

Issue: Group III Written Notice with demotion (threatening behavior); Hearing Date: 07/07/04; Decision Issued: 07/14/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 755



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 755

Hearing Date: July 7, 2004
Decision Issued: July 14, 2004

PROCEDURAL HISTORY

On May 10, 2004, Grievant was issued a Group III Written Notice of disciplinary action with demotion and disciplinary salary action for:

"Threatening or coercing persons associated with any state agency, including not limited to employees, supervisors, patients, visitors, and students." On April 29, 2004, you entered your supervisor's ... office and made the statement that you were so mad with an officer that you could kill her. You told your supervisor that you could not guarantee that you would not hurt the officer. For this reason you are being issued a Group III written notice.

On May 10, 2004, 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 she requested a hearing. On June 17, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 7, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Party Representative
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion for threatening another employee.

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 Program Specialist until her demotion to Officer Services Specialist. Grievant had received favorable evaluations throughout her career with the Agency. Grievant received a Group I Written Notice for inadequate or unsatisfactory job performance on March 4, 2004.¹

On April 29, 2004, at approximately 8:30 a.m., Grievant entered the office of her supervisor and asked to speak with him. Grievant began crying and said she was “losing it.” Grievant had seen Corrections Officer T’s pickup truck in the parking lot as Grievant entered the Facility. Grievant told the Supervisor that it was hard, in fact, unbearable for her to come to work everyday knowing that [Correctional Officer T] worked at the Facility.² Grievant made several derogatory comments about Corrections Officer T. The Supervisor cautioned Grievant that unless Corrections Officer T was harassing or bothering Grievant at work there was nothing the Supervisor could do. He added that if Corrections Officer T did something to Grievant outside of work, she should let him know. Grievant stated that Corrections Officer T was “messing with her

¹ Agency Exhibit 8.

² Corrections Officer T took several actions that improperly disrupted Grievant’s family. Those actions were taken outside of the workplace and outside of the Agency’s control. Grievant’s desire not to see or work near Corrections Officer T is understandable.

life” and that there was nothing Grievant could do about it. Grievant became more upset and said she was so angry about Corrections Officer T that she could kill her.

The Supervisor became concerned about Grievant’s statement and wish to determine whether Grievant was simply venting³ her anger or was making a serious threat to harm Corrections Officer T. The Supervisor asked Grievant “If you go back inside to work, can you assure me that you will not search out [Corrections Officer T] and hit her with something up beside the head?” Grievant replied that she could not guarantee that she would not try to hurt Corrections Officer T. Grievant said that all she thought about was Corrections Officer T and that she could not do her work. Grievant said she probably would try to hurt Corrections Officer T. The Supervisor told Grievant she should voluntarily choose to leave work and go home and call her psychiatrist.⁴ Grievant insisted she had some work that had to be completed. At that point, the Supervisor ordered Grievant to go home because he would not allow her to remain at work. The Supervisor believed that if Grievant remained at the Facility, Grievant would hurt Corrections Officer T. Grievant left the Facility.

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.

“Threatening ... persons associated with any state agency, including, but not limited to employees ...” is a Group III offense.⁵ DOC Operating Procedure 1304 prohibits workplace violence which includes, “[t]hreatening to injure an individual”⁶ Grievant threatened another State employee when she stated that she could kill Corrections Officer T. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. Demotion with disciplinary salary action is an action authorized by the Standards of Conduct when an employee receives a Group III Written Notice.

³ The Supervisor testified that he did not believe Grievant was venting.

⁴ Grievant had been receiving counseling relating to domestic concerns since March 2004. See, Grievant Exhibit 2.

⁵ DOCPM § 5-10.17(B)(12).

⁶ Agency Exhibit 4.

Grievant contends that her statement was not a threat because she stated she “could” kill as opposed to “would” kill. It is not surprising for an individual experiencing significant stress caused by another person to overstate one’s intentions by suggesting he or she could kill that person. Grievant’s statement was not an example of this. The Supervisor tested the seriousness of Grievant’s statement by specifically questioning Grievant regarding whether she may do harm to Corrections Officer T. Grievant did not deny a true intention to harm Corrections Officer T. She, thus, confirmed that the Supervisor should take seriously her statement of an intent to harm.

Grievant contends the Agency’s discipline is too harsh and should be mitigated. *Va. Code § 2.2-1001* requires the EDR Director to “[a]dopt rules ... for grievance hearings.” The *Rules for Conducting Grievance Hearings* set forth the Hearing Officer’s authority to mitigate disciplinary action. The Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion 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. Please address your request to:

Director
Department of Human Resource Management

101 North 14th St., 12th 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.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.