

Issue: Two Group III Written Notices with termination (inappropriate behavior in public relation, and failure to comply with established agency policy and procedures); Hearing Date: October 22, 2001; Decision Date: October 25, 2001; Agency: Department of Lottery; AHO: David J. Latham, Esquire; Case Number: 5301



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5301

Hearing Date: October 22, 2001
Decision Issued: October 25, 2001

PROCEDURAL ISSUES

The State Lottery Department is an independent state agency. As such, the Lottery Department is not subject to the Virginia Personnel Act (VPA), or the Standards of Conduct promulgated by the Department of Human Resource Management (DHRM).

However, the Lottery Department has promulgated Standards of Supervision and Performance similar to the DHRM Standards of Conduct. Moreover, for purposes of this hearing, the State Lottery Department made a policy decision to utilize the services of the Department of Employment Dispute Resolution (EDR). Because the agency has opted to utilize the EDR grievance process, the hearing was conducted pursuant to VPA and EDR policies and practice. Similarly, this decision reflects the principles that govern such grievance decisions.

Due to availability of the participants, the hearing could not be docketed until the 34th day following appointment of the hearing officer.¹

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Human Resource Manager
Attorney for Agency
Six witnesses for Agency

ISSUES

Was the grievant's conduct on July 18, 2001 and his failure to report his suspended driver's license subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from two Group III Written Notices and discharge from employment. One Notice was issued on August 27, 2001 for inappropriate behavior in public relations and judgement. The second Notice was issued on August 29, 2001 due to failure to comply with established agency policies and procedures. Following failure to resolve the matter at the second resolution step, the agency head qualified the grievance for a hearing.

The State Lottery Department (Virginia Lottery) (Hereinafter referred to as "agency") has employed the grievant since 1988 as a lottery sales consultant. The regional manager characterizes grievant as a nice person. Until July 18, 2001, he had a good reputation with the retailers he serviced.

Inappropriate Behavior

The grievant signed a Code of Ethics form, which states, in pertinent part:

Employees of the Virginia State Lottery are expected to conform to the high standards of ethical behavior. We are judged not only by our official actions and behavior, but also by our personal activities which could bring discredit to us and the Lottery. ... I agree to

¹ § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

perform my duties with quality, integrity, professionalism, and dedication in keeping with standard policy and procedures.²

Among the performance goals established for grievant are the requirements to, "Project a positive image for the Lottery," be "consistently businesslike in both appearance and conduct," and "Exhibit proper judgement and ethical behavior in all aspects of professional and personal dealings which could reflect on the Lottery."³

On July 18, 2001 grievant made a routine ten-minute service call at a convenience store in his territory. Several customers were in the store during grievant's visit. An analysis of the store's surveillance videotape for July 18, 2001 reveals the following chronology.⁴ The videotape does not have an audio track. Shown in brackets and Italics are the comments the store manager said she made to grievant each time he made physical contact with her.⁵

- 12:20:15 – Grievant enters store and goes behind counter.
- 12:21:14 – Grievant brushes by female employee's backside; she turns and pushes him.
- 12:23:09 – Grievant leaves store and then reenters store at 12:24:04.
- 12:24:10 – Female store manager enters picture and slightly leans on deli case with right arm; her left arm is on her hip with elbow sticking out.
- 12:24:11 – Grievant walks past manager and makes contact with her elbow.
[Store manager states: *"Don't touch me."*]
- 12:24:20 – Grievant returns, speaks to manager and then walks off camera.
- 12:24:40 – Manager moves to counter against wall and looks at book.
- 12:24:41 – Grievant returns, stands behind manager with hands on his own hips. Grievant leans slightly to his left, nudging manager with his elbow. Manager immediately pulls away from grievant.
[Store manager states: *"Don't touch me; keep your hands off me."*]
- 12:24:50 – Grievant turns and moves close to manager and places his left arm around her shoulder. He then immediately removes his arm and backs away from the manager.
[Store manager states: *"Don't touch me; keep your hands off me."*]
- 12:25:05 – Manager moves back to deli case.
- 12:25:29 – Grievant picks up telephone with left hand, moves next to manager and places his right arm and elbow on her left shoulder. Manager immediately pushes grievant away, and then walks off camera.
[Store manager states: *"Leave me alone; don't touch me; keep your hands off me."*]
- 12:26:15 - Grievant completes telephone call, then stands behind the counter

² Exhibit 5. *Employee Code of Ethics*, signed by grievant February 24, 1992 and May 31, 1994.

