

Issue: Group III Written Notice with 10-day suspension (assault and battery); Hearing Date: September 21, 2001; Decision Date: September 24, 2001; Agency: Department of Social Services; AHO: Carl Wilson Schmidt, Esquire; Case Number 5281



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5281

Hearing Date: September 21, 2001
Decision Issued: September 24, 2001

PROCEDURAL HISTORY

On July 3, 2001, Grievant was issued a Group III Written Notice of disciplinary action with ten day suspension for:

Physically grabbing an employee with your hand on her face which constitutes assault and battery. See attached Notice of Intent to Issue Written Notice of Group III Offense dated June 18, 2001. Total disregard of management's directives to leave the employee you assaulted alone was evidenced when you subsequently issued, in violation of direct instructions otherwise, a threatening Instant Message email dated June 28, 2001 (copy attached) to the same coworker, thereby creating an intimidating and hostile work environment and clearly threatening her for reporting the assault and battery.

On July 19, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On August 30, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 21, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
District Manager
Agency Representative
Program Manager
Complaining Witness
Program Compliance Specialist I
Supervisor
Program and Contract Consultant

ISSUES

1. Whether Grievant should receive a Group III Written Notice of disciplinary action with ten day suspension.
2. Whether the Agency retaliated against Grievant for writing a letter of complaint.

BURDEN OF PROOF

With respect to the first issue, 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. With respect to the second issue the burden of proof is on Grievant to show that the Agency retaliated against her. 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 Social Services employs Grievant as a Support Enforcement Specialist. She has worked for the Commonwealth for approximately 27 years. No evidence of prior disciplinary action against Grievant was presented.

The Agency transferred Grievant's supervisor to another position. Grievant wrote a letter, dated April 30, 2001, to the District Manager with copies to the Agency Head and senior managers expressing her support for the supervisor and seeking an investigation as to why the supervisor was transferred. She stated, "I believe that each and every member of the unit needs to be interviewed to determine whether favoritism really exists."¹ On May 29, 2001, two managers from the Central Office notified the

¹ Grievant Exhibit 1.

District Manager that they would be individually interviewing all District Office staff beginning on June 6, 2001.² When the two managers arrived at the District Office, they assembled all of the employees and informed them that they would be conducting individual interviews with all staff and recording the interviews on tape. Employees were instructed not to discuss the questions asked of them and their answers with other staff.

On June 7, 2001, the Complaining Witness was sitting in a chair just inside the entrance to the “work cube” of the Program Compliance Specialist and speaking with him regarding the questions being asked by the two managers. Grievant stood in the entranceway adjacent to the chair³ but not within the line of sight of the Complaining Witness. Grievant attempted to get the attention of the Complaining Witness. The Complaining Witness kept on talking without acknowledging Grievant’s comments. Grievant became frustrated at being ignored so she leaned over and placed her open hand underneath the Complaining Witness’s chin and then raised her hand upward to tap the Complaining Witness’s chin. The Complaining Witness turned her head towards Grievant and Grievant warned the Complaining Witness not to speak to a specific employee because that employee “was going down” and would be taking others with her. After the conversation ended, the parties returned to their work areas. The Complaining Witness did not immediately express any displeasure at having her chin touched.

On the following day, the Complaining Witness met with the District Manager and alleged that Grievant had forcefully grabbed her face and turned her head towards Grievant, and then warned her not to speak with a specific employee. The Complaining Witness did not have any marks on her face from what she contended was a battery. The Agency began an inquiry of what happened and allowed the Complaining Witness to temporarily relocate her work area away from Grievant’s work area. On June 18, 2001, the District Manager wrote a memorandum to Grievant informing her of his intent to issue her a Group III Written Notice with a ten day suspension.

On June 28, 2001, the Complaining Witness received an instant message email from Grievant stating:

FYI – since [District Manager] is not here & I can’t pass this info thru him I am sending this instant message – if I get suspended for 10 days without pay, I will be filing a personal law suit against you for defamation of character, slander, & I will ask that you pay me the 10 days of lost pay.⁴

² Agency Exhibit 1.

