

Issue: Group III Written Notice with termination (property damage); Hearing
Date: 03/28/05; Decision Issued: 03/29/05; Agency: DOC; AHO: David J.
Latham, Esq.; Case No. 8017, 8022



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 8017 & 8022

Hearing Date: March 28, 2005
Decision Issued: March 29, 2005

PROCEDURAL ISSUE

Grievant filed two grievances – one (Case #8017) challenging a Group III Written Notice and removal from employment effective November 9, 2004 and, one (Case #8022) which effectively alleges misapplication of policy in connection with a previous disciplinary action. The disciplinary action resulting in termination of employment automatically qualifies for hearing. However, the agency declined to qualify the grievance alleging misapplication of policy. Grievant appealed the disqualification to the Director of the Department of Employment Dispute Resolution (EDR). The EDR Director ruled that the misapplication of policy does qualify for hearing and that both grievances should be consolidated for hearing.¹

APPEARANCES

Grievant
Attorney for Grievant

¹ Agency Exhibit 1. *EDR Qualification and Compliance Ruling of Director*, Number 2005-952, February 9, 2005.

Chief Warden
Attorney for Agency
One witness for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct? Did the agency misapply policy when it transferred grievant?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice issued for damaging real property of a correctional officer.² As part of the disciplinary action, grievant was removed from employment effective November 9, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ Grievant filed a second grievance alleging that the agency misapplied policy by transferring her to another facility after advising her that she would not be transferred.⁴

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 12 years. She was an Office Services Specialist at the time of the discipline. Grievant has two prior active disciplinary actions – A Group I Written Notice for unsatisfactory job performance and,⁵ a Group III Written Notice for threatening an employee.⁶ Grievant grieved the Group III Written Notice and it went to a hearing; the case was adjudicated by another hearing officer who upheld the agency's disciplinary action.⁷ The Circuit Court affirmed the hearing officer's decision.⁸ The hearing officer concluded that grievant had made a serious threat to harm a female corrections officer who had been having a relationship with grievant's husband.

Grievant's husband had lived with the female corrections officer for approximately four years before grievant married him. At some point after grievant and her husband married, he again began to see the female officer. In March 2004, grievant was hospitalized for one week. During that time, grievant's husband spent some nights at the female officer's home. In April 2004, grievant and her husband entered into a formal separation agreement. On April 29, 2004,

² Agency Exhibit 2. Group III Written Notice, issued November 9, 2004.

³ Agency Exhibit 2. Grievance Form A, filed November 15, 2004.

⁴ Agency Exhibit 1. Grievance Form A, filed October 18, 2004

⁵ Agency Exhibit 5. Decision of Hearing Officer, Case No. 755, July 14, 2004, found as fact that grievant received a Group I Written Notice on March 4, 2004.

⁶ Agency Exhibit 3. Group III Written Notice, issued May 10, 2004.

⁷ Agency Exhibit 5. Decision of Hearing Officer, Case No. 755, July 14, 2004.

⁸ Agency Exhibit 6. Final Order of Circuit Court, November 30, 2004.

grievant made a threatening remark toward the female officer that resulted in the issuance of the Group III Written Notice in May 2004. When the chief warden issued the disciplinary action, he advised grievant that any threatening conduct toward the female corrections officer would not be tolerated in the future.

Although the Written Notice did not include a transfer to another facility, the chief warden and the regional director concluded that it would be in the best interest of both grievant and the female officer to transfer grievant to a different correctional facility. However, at that time, there were no available positions at nearby facilities. Accordingly, grievant was retained on paper in a position at her current facility but was temporarily detailed to work at a nearby facility. The regional director planned to permanently transfer grievant to another facility as soon as a position became available.

At about 1:00 a.m. on August 27, 2004, grievant and her daughter drove to the residence of the female corrections officer. Grievant's husband's truck was parked at the residence. Grievant honked her car horn as she drove down the driveway. She then exited her vehicle, came to the door of the residence and began loudly screaming, cursing, and demanding to be let into the house. Grievant's husband and the female officer did not open the door and did not respond at any time to grievant. The female officer called 911 but the police did not respond. Grievant returned to her vehicle, got a baseball bat, and used it to break out the side windows and windshield of her husband's truck. Grievant then went to the door of the house and used the bat to break the glass in the door. Grievant and her daughter then drove away.

The female officer and grievant's husband went to the local magistrate and swore out warrants against grievant for criminal trespass,⁹ damage to the residence door glass,¹⁰ and damage to grievant's husband's truck.¹¹ The police came to the residence the next morning and photographed the damage. At trial, the general district court judge found sufficient evidence to conclude that grievant was guilty on all three counts, and so noted on the warrants.¹² The judge then redacted his notation of guilty and decided to defer judgment for one year providing grievant paid restitution for the damage, obtained professional counseling, and avoided contact with the female officer for a period of one year.¹³ Grievant has subsequently complied with these terms by making restitution to the female officer, obtaining counseling, and avoiding contact with the female officer.¹⁴ Grievant and her husband are now attempting to reconcile and preserve their marriage.

