

Issue: Group III Written Notice with termination (disruptive, harassing behavior which creates a threat); Hearing Date: 08/09/05; Decision Issued: 08/09/05; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8140



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8140

Hearing Date: August 9, 2005
Decision Issued: August 9, 2005

PROCEDURAL HISTORY

On May 31, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

On May 23, 2005, [Grievant] during course of your duties, cutting grass, within the [Neighboring Complex], you had an altercation with one of the security guards and during this altercation you cussed him out. Also, on May 23, 2005 you [were] overheard stating that "you let me catch him on the street, I will F—K him up. You have been charged [with] violating Standards of Conduct Section V, B 3k, threatening or coercing persons associated with any state agency and DHRM Policy 1.80 Workplace Violence. Also, according to [the Neighboring Complex] Director [Grievant] is not permitted on [Neighboring Complex] because of his disruptive and disrespectful behavior which creates a security threat to their operation.

On June 6, 2005, 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 July 14, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 9, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witness

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Grounds Worker until his removal effective May 31, 2005. He had been employed by the Agency for approximately ten years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

At approximately 2:40 p.m. on May 23, 2005, Grievant was cutting grass on the inner-perimeter of the resident's area on the Neighboring Complex. Grievant spoke with a Lieutenant working as a security officer.¹ Grievant expressed some concerns about security measures at the Neighboring Complex. The Lieutenant said "Sorry sir, this is how we do things here." Grievant then asked "Where is my ID?" The Lieutenant responded, "I don't have your ID card sir!" Grievant then started cursing the Lieutenant, got on his riding mower and headed toward the control room. The Lieutenant went to the control room as well. While at the control room, Grievant was trying to obtain the ID cards of all the grass detail workers. The Lieutenant asked him, "What are you doing?" Grievant replied, "I'm getting the other guy's cards!" The Lieutenant stated, "not here! You don't run anything on this side." The Lieutenant then told the officer on duty to give

¹ Grievant and the Lieutenant had not met before May 23, 2005.

Grievant his ID card. Grievant took his card, left the building, got on his riding mower, and headed out of the secure area.

At approximately 3:30 p.m., Grievant entered the grounds shop tool room where employees were preparing to go home. The Grounds Leadworker entered the shop and asked how the grass cutting had gone that afternoon. Grievant said the Lieutenant said Grievant had cursed the Lieutenant. Grievant denied doing so. Another employee, Mr. M, who worked along side Grievant cutting grass said “yes, [Grievant] did curse at him.” As Grievant was walking out of the tool room, Grievant said, “you let me catch him on the street and I will f—k him up.”

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 Policy 1.80, Workplace Violence, prohibits, “threatening to injure an individual or to damage property.” Group III offenses include, “[t]hreatening or coercing persons associated with any state agency (including, but not limited to, employees, supervisors, patients, inmates, visitors, and students).”

The Hearing Officer interprets the phrase, “f—k him up” to mean to fight and hit the Lieutenant. Grievant’s comments constitute a threat to another State employee thereby justifying issuance of a Group III Written Notice. A Group III Written Notice normally warrants removal.³

Grievant argues he did not curse the Lieutenant. Grievant was not disciplined solely for cursing the Lieutenant, but rather for threatening the Lieutenant with physical injury. Grievant has not argued that he was not serious when he threatened the Lieutenant or that he was just expressing frustration. No evidence has been presented to contravene the Agency’s understanding of Grievant’s statements as being an actual and intended threat.

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

³ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

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 **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. 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 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. 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.