

Issue: Group III Written Notice with termination (damaging State property); Hearing Date: 11/20/02; Decision Date: 11/25/02; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5568; **Administrative Review: EDR Ruling requested 11/18/02; EDR Ruling Date: 01/06/03; Outcome: HO neither abused his discretion nor exceeded authority (#2002-226); Judicial Review: Appealed to the Circuit Court in Wise County; Outcome: Court finds that HO's decision is not contradictory to law [Case No. L03-24]; ruling dated 05/06/03**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5568**

Hearing Date: November 20, 2002  
Decision Issued: November 25, 2002

**PROCEDURAL HISTORY**

On August 19, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Violation of Employee Standards of Conduct 5-10.17 B 3. Willfully, or by acts of gross negligence, damaging or defacing state records, state property or property of other persons, including but not limited to employees, supervisors, patients, offenders, visitors, volunteers, contractors, and students.*

On September 18, 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 28, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 20, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel

Agency Party Designee  
Legal Assistant Advocate  
Lieutenant  
K9 Officer  
Corrections Officer  
Sergeant

## **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 Corrections Officer Senior until his removal on August 19, 2002. Grievant began working for the Agency on February 23, 1998. He received a Group III Written Notice on February 26, 2001, for leaving his security post without permission and threatening an inmate.<sup>1</sup> His evaluations show his overall work performance met the Agency’s expectations.<sup>2</sup>

Grievant worked as a control room officer. He had been working in this position for approximately ten months. As a control room officer, Grievant was responsible for sitting in front of a control panel and opening and closing numerous doors connecting two living areas with recreational and other parts of the prison. When corrections staff wish to pass through certain doors, they must notify Grievant and request that he open the door for them. Since only a certain number of doors can be open at the same time for security reasons, individuals wishing to pass through doors often have to wait for the doors to be opened. When several staff are waiting to have doors opened, they can

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<sup>1</sup> Agency Exhibit 8.

<sup>2</sup> See Grievant Exhibits 1 through 6.

become loud and impatient. This can create pressure and stress on the control room officer who is trying to manage the flow of traffic.

On July 25, 2002, Grievant was sitting at a chair in front of the control panel. Immediately behind Grievant was a rugged interior window approximately two and a half feet in height, three feet in width, and one and a half inches in depth. Several small screws secured the window into its metal casing. The window opens with hinges on the left side. Two sergeants were escorting an inmate from A-3 pod to B-building. One of the sergeants banged on the metal door and yelled to let Grievant know to open the door. This practice was customary. The Tower controller had instructed Grievant not to open the door that the two sergeants escorting an inmate wanted open. This meant the sergeants had to wait a little longer than usual before Grievant would open the metal door for them. They were unaware of the reason for the delay and assumed Grievant had not heard them bang on the metal door. Grievant grew frustrated with the competing demands of staff to open doors. Grievant is very tall. He stood up and stepped backwards with the chair passing through his legs. As he moved backwards, he brushed up against the open interior window. He took his left hand, grabbed the handle and slung the window shut with a stroke going from the left side of his body to his right side. Rubber padding provided a cushion between the window and the inside of the metal casing where the window would normally close. Because of the force Grievant used, the window hit the rubber padding and bounced outward to remain open.

When Grievant slammed the window, a loud boom could be heard throughout the small control room and several feet away. Inmates are instructed when they come to the prison that they must immediately lay down whenever they hear a shotgun blast. As Grievant slammed the window, the inmate being escorted by the two sergeants attempted to lay down because he believed someone had discharged a shotgun. One of the sergeant looked towards the sound and observed the window swaying.

The Lieutenant spoke with Grievant and asked him why he slammed the window. Grievant responded with words to the effect of "You got the most inconsiderate people working in this building that I have ever seen." Agency staff examined the window. The heads of two screws were on the floor below the window. The Hearing Officer viewed the control room and noticed several windows with missing screw heads. Grievant did not slam these windows and the screw heads were missing due to normal wear and tear.

## **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." 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.

Group III offenses include, “willfully, or by acts of gross negligence, damaging or defacing ... state property ....”<sup>3</sup> The Agency contends Grievant damaged the window handle, screws securing the window, and paint on the wall where the window opened against the wall. Pictures taken of the damage immediately after the incident could not be located by the Agency. Without contemporaneous pictures, the evidence is sufficient for the Hearing Officer to conclude only that Grievant’s action caused the heads of two small screws to shear off.<sup>4</sup> The amount of State property damaged is *de minimis*. It represents damage that would occur based on normal wear and tear. This conclusion is confirmed by the Hearing Officer’s observation that other similar windows in the control booth had missing screw heads.

Group I offenses include “disruptive behavior.”<sup>5</sup> Grievant’s behavior was disruptive because of the loud shotgun sound he caused when he slammed the window. The reaction of other employees and an inmate confirm Grievant’s behavior was disruptive. Grievant’s behavior rises to the level of a Group I Written Notice.

An employee may be removed from employment based on the accumulation of disciplinary action.<sup>6</sup> Grievant has an active Group III Written Notice and now has a Group I Written Notice. Based on the accumulation of disciplinary action, Grievant’s removal must be upheld.

Grievant contends he cannot be removed based on the accumulation of disciplinary action because he was not notified when he received the February 26, 2001 Group III Written Notice that any additional disciplinary action would result in his removal. Grievant cites the procedure for issuing a Group III notice which states:

If the employee is not removed, due to mitigating circumstances, the employee is to be notified that any subsequent written notice issued during the “active” life period, regardless of level, may result in removal.<sup>7</sup>

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<sup>3</sup> DOCPM § 5-10.17(B)(3).

<sup>4</sup> The Agency contends Grievant also knocked down riot vests and helmets in the adjoining hallway across from the bathroom. No one observed Grievant knock the items down. Grievant immediately picked up the equipment and put it back on the wall. Grievant testified that he accidentally brushed up against the vests and helmets while walking to the bathroom. Given the narrowness of the hallway and Grievant’s credible testimony, the Hearing Officer finds that the Agency has not established that Grievant intentionally knocked down the vests and helmets.

<sup>5</sup> DOCPM § 5-10.15(B)(5).

<sup>6</sup> For example, see DOCPM § 5-10.15 (fourth active Group I written notices results in termination), DOCPM § 5-10.16(C)(2) (two Group II or a Group II with three active Group I written notices should result in termination).

<sup>7</sup> DOCPM § 5-10.17(C)(2).

The Hearing Officer construes this language to provide Agency staff with a procedure it should follow to better manage its employees. Nothing in this section suggests it creates a condition precedent before the Agency may issue subsequent disciplinary action resulting in removal of an employee with an active Group III Written Notice.

Grievant argues that mitigating circumstances exist to warrant Grievant's reinstatement. The Agency contends removal is appropriate because it sees a pattern of Grievant's losing his temper and being out of control under certain stressful situations. Although the Hearing Officer may have made a decision different from the Agency's decision, the Hearing Officer is not a "super personnel officer"<sup>8</sup> who can ignore Agency reasoning that is consistent with policy. Consideration of Grievant's past work performance and factors of fairness and objectivity do not warrant mitigation of removal.

## 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

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 four 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.

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<sup>8</sup> See Section VI(A), *Rules for Conducting Grievance Hearings*.

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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer