

Issue: Group III Written Notice with termination (engaging in conduct which undermines the agency's effectiveness); Hearing Date: 01/31/05; Decision Issued: 02/14/05; Agency: VSP; AHO: David J. Latham, Esq.; Case No. 7958



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7958

Hearing Date: January 31, 2005
Decision Issued: February 14, 2005

PROCEDURAL ISSUE

Grievant requested as part of the relief he seeks that he be transferred to a different area of the state. A hearing officer does not have authority to direct an agency to transfer an employee.¹ Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant

¹ § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

Division Commander
Representative 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 at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued for engaging in conduct that undermines agency effectiveness.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ The Virginia State Police (VSP) (Hereinafter referred to as "agency") has employed grievant for 20 years; he was a senior trooper. He was rated a "Major Contributor" on his most recent annual performance evaluation and an "Extraordinary Contributor" on the previous evaluation.⁴

The agency has promulgated General Rules of Conduct that require the maintenance of unusually high standards of conduct to maintain the confidence of citizens of the Commonwealth.⁵ Employees are required to be respectful in dealing with the public,⁶ and to exercise sound discretion in carrying out duties and responsibilities.⁷

On February 4, 2004, while on-duty and in uniform, grievant entered a convenience store that he had frequented for approximately eight years. He knew that a female employee who had been working there for at least five years had been sick for a few days. He asked another employee where the sick employee was and was told that she was in the office. Grievant walked to the rear of the store and entered the small office. The female employee was sitting on a stool at a waist-high counter doing paperwork. She was not expecting grievant and screamed, saying, "You scared me." Grievant put his hands on her neck and pushed her hair aside. He noticed something on her neck and said to her, "It looks like someone has been sucking on your neck." She said, "Stop, don't touch me" and pushed grievant away. Grievant then observed a ball cap on a file cabinet behind the female employee and leaned over her to pick it up. She told grievant to leave her alone and not to put his hands on her. Grievant

² Agency Exhibit 7. Written Notice, issued November 3, 2004.

³ Agency Exhibit 8. Grievance Form A, filed November 22, 2004.

⁴ Grievant Exhibit 1. Performance evaluations for 2003 & 2002, respectively.

⁵ Agency Exhibit 3. Section 1, General Order No. 17, *General Rules of Conduct*, revised October 1, 2002.

⁶ Agency Exhibit 3. Section 11, *Ibid.*

⁷ Agency Exhibit 3. Section 31, *Ibid.*

apologized and left the office. He went to the front of the store and got a cup of coffee. A few minutes later, grievant returned to the office and again apologized.

Six days later, on February 10, 2004, the female employee filed a written complaint with the agency.⁸ On February 11, 2004, a special agent and a sergeant interviewed the female employee. When the female employee related what had occurred, she added another complaint that she had not previously mentioned in her written statement. She claimed that grievant rubbed the front of his body against her thigh when he leaned over her to pick up the ball cap.

The agency conducted a criminal investigation of the incident until April 1, 2004 when it closed the matter because the special prosecutor concluded there was insufficient evidence to go forward, and because the female employee was unwilling to testify. On April 14, 2004 an Internal Affairs investigator began a new investigation. Over the next two months, the investigator interviewed six people and wrote a report on June 16, 2004.⁹ The report was given to the division commander. During the next two months, four supervisors reviewed the written report and offered recommendations about possible disciplinary action. All agreed that the offense warranted a Group III Written Notice (Two recommended suspension and two recommended termination of employment). On August 12, 2004, the division commander captain recommended that grievant be removed from employment.¹⁰ The Superintendent assigned the case to a major to take appropriate disciplinary action.¹¹ Over two more months passed until the major decided that grievant would receive a Group III Written Notice and be transferred to another area of the state.¹² Subsequently, the Superintendent overruled the major's decision and directed that grievant be removed from employment.¹³

The female employee advised the investigator that about two weeks before the February 4, 2004 incident, grievant entered the store and initiated a conversation during which he discussed personal aspects of his sex life. This conversation was corroborated by a second convenience store employee.

During the nine months between the offense and his removal from employment, grievant was not suspended or transferred and, he continued to work in the same area in which he had been assigned for several years.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the

⁸ Agency Exhibit 1. Citizen Complaint Form, filed by complainant on February 10, 2004.

⁹ Agency Exhibit 1. Memorandum from sergeant to captain, June 16, 2004.

¹⁰ Agency Exhibit 2. Memorandum from captain to lieutenant colonel, August 12, 2004.

¹¹ Agency Exhibit 4. Memorandum from Superintendent to major, August 24, 2004.

¹² Agency Exhibit 4. Memorandum from major to lieutenant colonel, October 21, 2004.

¹³ Agency Exhibit 6. Memorandum from Superintendent to major, October 26, 2004.