³ Exhibit 7. Performance Goals

⁴ Exhibit 25. Convenience store surveillance videotape, July 18, 2001.

⁵ Exhibit 8. Written statement of store manager. The un rebutted evidence from the store manager is that she wrote her statement on July 19 or 20, 2001 while sitting alone at home.

with his arms folded on his chest for four minutes.
12:30:27 – Grievant leaves store.

This summary reveals that grievant made physical contact with the female store manager on four occasions. At least three of the contacts were deliberate. In each case, the store manager told grievant not to touch her and on the last three occasions she pulled away from grievant or pushed his arm away. Grievant had engaged in similar conduct with the store manager in the past. The store manager had told the grievant to desist, but she had not filed a complaint with the agency until after the July 18, 2001 encounter.

The store manager called the agency to file a complaint about the grievant's unwelcome behavior alleging that grievant was sexually harassing her. In addition a vice president for the convenience store chain (45 locations in Virginia) requested the agency to prohibit grievant from entering any of their stores. During summer months, grievant is required to wear a shirt that identifies him as a representative of the Virginia Lottery. The agency concluded that grievant's behavior does not fit within the definition of sexual harassment⁶ but did find that it constituted inappropriate behavior and that it adversely affected the agency's public image. In the class on sexual harassment that grievant attended, employees are taught that you should immediately cease any physical contact when the other person objects to such contact.⁷

The grievant was given a Group III Written Notice on August 27, 2001 for inappropriate behavior, and was suspended for 10 workdays.

Failure to Follow Established Written Policy

The agency has established certain conditions of employment, which have been published in the Employee Handbook. Grievant received a copy of this handbook.⁸ Condition G addresses Reporting Arrests and Convictions and states, in pertinent part:

You must report any criminal arrest or driving violation to the Security Division within one work day. Report any such convictions to your immediate supervisor, the Human Resources Division and the Security Division. Notification should be in writing within two work days following the conviction, even if you plan to appeal the conviction.⁹

⁶ The test for sexual harassment is found in Mendoza v. Borden, Inc., No. 97-5121, Ct. of Appeals (11th Cir.) November 16, 1999.

⁷ Exhibit 17. Virginia Lottery Sexual Harassment Training *Acknowledgement Form*, March 20, 2000.

⁸ Exhibit 6. Virginia Lottery Employee Handbook *Acknowledgement of Receipt*, August 23, 1999.

⁹ Exhibit 1. *Virginia Lottery Employee Handbook*, 1999. The policy now requires the reporting of all driving violations. When grievant was hired in 1989, the policy required reporting only if an employee incurred a driving violation of four or more points. See Exhibit 4.

Periodically, the Security Division obtains routine updates from the Department of Motor Vehicles (DMV) for those employees whose positions require them to drive agency vehicles in the performance of their duties. A routine update obtained from DMV on August 23, 2001 reflected that grievant's driver's license was suspended effective May 31, 2001 for insurance monitoring and reinstated on July 27, 2001.¹⁰ Grievant purchased another vehicle on July 27, 2001. When he contacted his insurance agent to obtain insurance coverage for the new vehicle, his agent advised him that his driver's license had been suspended. Grievant immediately went to DMV, paid a reinstatement fee of \$30, and his driver's license was reinstated.¹¹ Grievant never notified the Security Division or anyone else at the agency about the suspension of his license.¹²

In March 2001, grievant owned a sports car and a truck. The car became inoperable due to axle problems and grievant requested his insurance agent to remove insurance coverage on the car; the truck remained insured. Insurance agents are required to report to DMV the removal of insurance coverage on any vehicle. Because grievant had not turned the car's license plate in, DMV mailed a notice of non-compliance to grievant on March 31, 2001. When grievant failed to respond to the notice, DMV mailed grievant a second notice on May 1, 2001 advising that his driver's license would be suspended effective May 31, 2001. Grievant avers that he did not receive either letter from DMV. Grievant has been living at the same address for three years. DMV does not assess points when a driver's license is suspended for failure to furnish proof of financial responsibility.

