against Grievant.

Grievant contends the Agency did not consider his behavior as offensive as it now claims because correspondence with Grievant after March 20, 2002 showed the Agency expected Grievant to return to work. The Hearing Officer has no reason to believe the Agency understated its concern about Grievant's behavior. Correspondence with Grievant after March 20, 2002 regarding his sick leave was a separate matter from the disciplinary action. The Agency had not completed its decision-making process regarding how to discipline Grievant while it followed its standard procedures for absent employees.

In addition to claiming his removal was unjust, Grievant contends the Agency retaliated against him, coerced and undermined employees, falsified documents, and made false allegations against him. No credible evidence was presented to support these claims.

Grievant was removed from employment on March 20, 2002, but the Written Notice was not issued until April 5, 2002. The effect of this action is to retroactively remove Grievant based on the date of his behavior.⁴ The active life of a Group III Written notice is "for four years from its **date of issuance** to the employee."⁵ (Emphasis

³ Grievant argues the Hearing Officer should adopt a rigorous definition of "threat" as specified in Virginia case law. The Hearing Officer declines to do so. It is not necessary to rely on case law in order to define terms with common usage. In this instance, Grievant's behavior served as a threat of bodily injury to the Manager.

⁴ No evidence was presented suggesting Grievant was suspended pending an investigation or removed with pay pending the issuance of disciplinary action.

⁵ DHRM § 1.60(VII)(B)(2)(c).

added.) The Group III Written Notice was not active on March 20, 2002 and, thus, there is no basis to remove him as of March 20, 2002.⁶ Grievant's removal is appropriate no sooner than April 5, 2002, the date the notice became active. Grievant must be awarded back pay and benefits for the period of March 20, 2002 until April 5, 2002, subject to the application of leave policies and balances.

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**.

The Agency is directed to pay Grievant from March 20, 2002 to April 5, 2002 subject to Agency leave policies and Grievant's leave balances.

APPEAL RIGHTS

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.

⁶ The effect of permitting Grievant's removal to remain March 20, 2002 is to extend the active life of the Written Notice from four years to four years and 16 days.

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.⁷

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.