

Issue: Group III Written Notice with suspension (violation of Violence in the Workplace policy); Hearing Date: 04/14/03; Decision Issued: 04/15/03; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 5682



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5682

Hearing Date: April 14, 2003
Decision Issued: April 15, 2003

PROCEDURAL HISTORY

On January 6, 2003, Grievant was issued a Group III Written Notice of disciplinary action with suspension from January 7, 2003 to January 22, 2003 for:

Violation of "Violence in the Workplace" during a phone conversation with [Benefits Administrator]. She filed a complaint noting that she was threatened by the call and felt that she had been harassed. An investigation was conducted and your statement given did not deny any of the comments filed.

On February 7, 2003, 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 19, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 14, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee

Agency Advocate
Benefits Administrator
Fiscal Assistant
Resident Engineer

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension for violating the Violence in the Workplace policy.

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 a Transportation Operator II. He has been employed by the Agency for approximately 20 years with a good work history. No evidence of prior active disciplinary action against Grievant was introduced.¹

Grievant was having difficulty obtaining his Commercial Driver's License (CDL) because of a minor medical condition. He needed to obtain a medical waiver from a physician. Agency staff informed him that he had ten days to obtain the waiver. Grievant believed he had not been timely notified of the requirement. He was frustrated with having to complete certain Agency requirements in order to retain his CDL and continue his job duties with the Agency.

On December 18, 2002 at approximately 11:30 a.m., Grievant was speaking with the Fiscal Assistant about processing the necessary paperwork to have his CDL renewed. She did not know how to fully assist Grievant so she placed a call to the Benefits Administrator and then handed the telephone to Grievant. While speaking in serious tone and voice, Grievant told the Benefits Administrator that:

¹ The Agency offered evidence of a Group I Written Notice issued in 1991. Since that Notice was no longer active and did not relate to this grievance, the Hearing Officer rejected the exhibit.

his [appointment] was scheduled for 12/27 and that we'd better get this straight because he'd have to come strangle me. He repeated this several times and changed between strangling, choking and killing if the card issue wasn't resolved. He told me that he would bring the waiver packet to me after his [appointment] on the 27th and I'd better be there to fix it. I told him that I was on vacation [and] to leave it with Jennifer – he then told me that he would come to my house and bring it because it had better be fixed.²

Immediately after the telephone conversation, the Benefits Administrator left her office and walked into the Resident Engineer's office. The Benefits Administrator was crying and upset because of the way Grievant spoke with her.

On April 18, 2002, Grievant attended training regarding the Agency's Preventing Violence in the Workplace policy.³

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).⁴ 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).

"VDOT has a standard of zero tolerance for all acts or threats of violence against its employees while they are engaged in performing work responsibilities." Workplace violence includes, "threatening behavior that occurs in the workplace." Threatening verbal behavior includes "threats of violence towards persons" and "verbal intimidation."⁵ "Threatening or coercing persons associated with any state agency ..." is a Group III offense.⁶ Grievant threatened the Benefits Administrator by saying he may choke or kill someone. He attempted to coerce her into acting quickly on his CDL

² Agency Exhibit 2.

³ Agency Exhibit 6.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ Agency Exhibit 4.

⁶ DHRM § 1.60(V)(B)(3)(k).

paperwork by threatening her. Grievant's behavior rises to the level of a Group III offense. Group III offenses may include suspension for up to 30 workdays.⁷ Grievant's suspension is in accordance within that standard. No further mitigating circumstances were presented to justify reduction of the suspension or level of the Written Notice.

Grievant argues he was joking and did not say he would kill anyone. Based on the evidence presented, it was reasonable for the Benefits Administrator to believe Grievant was not joking and that he did say he would kill someone.

Grievant contends the Agency is disciplining him differently from the way two other employees are being treated. He contends those employees violated the workplace violence policy but received counseling memorandums rather than written notices because they are white whereas he is African-American. The evidence is insufficient for the Hearing Officer to determine the merit of Grievant's allegation. No evidence was presented regarding what behavior the two other employees engaged in or the circumstances of their employment history. The evidence remains as Grievant's opinion that he is not being disciplined consistently with other employees.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension from January 7, 2003 to January 22, 2003 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.

⁷ DHRM § 1.60(VII)(D)(3)(b)(1).

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.