

Issue: Group III Written Notice with termination (creating a hostile work environment);
Hearing Date: 02/26/03; Decision Issued: 03/24/03; Agency: DCE; AHO: Carl
Wilson Schmidt, Esq.; Case No. 5650



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5650

Hearing Date: February 26, 2003
Decision Issued: March 24, 2003

PROCEDURAL HISTORY

On November 21, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for creating a hostile work environment. On December 18, 2002, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 4, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 26, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Principal
Program Support Technician
Lead Teacher

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for creating a hostile work environment.

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 Correctional Education employed Grievant as an Assistant Principal at one of its Facilities until his removal on November 21, 2002. He began working for the Agency on January 16, 1973. The purpose of his position is to "Provide educational leadership, supervision and guidance to facilitate cost effective opportunities that enable youth and adults committed to correctional facilities to integrate successfully into the community as contributing productive citizens."¹ No evidence of any prior disciplinary action against Grievant was presented.

On October 18, 2002, the Assistant Superintendent and Superintendent from the Richmond Central Office visited the Facility where Grievant worked. They met with the Principal to discuss a corrective action plan. Grievant was standing near the meeting and he began participating in the meeting. As the Central Office staff discussed what they wanted to do, Grievant interjected his personal comments regarding the corrective action plan and the purpose of the visit by the Central Office staff. He rolled his eyes and made several sarcastic and unprofessional comments. His behavior was so disrespectful and disruptive that the Principal instructed Grievant to leave the meeting.

The Principal drafted a counseling memorandum and presented it to Grievant. The Principal describes the meeting after he presented the letter to Grievant:

But rather than accept the letter as a necessity created by your behavior, you told me you intended to resign from the agency and then said: "Don't ever call me at home again. If you do, I'll chop your neck off." The anger with which you said this quite frankly stunned me. It was several days

¹ Grievant Exhibit 1.

before I was able to make sense of this event, but I came to believe, as I now believe, that you intended your words as a threat.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).

DHRM Policy 1.60 lists examples under each level of Group offense. These listings are not all-inclusive. “[A]ny offense which, in the judgment of agency heads, undermines the effectiveness of agencies’ activities may be considered unacceptable and treated in a manner consistent with the provisions [of DHRM Policy 1.60].”⁴ The Agency has created an offense which it calls “hostile work environment” and contends Grievant undermined the effectiveness of the Agency’s activities. The phrase “hostile work environment” is a term of art typically associated with discrimination law. The Agency is not alleging Grievant unlawfully discriminated against anyone, but rather is alleging that Grievant’s behavior was so inappropriate as to justify his removal.

Regardless of what the Agency wishes to call Grievant’s behavior, the Agency has met its burden of proof to show that Grievant’s behavior justifies his removal from employment. Grievant threatened a person “associated with any state agency (including, but not limited to, employees ...”, thereby justifying issuance of a Group III Written Notice.⁵ His behavior was also contrary to DHRM Policy 1.80, *Workplace Violence*, which prohibits any “threatening to injure an individual”

Grievant contends he told the Principal, “... and don’t call me at home, I’m gonna cut the phone off.” Based on the credibility of the Principal’s testimony, the Hearing Officer concludes the Agency has met its burden of proving that Grievant threatened the Principal and did not refer to cutting off a telephone.⁶ The Agency presented several

² Agency Exhibit 5.

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

⁴ DHRM § 1.60(V)(A).

⁵ DHRM § 1.60(V)(B)(3)(k).

⁶ Grievant also argues the Principal is hard of hearing and did not correctly hear what Grievant said. Based on the evidence presented, the Hearing Officer finds that the Principal correctly heard what

examples of Grievant expressing uncontrolled anger. It is a reasonable inference that Grievant became angry when being counseled by the Principal and then threatened the Principal.

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**.

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

Grievant said. The Principal was engaged in a discussion with Grievant and was close to the Principal when Grievant made his threat.

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

[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