

Issue: Group III Written Notice with termination (disruptive behavior; insubordination and destruction of State property); Hearing Date: 04/06/04; Decision Issued: 04/07/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 637



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 637**

Hearing Date: April 6, 2004  
Decision Issued: April 7, 2004

**PROCEDURAL HISTORY**

On November 7, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for "Disruptive behavior, insubordination and destruction of state property." On December 20, 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 11, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 6, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for disruptive behavior, insubordination and destruction of state property.

### **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 for approximately eight years until his removal on November 25, 2003. On January 15, 2002, Grievant received a Group I Written Notice for inadequate or unsatisfactory job performance. On February 19, 2003, Grievant received a Group II Written Notice for failure to follow established written policy. On September 26, 2003, Grievant received a Group II Written Notice for failure to follow a supervisor’s instructions, perform assigned work or otherwise comply with established written policy.<sup>1</sup> All of these Written Notices remain active disciplinary actions.

Grievant engaged in behavior that the Agency found objectionable. Before determining whether to issue disciplinary action, the Agency held a predisciplinary hearing in the Warden’s office. On September 26, 2003, the Grievant, Warden, Human Resource Officer and two senior security staff heard statements from employees involved in the incident. Grievant was then asked to leave the room while the group debated what disciplinary action to take. After a decision was made, Grievant was asked to return. The Warden began explaining to Grievant why the Agency found Grievant’s behavior to be inappropriate. The Warden explained that Grievant could have been fired. Grievant abruptly stood up from his chair, stepped towards the Warden’s desk, removed his radio from his side and threw it on the floor. He said “I quit.” He stepped towards the door and said about the Warden, “You redneck racist mother-f—cker.” He slammed the door behind him so hard that it bounced open and caused a plaque on the wall to fall to the floor. On October 5, 2003, Grievant sent the Warden a letter apologizing for his behavior and saying that he loved his job and the employees he worked with.

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

## 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.” 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.

DOCPM § 5-10.7(C) states, “The offenses listed in this procedure are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head, although not listed in the procedure, undermines the effectiveness of the agency’s activities or the employee’s performance, should be treated consistent with the provisions of this procedure.”

Grievant’s behavior permanently destroyed his working relationship with the Warden and the Agency. His actions were insubordinate and disruptive. It is the Agency’s judgment that Grievant should receive a Group III Written Notice with removal. The Agency has presented sufficient evidence to support that action.

Grievant argues the disciplinary action should be mitigated because he was under a great deal of stress and experienced certain medical conditions affecting his judgment. Even if the Hearing Officer were to reduce this matter to a Group I Written Notice, Grievant has two active Group II Written Notices which would form a basis for removal based on the accumulation of disciplinary action.<sup>2</sup> The Agency has presented sufficient evidence to support its removal of Grievant from employment.<sup>3</sup>

## 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:

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<sup>2</sup> DOCPM § 10.16(C)(2).

<sup>3</sup> Grievant has not presented sufficient evidence to support mitigation of the disciplinary action against him. No evidence was presented regarding the effect of his medical condition on his temperament. The stress resulting from Hurricane Isabel was experienced by a majority of Facility staff and would not be unique to Grievant.

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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

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.<sup>4</sup>

[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].

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<sup>4</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.  
Hearing Officer