

Issue: Group I Written Notice (insubordination); Hearing Date: 03/18/03; Decision
Issued: 03/19/03; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 5670



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5670

Hearing Date: March 18, 2003
Decision Issued: March 19, 2003

PROCEDURAL HISTORY

On September 1, 2002, Grievant was issued a Group I Written Notice of disciplinary action for:

You are being issued a written notice for insubordination, DHRM Policy, Standards of Conduct, 1.60.V.A.1.e, in that you failed to control your unprofessional behavior during a meeting with the Captain and [the Assistant Superintendent] on August 14, 2002, despite two prior warnings.

On December 3, 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 March 4, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 18, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative

Officer Service Specialist
Captain
Assistant Superintendent
Two Lieutenants
Sergeant

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for insubordination.

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 Juvenile Justice employs Grievant as a Corrections Lieutenant. He serves as shift commander for the 7 p.m. to 7 a.m. shift. No evidence of prior disciplinary action against Grievant was introduced.

On August 14, 2002, Grievant met with the Captain and the Assistant Superintendent in the Assistant Superintendent's office. The purpose of the meeting was to discuss issuance of a Group II Written Notice to Grievant because the Agency believed Grievant had acted contrary to established written policy. The meeting began at approximately 8:40 a.m. The Captain and Assistant Superintendent explained their reasoning for issuing the Group II Written Notice. Grievant explained his reasoning why the Agency should not issue the notice. The discussion became heated and Grievant began speaking so loudly the Secretary outside the office could hear his voice.¹ At least two times, the Assistant Superintendent told Grievant he was being insubordinate and should change his behavior. Grievant continued speaking loudly to the Assistant Superintendent and the Captain. He pounded his fist on the table several times to

¹ As Grievant raised his voice, the Secretary became scared and left her office. She walked down the hall to ask another employee to walk by the Assistant Superintendent's office to see if everything was all right.

emphasize his point. As the meeting was concluding, the Assistant Superintendent presented the Group II Written Notice to Grievant along with a pen and asked Grievant to sign the notice. Grievant stood up from his chair and leaned forward towards the desk as if to sign the notice. Grievant took the pen and then threw it down onto the table where it moved across the table. He indicated he did not intend to sign the Written Notice. Grievant abruptly left the room closing the door behind him. He then left the facility.

On August 15, 2002, Grievant spoke with the Superintendent regarding the Group II Written Notice and his outburst on August 14, 2002. The Superintendent withdrew the Group II Written Notice because several of the facts giving rise to the notice turned out to be incorrect.

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).² 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).

Disruptive behavior is a Group I offense.³ When disruptive behavior is directed towards a superior officer, that behavior becomes insubordination. By speaking loudly to his supervisors, banging on the table, and throwing a pen⁴ onto the table, Grievant was disruptive.⁵ His actions were directed towards superior officers and, thus, his actions support issuance of a Group I Written Notice for insubordination.

Grievant contends he did not use profanity during the meeting. Grievant’s denial of the use of profanity is credible. Even though Grievant may not have used profanity towards the Captain and Assistant Superintendent, his behavior of speaking loudly, pounding the table, and throwing a pen onto the table remains disruptive and

² The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ DHRM § 1.60(V)(1)(e).

⁴ Grievant’s refusal to sign the Written Notice is not insubordination. Employees are asked to sign the Written Notice but they are not required to do so. When an employee refuses to sign the Written Notice, the supervisor writes on the notice that the employee refused to sign it.

⁵ Grievant admits the conversation was heated and that he pounded on the table. He offered no evidence challenging the Agency’s contention that he threw a pen onto a table.

insubordinate. Thus, the outcome of this hearing does not depend on Grievant having used profanity.

Grievant contends the Captain and Assistant Superintendent regularly use profanity and used profanity during the meeting on August 14, 2002, but they were not disciplined. The Hearing Officer agrees that the Captain and Assistant Superintendent used profanity during the meeting.⁶ Grievant's behavior was disruptive even without considering any use of profanity. The use of profanity is not in itself a basis for disciplinary action. Only if the profanity becomes obscene or abusive language does it rise to the level of disciplinary action.⁷ No evidence was presented suggesting the Captain and Assistant Superintendent used profanity in a manner such that it would be obscene or abusive language.

Grievant contends Agency staff retaliated against him for complaining to the Superintendent because of the inadequate staffing levels during Grievant's shift. No credible evidence of retaliation was presented.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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

⁶ Several witnesses testified that the Captain and Assistant Superintendent frequently use profanity.

⁷ An example of using obscene or abusive language would be when two people are speaking and one of them directs curse words towards the other.

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.