

Issue: Group III Written Notice with 15-day suspension (threatening or coercing behavior); Hearing Date: 02/27/03; Decision Issued: 03/04/03; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 5642



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5642

Hearing Date: February 27, 2003
Decision Issued: March 4, 2003

PROCEDURAL HISTORY

On October 9, 2002, Grievant was issued a Group III Written Notice of disciplinary action with a fifteen workday suspension for:

Violation of Preventing Violence in the Workplace Policy as defined in Section III B1 and B2. The acts and behavior as documented are of such a serious nature that a Group III is being issued in accordance with Section IV B-3-K of the Standards of Conduct, "Threatening or coercing persons associated with any state agency (including, but not limited to, employees, supervisors, patients, inmates, visitors, and students.)"

On November 7, 2002, Grievant timely filed a grievance to challenge the Agency's action. During the Step Process, the Agency reduced the disciplinary action to a Group II Written Notice with a five workday suspension.¹ The outcome of the Step Process was not satisfactory to the Grievant and he requested a hearing. On January 29, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 27, 2003, a hearing was held at the Agency's regional office.

¹ Agency Exhibit 3.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Equipment Service Repair manager
Supervisor

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with five workday suspension.

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 an Equipment Repair Technician. No evidence of prior disciplinary action against Grievant was presented.

On September 25, 2002, Grievant's Supervisor wanted to speak with Grievant to find out Grievant's concerns about a prior meeting Grievant had with Agency managers. Grievant considered the issues to be discussed to be sensitive. When the Supervisor asked to speak with him, Grievant asked to have a witness present during the meeting. The Supervisor went into a small room to wait for Grievant to arrive with his witness. Grievant brought a witness into the room and the door to the room was closed. The Supervisor prepared a statement of what happened during the meeting:

On 9/25/02, I visited the [Facility] to talk with [Grievant] about a meeting he had attended with [Agency managers]. I wanted to know how the meeting went. After we were seated and started talking [Grievant] became very agitated and began accusing me of going behind his back, sticking knives

in his back, and that I am worse than the others, that what I had done to him was the worst thing anyone had ever done to him.

At this point I stood up and told [Grievant] I will not argue with you. I am leaving. I put my hand on the door handle and began to open it. [Grievant] came out of his chair, grabbed the door and closed it. Then he put his back against the door and told me “you’re not leaving. I am going to talk to you.” I took a step back and waited a few seconds and told [Grievant] you need to let me out of here. [Grievant] said again “you are not going anywhere.” So I continued to wait to see if he would calm down. After a few minutes, I said [Grievant] you blocked the door on me. At that point he opened the door and I was allowed to leave.²

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.” DHRM § 1.60(V)(B).³ 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).

The Agency adopted a policy entitled “Preventing Violence in the Workplace” to establish the Agency’s policy “concerning acts or threats of violence in the workplace.” Workplace violence is defined by the policy as:

Workplace Violence is any act of violence, harassment, intimidation, or other threatening behavior that occurs in the workplace.

- A. Violent behavior includes, but is not limited to:
 - 1. Violence directed at an employee by a co-worker.
 - 2. Violence directed towards an employee by a third party (e.g. family member, friend, contractor, etc.)
 - 3. Violence directed at a third party (e.g. family member, friend, contractor, etc.) by an employee while engaged in performing work responsibilities.

- B. Threatening behavior includes, but is not limited to:

² Agency Exhibit 7.

³ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

1. Verbal – verbal threats of violence towards persons or property; the use of vulgar or profane language towards others; derogatory comments or slurs; verbal intimidation, exaggerated criticism or name calling.
2. Physical – any physical assault such as hitting, pushing, spitting, kicking, holding, impeding, or blocking the movement of another person.
3. Visual – threatening or intimidating writings, electronic mail, posters, cartoons, publications, drawings, or gestures.⁴

“Failure to ... comply with established written policy” is a Group II offense.⁵ Grievant engaged in threatening physical behavior because he blocked the movement of his supervisor who was attempting to leave the room. Grievant’s actions were contrary to the VDOT Preventing Violence in the Workplace Policy. Issuance of a Group II Written Notice to an employee without prior active disciplinary action may result in a suspension of up to ten days. Grievant was suspended for five workdays. There are no mitigating circumstances justifying a reduction in the disciplinary action. The Agency’s issuance of a Group II Written Notice with five workday suspension to Grievant must be upheld.

Grievant objects to a portion of the Written Notice which states that his return to work from suspension requires “written proof that contact has been made with the VDOT Fitness for Duty Coordinator.” The Written Notice also states, “Failure to provide this documentation will result in the continuation of the suspension through November 8, 2002 at which time a review of his employment status will take place.”

An Agency may require an evaluation of an employee’s fitness for duty in accordance with State or Agency policy. This process must be separate from and not part of the disciplinary action taken against an employee. Nothing in DHRM Policy 1.60, *Standards of Conduct* authorizes agencies to include in a Written Notice a requirement that an employee present evidence of contact with a fitness for duty coordinator.⁶ Thus, the Written Notice must be re-written. If the Agency wishes to require Grievant to submit proof of contact with a fitness for duty coordinator, it must do so in accordance with policy other than DHRM Policy 1.60.

Grievant contends he is a peaceful man and did not intend to harm the Supervisor. The Hearing Officer agrees. It is not necessary, however, for the Agency to show Grievant intended to harm the Supervisor. By intentionally blocking the movement of the Supervisor, Grievant violated the Agency’s policy.

⁴ Agency Exhibit 1.

⁵ DHRM § 1.60(V)(B)(2)(a).

⁶ DHRM § 1.60(VII)(A), states, “Disciplinary action should be used in response to the commission of offenses, and may consist of a Written Notice and: 1. suspension; 2. Transfer or demotion ...and/or (3) termination.”

Grievant contends the door was open and he shut it as the Supervisor tried to leave. Grievant testified that he did not block the door as the Supervisor contends and that the Supervisor was not intimidated by Grievant. Neither party called as a witness the third person in the room. Based on the evidence presented, the Supervisor's version is more reliable. For example, Grievant was the last person entering the room and Grievant understood the conversation would deal with issues sensitive to him. Thus, it is more likely that Grievant closed the door after he entered the room and sat down. In any event, if Grievant's version of the events is adopted, the outcome does not change. Under Grievant's version, he closed the door to prevent the Supervisor from leaving while Grievant continued the conversation. Thus, Grievant intentionally blocked the movement of the Supervisor thereby violating the Agency's policy.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with five workday suspension is **upheld**. The Agency is Ordered to re-issue the Written Notice as follows: (1) Date of Issuance remains October 9, 2002, (2) Offense type is revised to a Group II, (3) Suspension is revised to five workdays, and (4) Mitigating Circumstances do not include discussion of fitness for duty or a continuation of suspension.

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.