The agency concluded that grievant had placed the agency at risk by driving on a suspended license. The agency also felt that grievant's failure to report the suspension was gross negligence. Grievant was given a Group III Written Notice on August 29, 2001 for failure to comply with established agency policy and was discharged from employment on the same date.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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

¹⁰ Exhibit 2. DMV transcript of Driver History record, August 23, 2001.

¹¹ Exhibit 22. DMV receipt for reinstatement fee, July 27, 2001.

¹² Grievant had complied with this requirement in the past; he had submitted written notice to the agency of speeding tickets in 1995 and 1996, and a right-turn-on-red violation in 1998. See Exhibit 3.

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 § 2.1-116.05(A) 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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹³

To establish procedures on Standards of Supervision and Performance for its employees, the agency promulgated Policy No. 1.60 effective July 1, 1994. The Standards 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. Section V.B.2 of the policy states that Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. One example of a Group II offense is failure to comply with established written policy.

Section V.B.3 of the 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. An example of a Group III offense is violation of the Lottery Policy regarding sexual harassment.¹⁴ Sexual harassment can also be a Group I or Group II offense depending upon the nature of the offense.

Inappropriate Behavior

The agency has demonstrated by a preponderance of the evidence that grievant did make four physical contacts with a female client store manager during a two-minute time frame on July 18, 2001. The videotape clearly

¹³ § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.

¹⁴ Exhibit 15. Virginia Lottery Policy #1.60, *Standards of Supervision and Performance*, effective July 1, 1994.

demonstrates that at least three of the four contacts were intentional. The store manager testified credibly that she told grievant to stop touching her after each of the four contacts. Grievant argues that the store manager's written statement mirrors the action on the videotape too closely and that she must have written the statement while watching the videotape. The store manager denied this allegation; grievant produced no other evidence to rebut the store manager. Careful analysis of the videotape corroborates the store manager's assertion that she repeatedly told grievant to stop touching her. Even though the videotape does not have an audio track, the body language of both grievant and store manager are consistent with her rejection of his physical advances. When grievant nudged the manager, she immediately pulled away; when grievant put his arm around her shoulder, he immediately jerked it away and backed off as though she had just rebuked him; when grievant rested his arm on her shoulder, she abruptly pushed it away.

Therefore, it is concluded that grievant did make unwelcome physical contacts or advances to the store manager. She rejected each advance and told him on four separate occasions to desist. Grievant persisted in his behavior notwithstanding her rejections. Grievant equates his behavior to shaking hands. This argument is rejected for two reasons. First, shaking hands is a common and acceptable practice in the business world. Placing one's arm around the shoulder of a member of the opposite gender is neither common practice nor generally acceptable. Second, if one could construe grievant's actions to be similar to a handshake, even a handshake can be unwelcome behavior if the other person tells you they do not want to touch or shake the hands of others.

The grievant's behavior in the convenience store was not sexual harassment. Not only does the behavior not meet the Mendoza definition¹⁵ but also the physical contact was not sexually oriented. However, grievant's behavior was closely akin to sexual harassment because it was unwelcome physical contact with a member of the opposite gender. Moreover, the training given to grievant emphasized that any physical contact with others should be stopped as soon as the recipient makes known that the contact is not welcome.

Grievant argues that he had engaged in similar behavior with the store manager on other occasions and that she did not indicate it was unwelcome. The store manager contends that she had told grievant in the past not to touch her. The hearing officer finds the store manager's testimony more credible than grievant's testimony because of the videotape evidence. Therefore, where a difference in testimony exists, the hearing officer accepts the store manager's version. However, even if the store manager had not previously told grievant to cease his physical contact, she did tell him on July 18, 2001 – not just once, but four separate times. Grievant should have ceased touching her after the first admonition and certainly after the second time. However, he persisted and

¹⁵ See footnote 6.

thereafter committed the two most egregious physical contacts by putting his arm around her shoulder and then leaning on her shoulder.

Grievant's unwelcome physical advances plainly did not project a positive image for the Lottery and are not businesslike conduct. It is also clear, in view of the fact that the convenience chain has banned grievant from its 45 locations, that his behavior was not good judgement and that it reflected adversely on the agency. While grievant's actions were unacceptable, it cannot be concluded that they were so egregious as to warrant discharge for a first offense (the criterion for a Group III offense). Rather, it appears that his behavior was sufficiently severe that a recurrence would warrant discharge (the criterion for a Group II offense). Therefore, the discipline for grievant's offense must be modified.

Failure to Follow Established Policy

Virginia law provides that a licensed driver must furnish proof of financial responsibility and that failure to do so may result in the suspension of driving privileges. Moreover, driving a vehicle while one's license is suspended is a misdemeanor offense.¹⁶

It is undisputed that grievant drove agency vehicles for nearly two months during which time his driver's license was suspended. Grievant denies being aware of his suspension until July 27, 2001 – the day on which his driving privilege was restored. While it is difficult to believe that grievant did not receive either of two notices mailed to him from DMV, the agency has not rebutted grievant's assertion. Nonetheless, it is also undisputed that grievant failed to ever report this suspension to the agency even after he learned about it on July 27th. The agency learned about the suspension only after requesting a routine periodic check from DMV in late August. Therefore, the agency has shown, by a preponderance of the evidence, that grievant failed to report the suspension of his license after he learned about it on July 27th.

Grievant's position is that he did not have an obligation to report the suspension because it is neither a "criminal arrest" nor a "driving violation." The agency contends that a suspended license is a driving violation because the grievant was driving while his license was suspended – a misdemeanor offense. It is concluded that the agency is correct in its interpretation for two reasons. First, if grievant had been stopped for any traffic infraction during June or July 2001, he would have been cited for driving without a valid driver's license – an undisputed driving violation. The mere fact that he was fortunate enough to avoid being caught does not change the fact that he was, in fact, driving on a suspended license. Thus, he did commit a driving violation. Second, and more significantly, grievant subjected the agency to potential liability and possible adverse publicity while driving on a suspended license. If he had been involved

¹⁶ § 46.2-302, Code of Virginia provides that driving without proof of financial responsibility is a Class 2 misdemeanor.

in an accident during June or July, the consequences for the agency and its image could have been significant.

Grievant alleges disparate treatment, citing the case of another employee whose license was suspended. That employee was not disciplined but received only a letter of reprimand. In that case, the employee had received a traffic ticket but subsequently made a deal with the Commonwealth's Attorney to testify in a murder trial in return for having the ticket vacated. For some reason, the ticket was not vacated and the employee's license was suspended. The matter was then resolved satisfactorily and the employee was reprimanded. However, during the hearing, there was no evidence presented to establish whether the employee had failed to report his suspension after learning about it. Therefore, it is impossible to properly compare that situation with the instant case.

Given that the license suspension resulted from failure to turn in license plates to DMV after removing insurance coverage for an inoperable vehicle, grievant's driving violation is not as egregious as a speeding ticket or major moving violation. The fact remains, however, that grievant was obligated to report this violation upon learning of it on July 27, 2001. Thus, grievant did fail to follow established agency policy. Failure to follow established agency policy is a Group II offense. Therefore, the discipline for this offense must be modified.

DECISION

The decision of the agency is hereby modified.

The Group III Written Notice issued on August 27, 2001 is vacated. The agency shall prepare a Group II Written Notice for inappropriate behavior in the areas of public relations and judgement.

The Group III Written Notice issued on August 29, 2001 is vacated. The agency shall prepare a Group II Written Notice for failure to comply with established agency policy.

Because the August 29, 2001 Group II Written Notice is issued while another Group II Written Notice is active, the grievant's discharge from employment is AFFIRMED.¹⁷

This decision is FINAL and binding on both parties.¹⁸

¹⁷ Exhibit 15. Virginia Lottery Policy #1.60, *Standards of Supervision and Performance*, effective July 1, 1994. Group II Written Notices are cumulative. A second active Group II Notice should result in discharge.

¹⁸ Exhibit 24. Section V.H, Virginia Lottery Policy #1.75, *Employee Appeal Procedure*, effective July 1, 2000, states, "The [hearing officer's] decision shall be final and binding."

David J. Latham, Esq.
Hearing Officer