⁹ Agency Exhibit 7. Warrant for misdemeanor trespass, August 27, 2004.

¹⁰ Agency Exhibit 8. Warrant for misdemeanor intentional damage to house, August 27, 2004.

¹¹ Agency Exhibit 9. Warrant for misdemeanor intentional damage to truck, August 27, 2004

¹² Agency Exhibit 10. Letter from Commonwealth's Attorney to chief warden, October 15, 2004.

¹³ Agency Exhibits 7, 8, & 9. *Ibid.* See also Agency Exhibit 11. Letter from district court judge to chief warden, October 28, 2004.

¹⁴ Prior to this hearing, grievant raised a question of whether the female officer should be permitted to testify at this administrative law hearing in view of the district court judge's no-contact

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as allegations of misapplication of policy, the employee must present her evidence first and must prove her claims by a preponderance of the evidence.¹⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

order. This hearing officer concluded that the female officer could testify for two reasons. First, it is presumed that the judge did not intend his no-contact order to extend to judicial and quasi-judicial proceedings such as this hearing. Second, because grievant was represented at the hearing by an attorney, there was no direct interaction between grievant and the female officer during the hearing.

¹⁵ §5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

Section V.B.3 of the Standards of Conduct policy provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.¹⁶ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct. One example of a Group III offense is threatening persons associated with any state agency including employees.

The agency has borne the burden of proof, by a preponderance of evidence, to show that grievant damaged the female officer's residence on August 27, 2004, despite grievant's denial of such action. The female officer testified clearly, consistently, and credibly about what occurred on that night. Her testimony is corroborated by the warrants she took out against grievant within five hours of the incident, by the judge's finding of sufficient evidence, and by grievant's making restitution for the damages she caused. Grievant's threatening actions toward a fellow employee constitute a Group III offense.

Grievant's denial is unsupported by any corroborating testimony. Grievant's daughter accompanied her to the female officer's residence on August 27, 2004. However, grievant did not bring her daughter to the hearing to corroborate her version of what occurred. When a party could have brought to the hearing a witness who saw the event, but fails to do so, it is presumed that the witness's testimony would not have been favorable to grievant. Grievant also asserts that her husband signed a statement to the effect that she did not have to pay him restitution for the damage to his truck. Grievant claims this is proof of her innocence. However, grievant failed to proffer this statement as evidence. Moreover, even if such a statement exists, it would prove only that her husband had agreed to forgive the monetary debt; it does not negate the fact that grievant damaged the truck.

Grievant suggests that her husband's on again-off again relationship with the female officer should be considered a mitigating circumstance. When grievant was disciplined on two prior occasions, the chief warden did take into account grievant's personal situation. He testified that grievant's personal situation was a factor in deciding to reduce the first disciplinary action from Group II for failing to follow a supervisor's instructions to a Group I for unsatisfactory work performance. He further testified that he again considered grievant's marital difficulties, as well as her years of satisfactory performance and service at the time the Group III Written Notice was issued. While a Group III normally

¹⁶ Agency Exhibit 14. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

results in removal from state employment, the chief warden only demoted grievant in lieu of removal.

In the instant case, grievant has committed another Group III offense. While grievant's ongoing personal situation was understandably upsetting to her, there are also aggravating circumstances. First, the chief warden had warned grievant in May 2004 that any further adverse conduct toward the female officer would not be tolerated. Despite being given a second chance, grievant committed a physically violent act directed at the female officer's house and, indirectly toward the female officer. This represents an escalation from grievant's previous verbal threat to harm the female officer. Second, based on the past history of the relationships between grievant and her husband, and the female officer and grievant's husband, it is not inconceivable that the same problem will recur in the future. If grievant were to again take violent physical action against the female officer, particularly if it occurred in the workplace, the agency would be found derelict for retaining grievant in its employ. The agency cannot afford to take such a chance. Grievant's demonstrated history of being unable to maintain self-control makes her retention too risky for the agency. These aggravating circumstances, in light of previous history, outweigh the mitigating circumstances.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice and the removal of grievant from employment issued on November 9, 2004 are hereby UPHELD.

Because the termination of employment is upheld, the issue of grievant's transfer is moot.

APPEAL RIGHTS

You may file an administrative review request within **15 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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 15 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 15-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.¹⁷ 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.¹⁸

[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]

David J. Latham, Esq.
Hearing Officer

¹⁷ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.