³ The entranceway and the chair were next to each other and both the Complaining Witness and Grievant were facing the Program Compliance Specialist.

⁴ Agency Exhibit 6.

CONCLUSIONS OF LAW

Issue 1 – Written Notice

An act of physical violence is a Group III offense under the Department of Human Resource Management's Policies and Procedures Manual ("P&PM"). An employee who batters another employee could receive a Group III Written Notice.

The Agency contends Grievant battered⁵ the Complaining Witness by grabbing and turning the Complaining Witness's face and then placing her face within six inches of the Complaining Witness's face, and warning her not to speak with another employee.

Grievant did not batter the Complaining Witness. Grievant lacked the necessary intent to harm or injure for her behavior to constitute battery. Her intent was to obtain the attention of the Complaining Witness. In addition, the Hearing Officer finds the Complaining Witness's degree of outrage and discomfort to be overstated. The Complaining Witness's outrage was delayed. Immediately after the incident occurred, the Complaining Witness did not express displeasure at Grievant's alleged action. She cried when explaining the incident to the District Manager on the following day, but did not cry within a few hours of the incident. If the Complaining Witness's face had been grabbed as hard as the Complaining Witness suggested, her initial reaction would have been to pull back or take some defensive action or made some defensive statement.

Grievant could have tapped the Complaining Witness on the shoulder or arm to get her attention. By touching the Complaining Witness on the chin, Grievant exceeded what constitutes a reasonable level of familiarity among coworkers. An individual's face can be especially sensitive to touch and touching it can be highly personal in nature. In the absence of evidence that Grievant had been previously counseled regarding touching other employees, discipline against Grievant is not appropriate. The Hearing Officer recommends, however, that the Agency counsel Grievant regarding refraining from touching the chins or faces of other coworkers.

Threatening or coercing a coworker is a Group III offense. P&PM § 1.60(V)(3)(k). Grievant's instant message to the Complaining Witness is an unequivocal threat of civil law suit against the Complaining Witness. It was clearly designed to stop the Complaining Witness from pursuing her complaint against Grievant with Agency managers. The message was inappropriate.

Grievant contends she did not intend to threaten the Complaining Witness because that is not the type of person she is and because she wrote "FOR YOUR

⁵ The Agency used the more general phrase "assault and battery."

INFORMATION” in the subject line of the message. Grievant’s defense is untenable. The Complaining Witness reasonably construed Grievant’s message as a threat.⁶

Although Grievant’s instant message would otherwise constitute a Group III offense, the Hearing Officer finds mitigating circumstances warranting reducing the discipline to a Group II Written Notice. First, Grievant has been employed by the Commonwealth for approximately 27 years without being disciplined. Second, having Central Office managers come to the local office and conduct taped interviews heightened the tension and concern in the local office. Grievant may have acted differently had the Central Office inquiry not added drama to her regular work activities.

The Written Notice suggests Grievant was directed to “leave the employee you assaulted alone.” No evidence was presented of this alleged directive. Thus, the Hearing Officer concludes Grievant was not instructed to leave the Complaining Witness alone.

Issue 2 -- Retaliation

No credible evidence was presented by Grievant to support her claim that the Agency retaliated against her. Indeed, Grievant could have been disciplined for failure to follow her supervisor’s instructions when she discussed the interviews with other staff after having been instructed to refrain from doing so. The Agency showed reasonable restraint by not further disciplining her.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with ten days suspension is **reduced** to a Group II Written Notice with five workdays suspension. The Agency is directed to provide the Grievant with **back pay** for five days less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). P&PM § 1.60(IX)(B)(2). Grievant’s request for relief from retaliation is **denied**.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the

⁶ On June 11, 2001, Grievant filed a false complaint against the Complaining Witness regarding events occurring several years earlier. Apparently, the Complaining Witness spread her arms in a manner that accidentally knocked out one of Grievant’s earrings. The Complaining Witness apologized and both parties returned to work. Grievant could not remember the time, date, or precise location of the events. By filing this false complaint and sending the instant message, Grievant revealed her intention to intimidate the Complaining Witness.

administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer