

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date:
February 20, 2002; Decision Date: February 21, 2002; Agency: Department of Motor
Vehicles; AHO: Carl Wilson Schmidt, Esquire; Case No.: 5378



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5378

Hearing Date: February 20, 2002
Decision Issued: February 21, 2002

PROCEDURAL HISTORY

On October 4, 2001, Grievant was issued a Group I Written Notice of disciplinary action for "Unsatisfactory job performance." On November 5, 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 he requested a hearing. On January 25, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 20, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
District Manager
Customer Service Manager Senior
Customer Service Generalist

ISSUE

Whether Grievant should receive a Group I Written Notice 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 Motor Vehicles employs Grievant as a Customer Service Center Coordinator. He works in an Agency branch office and reports to the branch manager. When the branch manager is out of the office, he serves as the branch manager. He has been employed by the Agency for ten years without any prior disciplinary action.

On September 26, 2001, an 18 year-old Woman Customer entered the branch office where Grievant works. She asked another Agency employee how she could obtain a Virginia driver’s license. She had been living with a relative in Virginia for the past three months after having moved from Florida. The Agency employee explained to the woman what evidence she needed to provide in order to establish her Virginia residency. She did not have that evidence and demanded to speak with a manager. The Agency employee walked over to Grievant and told him that the woman wanted to speak with him.

Grievant approached the woman, identified himself, and inquired as to what assistance she needed. The Woman Customer explained that she wanted a Virginia license. Grievant informed her of the Agency’s requirements and provided her with a list of acceptable evidence of residency. The Woman Customer demanded that she be given a license even though she did not have the necessary proof. Grievant said he was sorry but he could not give her a license without the proper documents. The Woman Customer became irate, loud, and began using profanity. She made several disparaging comments about America. Grievant responded, “If you feel this way about America maybe you should go back to your country.”¹

The Agency makes a significant effort to inform its managers, coordinators, and branch staff of the importance of presenting a positive professional image as part of its

¹ Agency Exhibit 8.

customer service. Employees are regularly informed as to how to respond to difficult customers. On June 13 and 14, 2001, Grievant attended a meeting where the topic of customer complaints was addressed and how to avoid those complaints by providing appropriate customer service.

CONCLUSIONS OF LAW

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.” P&PM § 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.” P&PM § 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.” P&PM § 1.60(V)(B)(3).

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that he failed to perform those duties.

Part of Grievant’s job is to provide quality customer service including properly handling difficult customers. The Woman Customer was rude, insulting, disrespectful, and unpatriotic. She was clearly a difficult customer. Although Grievant’s defense of his country may be understandable in light of the terrorist attacks fifteen days earlier, his opinion regarding the woman’s lack of patriotism was not one he should have expressed while working in the capacity of an Agency employee. Grievant should have relied on his customer service training and expectations and refrained from expressing his opinion to a difficult customer. His behavior was inadequate job performance.

Grievant argues that his comments were not intended to discriminate against the Woman Customer. Grievant points out that since he is African-American, he understands what it means to be discriminated against and that his comments were not intended to be discriminatory in nature. Indeed, he did not know the Woman Customer’s nationality³ at the time he spoke with her.

The Hearing Officer agrees that Grievant did not intend his comments to be discrimination towards the Woman Customer. It is not necessary, however, for the Agency to show he intended to discriminate against the Woman Customer. All the

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

³ The Woman Customer’s family was of middle eastern descent.

Agency needs to show is that Grievant's comments were inadequate customer service. The Agency has done so.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

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

Administrative Review – This decision is subject to three 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.

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 DHRM, 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