

Issue: Group III Written Notice with termination (creating a hostile work environment);
Hearing Date: 11/22/02; Decision Date: 12/20/02; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No.: 5564; **Judicial Review: Appealed to the Circuit
Court in Wise County on 01/08/03; Outcome: Parties settled outside of court.
Appeal dismissed on 04/18/03 (Case No. L03-09)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5564

Hearing Date: November 22, 2002
Decision Issued: December 20, 2002

PROCEDURAL HISTORY

On September 9, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for creating a hostile work environment. On September 16, 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 October 21, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 22, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Electrician
Plumber Steam Supervisor
HVAC Supervisor
Electrician
HVAC Supervisor

Buildings and Grounds Supervisor B
Storekeeper Senior
OSA

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:

The Department of Corrections employed Grievant as a Building and Grounds Superintendent until his removal on September 9, 2002. He began working for the agency on October 1, 1997. The purpose of his position was, "Plans and directs full range of institutional building and grounds and maintenance programs, directs the work of subordinate supervisors, foreman and inmate workers."¹

Grievant received a Group II Written Notice on October 25, 2000 for failure to follow supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy.² On July 20, 2001, Grievant received a Group III Written Notice for conduct unbecoming a manager or non-professional relationship with inmates.³

In March 2002, the Electrician suffered an injury resulting from heavy lifting. He went to the local emergency room hospital and was treated and released for light duty. He came back to work the next day but continued to have problems. His medical

¹ Agency Exhibit 16.

² Agency Exhibit 13.

³ Agency Exhibit 14.

provider excused him from work for several weeks. When the Electrician returned to work, he remained on light duty.

Six staff including Grievant rotated carrying a pager and being on-call to respond to urgent requests for work at the Facility. Once the Electrician began working only light duty, he was no longer placed in the on-call rotation. This increased the burden on Grievant and the other employees who had to wear a pager and be on-call more frequently.

Grievant disliked the fact that the Electrician was not performing all of the duties of his position. From March to August 2002, Grievant stated to the Electrician and to other workers that the Electrician “was f—king them.” He made this statement approximately 20 to 30 times.

On August 8, 2002, the Electrician filed a grievance with the Agency alleging Grievant created a “hostile work environment and harassment.”⁴ He felt he was being singled out for criticism and ridicule by Grievant and wanted to protect himself. His grievance states:

On 7/10/02 superintendent [Grievant] informed me that all the maintenance personnel were mad at me because they were having to do my work and do my on call duties. And that I was f---ing them. I asked maintenance supervisor ... if he was mad and he said no. I asked maintenance [BP] if he was mad at me he said no. I asked maintenance [AT] if he was mad at me he said no. Superintendent [Grievant] said that “HE” did not like me being on light duty. I told superintendent [Grievant] that he needed to say “HE” did not like the fact that I was on light duty and not blame it on the other maintenance personnel.

On 7/26/02 superintendent [Grievant] told maintenance [LS] and [BP] to thank me for f---ing them. That sense I was on light duty per the compensation doctor this was causing each of them to have to pull extra duty on the weekend on call schedule for the next two months.

This is not the first time superintendent [Grievant] had told me that I was f--ing the rest of the maintenance department. As a matter of fact he has said this on many occasions in front of witnesses. Also it has come to my attention in the last couple of weeks, that while I was off work on disability leave, superintendent [Grievant] was telling a number of the maintenance personnel that the extra work and on call duties that they were having to perform were my fault and that I was f---ing them.

⁴ Agency Exhibit 1.

The Electrician felt intimidated by Grievant's criticisms and guilty that other staff were having to assume his duties. He worried about whether his inability to perform his duties would be held against him by Grievant.⁵

CONCLUSIONS OF 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." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. 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." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

A supervisor is expected to monitor the subordinate's claim that he cannot work in order to be a good supervisor. Grievant, however, not only monitored the Electrician's inability to work, Grievant pressured the Electrician to return to work at full capacity when the Electrician could not do so and had not been authorized to do so by his medical providers. Grievant's behavior reflected poor management and inadequate job performance. By reinforcing his opinion with the Electrician's co-workers, Grievant disrupted Agency operations. Grievant's behavior disrupted the workplace to the point where a subordinate believed it was necessary to file a grievance to protect himself from Grievant's personal attacks. Grievant's behavior rises to the level of a Group I offense.

An employee may be removed based on the accumulation of disciplinary action. Prior to the issuance of this disciplinary action, Grievant had an active Group III Written Notice and an active Group II Written Notice. With the addition of a Group I Written Notice, Grievant may be removed based on the accumulation of disciplinary action. Thus, Grievant's removal is upheld.

The Agency contends Grievant created a hostile work environment sufficient to justify a Group III Written Notice. Although the phrase "hostile work environment" is typically associated with gender discrimination,⁶ the Agency uses that phrase to mean an extreme level of disruptive behavior sufficient to warrant removal. The Agency has established that Grievant's behavior was disruptive, but it has not established that the

⁵ Grievant supervised an employee who supervised the Electrician.

⁶ The Agency argues Grievant violated DHRM § 2.30 regarding Workplace Harassment. Grievant did not violate this policy because his behavior was not based on "race, color, national origin, age, sex, religion, disability, marital status or pregnancy." The Electrician was injured, but the evidence does not show he was disabled. The Agency argues Grievant violated DHRM 1.80 regarding Workplace Violence. Grievant's behavior was not violent and was not extreme enough to subject another individual to "extreme emotional distress." The Electrician was distressed, but his distress was not extreme.

degree of disruption was so extreme as to warrant removal independently of the accumulation of evidence.

Grievant contends he was just joking with the Electrician when he made his comments and that the “f word” is frequently used the workplace. The evidence shows that on several occasions Grievant was not joking and intended to criticize the Electrician both personally and in front of the Electrician’s co-workers. Although employees may frequently use the “f word” in the workplace, Grievant’s behavior would have been disruptive even if he had not used the “f word.” Grievant created unnecessary pressure on the Electrician to return to work.

Grievant argues the Electrician filed a grievance against Grievant as part of a conspiracy with two other employees. The evidence is insufficient to support this allegation. The Electrician acted independently of the two other employees.

Grievant argues that the Electrician could have told him that his comments bothered the Electrician and then Grievant would have discontinued the offensive comments. Although it is possible this may have happened, the Electrician was not obligated to confront his superior. Given the relationship between the Electrician and Grievant, it was reasonable for the Electrician to conclude that Grievant would not have reacted favorably to being questioned by the Electrician.

DECISION

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

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.

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].

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.