

Issue: Group III Written Notice with termination (criminal conviction); Hearing Date: 09/29/03; Decision Issued: 10/03/03; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 5806



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5806

Hearing Date: September 29, 2003
Decision Issued: October 3, 2003

PROCEDURAL HISTORY

On May 30, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Criminal conviction, violation of VA Code Section 18.2-282¹, Brandishing Firearm, occurring off the job.

On June 27, 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 September 3, 2003, the Department of Employment

¹ Va. Code § 18.2-282(A) states:

It shall be unlawful for any person to point, hold or brandish any firearm or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, in such manner as to reasonably induce fear in the mind of another or hold a firearm or any air or gas operated weapon in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured. However, this section shall not apply to any person engaged in excusable or justifiable self-defense. Persons violating the provisions of this section shall be guilty of a Class 1 misdemeanor or, if the violation occurs upon any public, private or parochial elementary, middle or high school, including buildings and grounds or upon public property within 1,000 feet of such school property, he shall be guilty of a Class 6 felony.

Dispute Resolution assigned this appeal to the Hearing Officer. On September 29, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Nine witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for brandishing a firearm, occurring off the job.

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 Motor Vehicles employed Grievant as a DMV Customer Services Generalist. The purpose of his position was:

The incumbent interprets agency, state and federal regulations, policies and procedures to explain the requirements for compliance and/or financial responsibility; identifies individuals who may be attempting fraudulent or criminal activities and collects and accounts for fees and taxes. Additionally, incumbent conducts driver road testing and determines licensing and licensing restrictions. All work is performed in a customer service oriented manner, in accordance with statutory and administrative procedural requirements such as the Motor Vehicle Code of Virginia, DMV rules and regulations, the Privacy Protection Act and the Freedom of Information Act.

Grievant received a Group I Written Notice on July 18, 2001 for:

Unsatisfactory job performance/disruptive behavior - Employee threatened harm to coworkers in the [Facility] due to working an alternative work schedule during a holiday week. Employee asked a coworker if [the coworker] had ever seen anyone "go postal" and further stated the employee had no need to worry that "they only go after the supervisors that pissed them off."

Grievant owns a Colt .45 caliber handgun and has a permit to carry a concealed weapon. When Grievant leaves his home for work, he takes his handgun, places it in his fanny pack, and takes the gun to his vehicle. He takes the gun out and places it on the passenger seat of his vehicle. Once he arrives at work, he locks the gun in a case underneath the passenger seat.

On February 8, 2003 at approximately 9:15 p.m., Grievant and Mr. H. were driving their vehicles in the same direction on a road with two lanes in each direction. Mr. H. had his two young children riding with him. Traffic was heavy. Two lanes narrowed into one lane in each direction. Grievant and Mr. H. felt that the other was driving poorly and endangering the safety of others on the road. Grievant became angry with Mr. H. because of Mr. H.'s driving. He pulled in front of Mr. H. and then pulled off to the side of the road onto a turn lane. Mr. H. pulled behind Grievant and exited his vehicle. Grievant stepped out of his vehicle and observed Mr. H. coming towards him. Grievant reached into his vehicle and grabbed his pistol. Grievant turned towards Mr. H. and pointed the pistol at him while holding it under his arm. Mr. H. observe the weapon. Grievant threatened to shoot Mr. H. Mr. H. began backing away from Grievant at the same time a Police Officer, driving a marked police cruiser with flashing emergency lights, approach the two cars. Mr. H. approached the Police Officer and said that Grievant had a gun and had threatened to shoot Mr. H. While the Police Officer spoke with Mr. H., Grievant entered his vehicle and drove approximately ten feet forward, then stopped. Grievant exited his vehicle. The Police Officer asked Grievant what was going on. Grievant stated that Mr. H. had been following Grievant too closely. The Police Officer asked whether Grievant had any weapons. Grievant said he had a handgun on the front seat. Grievant was searched and detained. Grievant had a full .45 caliber magazine with eight rounds located in a fanny pack that he was wearing. The Police Officer determined that Grievant's pistol was charged and had a full magazine. Grievant was arrested and taken to jail. Grievant's General District Court date was set for March 7, 2003.

Mr. H. appeared as a witness against Grievant in General District Court. Grievant was convicted of brandishing a firearm. Grievant appealed his conviction to the Circuit Court thereby nullifying the General District Court conviction. Mr. H. did not appear as a witness in Circuit Court because he was afraid of Grievant and afraid of what Grievant may do to him later. Because the Commonwealth was not able to present sufficient evidence for a conviction, and the Circuit Court denied the

Commonwealth's motion to continue the case, the Commonwealth moved the Court to *nolle prosequi* the case. On July 11, 2003, the Circuit Court granted the motion and ordered that the case be *nolle prosequied*.

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).

DHRM § 1.60(V) lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section."

The Agency has presented sufficient evidence to establish that Grievant brandished a firearm on February 8, 2003. This evidence consists of the credible statements of Mr. H., and a police report showing that Mr. H. made contemporary statements of the events to the Police Officer on February 8, 2003.

DHRM Policy 1.80, *Workplace Violence*, prohibits "brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business." In most cases behavior occurring off of the job is not subject to disciplinary action. DHRM Policy 1.80, however, states:

Violent acts of employees occurring outside the workplace also may be grounds for disciplinary action, up to and including dismissal. In these situations, the agency must demonstrate in writing that the violent conduct committed has an adverse impact on the employee's ability to perform the assigned duties and responsibilities or that it undermines the effectiveness of the agency's activities.

The Agency has demonstrated that Grievant's violent conduct has an adverse impact on his ability to perform his assigned duties and responsibilities. The decision to brandish a firearm in a moment of anger reflects Grievant's decision-making and

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

judgment. That decision-making and judgment exists regardless of whether is at work or elsewhere.³ Grievant works at one of the Agency's facilities where he may often encounter angry customers or fellow employees and where he may encounter customers or employees who make him angry. Grievant has demonstrated that his judgment creates the risk that when angered, he will display and possibly use lethal force. When Grievant drove to work, he left his weapon in his vehicle which he parked near his workplace. If Grievant became angered and wished to use lethal force he would have ready access to his weapon. When these facts are considered together, the Agency has demonstrated that Grievant poses an unacceptable risk to continue his employment.

Although the Written Notice states that Grievant is being disciplined for criminal conviction, it is not necessary for the Agency to establish that Grievant was convicted of a crime and remains convicted. It is the underlying behavior of brandishing a firearm to which the Agency objects. The Written Notice provides Grievant with adequate notice of the behavior for which Grievant was being removed.

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.

³ Grievant received a Group I Written Notice because he lost his temper and made threatening comments. His action in 2001 confirm the Agency's concern about his judgment once he becomes angered.

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.⁴

[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

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