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.¹⁴

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 promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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. The Department of State Police has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department.¹⁵ Group III offenses include acts and behavior of such a serious nature that a first occurrence should normally warrant removal from employment. Engaging in conduct that undermines the effectiveness of agency activities or which might impair the department's reputation is one example of a Group III offense.¹⁶

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

¹⁵ Agency Exhibit 3. General Order No. 19, *Separation from the Service and Disciplinary Measures*, Revised October 1, 2002.

¹⁶ Agency Exhibit 3. Section 14.b.(20), General Order No. 19, *Ibid*.

The agency's case was weakened by its failure to offer the sworn testimony of the complainant. Because her statements were not subjected to cross-examination, her credibility could be assessed only by evaluating the differences between her written statement and her interviews with investigators. One notable inconsistency in her written statement was the lack of any allegation that grievant rubbed the front of his body against her thigh. The complainant did not raise this allegation until she was first interviewed on February 11, 2004. Most women would consider such an action at least equally offensive as the brushing aside of their hair. The complainant's add-on of this allegation after the initial complaint was filed raises a credibility question about whether there was any inappropriate touching of her thigh. Since the complainant did not testify and could not be cross-examined on this point, it is concluded that any contact that occurred when grievant picked up the ball cap was inadvertent and inconsequential.

Notwithstanding this discrepancy, grievant has admitted that he touched the complainant in an inappropriate and unwelcome manner. As an on-duty officer, in uniform, grievant's touching of the female's neck and moving her hair to the side was plainly contrary to the expectations of the General Rules of Conduct. Grievant knew, or reasonably should have known, that the female could justifiably object to such uninvited behavior. There is no evidence that the female had ever lead grievant on, either in the past or on the day in question. Accordingly, grievant had no reasonable expectation that the female would welcome his physical touching.

Grievant described the female as having hair long enough that it reached to the middle of her upper arm. He contends that he brushed her hair aside because he "saw something" on the back of her neck. With such long hair, it does not appear logical that grievant could see anything on her neck until *after* he had moved her hair aside. Grievant stated that her hair was "bushy"; whether bushy or straight, grievant's explanation is not credible. It appears more likely than not that, if grievant noticed anything on her neck, it was not until *after* he had moved her hair aside. The preponderance of evidence establishes that grievant's conduct, while on duty and in uniform, might impair the Department's reputation. As such, grievant's actions constitute a Group III offense.

The agency gave consideration to transferring grievant to a different area of the state in lieu of removal from employment. However, removal was ultimately determined to be necessary for two reasons. First, grievant has a prior inactive disciplinary action for conduct that is somewhat related to the current offense.¹⁷ The agency also considered the fact that during the past four years, two complaints had been filed alleging that grievant had behaved inappropriately with female motorists. The agency did not sustain either complaint and therefore, the hearing officer gives no weight to these latter two incidents.

¹⁷ Agency Exhibit 5. Grievant was issued a Group III Written Notice for assaulting a female, September 18, 1989.

Second, during the investigation of this case, grievant was less than forthcoming when questioned about whether he had called the female at her home. He called the female a liar when told that she said he called her at home. Subsequently, grievant admitted that he had spoken with the female by telephone at her home. As an explanation of why he initially denied calling her at home, grievant asserted that someone else dialed the number. The agency also gave weight to grievant's discussion of his personal sex life with two convenience store employees in late January 2004. While this evidence is hearsay, the cumulative weight of all the factors discussed above is sufficient to conclude that the agency's disciplinary action was appropriate in this case.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. Supervisors should be aware of inadequate or unsatisfactory work performance or behavior on the part of employees and attempt to correct the performance or behavior *immediately*.¹⁸ When issuing the employee a Written Notice Form for a Group I offense, *management should issue notice as soon as practicable*.¹⁹ One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless an extensive, detailed investigation is required, most state agencies issue disciplinary actions within a few weeks after an offense.

The agency has promulgated a policy regarding the conduct of administrative investigations that provides that such investigations should be expedited. The policy states that **an investigation shall be completed within 30 days**, unless extenuating circumstances warrant an extension.²⁰ In this case, no extenuating circumstances have been demonstrated. Only six people were interviewed, all of whom were readily available. The agency offered no reasons that would satisfactorily explain why nine months were needed to issue the Written Notice. When an agency delays imposition of discipline for such an extended time, it gives the appearance that the agency does not consider the offense to be very serious. In an appropriate case, a hearing officer may give consideration to reducing the level of discipline where the agency's delay is sufficiently egregious as to negate the alleged seriousness of the offense. In the instant case, it is concluded that the offense was sufficiently severe as to warrant the disciplinary action imposed.

¹⁸ Agency Exhibit 4. Section 7.b, General Order No. 19, *Separation from the Service and Disciplinary Measures*, revised October 1, 2002.

¹⁹ Agency Exhibit 4. Section 12.c (1), *Ibid*.

²⁰ Agency Exhibit 3. Section 14, General Order No. 17, *Administrative Investigations*, revised April 1, 2004.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and termination of grievant's employment effective November 3, 2004 is hereby 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. 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.²¹ 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.²²

[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

²¹ 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).

²² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.