

Issue: Group II Written Notice with suspension (inappropriate touching); Hearing Date: 12/15/05; Decision Issued: 12/30/05; Agency: Dept. of Veterans Services; AHO: Carl Wilson Schmidt, Esq.; Case No. 8220; Outcome: Agency upheld in full;
Administrative Review: HO Reconsideration Request received 01/11/06;
Reconsideration Decision issued 01/18/06; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8220

Hearing Date: December 15, 2005
Decision Issued: December 30, 2005

PROCEDURAL HISTORY

On September 2, 2005, Grievant was issued a Group II Written Notice of disciplinary action with suspension from September 6, 2005 to September 19, 2005 for inappropriate touching in the office. On September 23, 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 November 17, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 15, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Veterans Services employs Grievant as a Veterans Service Representative at one of its Facilities. He has been working for the Agency since May 1, 1987. His work performance has been satisfactory to the Agency. He is highly regarded by his co-workers for his knowledge and integrity. On July 22, 2004, Grievant received a Group I Written Notice regarding his interaction with another employee.¹

On August 26, 2005, the Representative entered Grievant's office to ask Grievant a question. She was newly hired by the Agency and did not know how to respond to a question asked of her by someone she was assisting. The door remained open. Grievant was sitting behind his desk. The floor underneath Grievant's chair was not level. His chair had wheels. The Representative stood to Grievant's right and close to the right front side of the desk. She remained standing and stationary. Grievant was handling a folder when several sheets fell out of the folder and onto the floor in front of Grievant. Grievant pushed back from the desk and reached down to grab the papers. As he did so, his chair rolled backwards more than he expected and he lost his balance.² He placed the papers on the desk. Using his right hand, he reached out

¹ Agency Exhibit 3.

² The Representative did not bend down to help pick up the papers. She remained stationary.

towards the Representative and touched the left side of her bottom. He patted her at least three times on her bottom. He said "I'm not trying to feel your ass." Grievant's touch was hard enough to feel her undergarments. The Representative was stunned. She did not expect to be touched by Grievant and was uncertain how to respond. Grievant continued his explanation to the Representative for another approximately five minutes. As the discussion concluded, Grievant patted the Representative at least two times on her left arm. The Representative left Grievant's office. She reported the matter to Agency's managers.

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).³ 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 § 1.60(V) lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section."

In the Agency's judgment, a male employee who pats a female employee on the bottom at least three times should receive a Group II Written Notice. The Agency's judgment is supported by the evidence. Group II offenses typically include some degree of intent to engage in the behavior deemed improper.⁴ In this instance, Grievant intentionally touched the Representative's bottom against her wishes and without her permission. Upon the issuance of a Group II Written Notice, an Agency may suspend an employee for up to ten workdays. Grievant's suspension is permitted by DHRM policy.

Grievant argues that he was not trying to touch Grievant but merely lost his balance and ended up touching her. While this may have been true with respect to the first time Grievant touched the Representative, it is not true with respect to the two

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ For example, failure to follow a supervisor's instruction is a Group II offense requiring an Agency to show the employee knew of the instruction and intended not to follow that instruction.

additional pats he gave her on her bottom. Grievant's second and third touching were clearly intentional.

Grievant contends he only touched the Representative once and that he did not pat her. The Representative's testimony was credible. She was stationary and not distracted at the time Grievant patted her. It is not necessary for the Agency to present evidence that shows touching occurred beyond any doubt. It is only necessary for the Agency to present evidence to show a preponderance of the evidence. The Representative's testimony satisfies this standard.

Grievant contends the Agency's investigation was not thorough. The type and quality of the Agency's investigation does not affect whether disciplinary action can be upheld. The Hearing Officer determines the facts *de novo* and Grievant could have presented whatever facts he wishes that he believed Agency managers overlooked during their investigation.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."⁵ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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:

⁵ *Va. Code § 2.2-3005.*

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.⁶

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8220-R

Reconsideration Decision Issued: January 18, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant argues the Agency did not show the touching was intentional. He says the case is a “He said, She said,” only in the instance of the number of touchings. The Agency, however, presented credible testimony of the Representative that Grievant patted her bottom at least three times. At least two of the pats were made with the intent to touch the Representative’s body. It is not likely that Grievant quickly and repeatedly touched the Representative’s bottom by accident. The Agency has met its burden of proof regarding the facts it alleged.

Grievant argues that in order to believe his actions were intentional, one must believe he lured the Representative into his office, or dropped the papers intentionally, or asked her to come around behind the desk or kicked the chair out from under him. Grievant’s argument fails. The Agency has established through the testimony of the Representative that at the time of the touching Grievant took his hand and intentionally touched the Representative at least three times. Grievant admits to touching the Representative hard enough to feel her undergarments.

Grievant argues that the Representative testified that he apologized to her two days after the event but it could not have happened because he was not in the building at the time. The time frame or the substance of any possible apology alleged of Grievant had no bearing on the outcome of this decision.

Grievant argues the investigator asked him questions that he could not answer even though he answered honestly. Grievant argues the investigator was trying to catch him in a lie. Grievant objects to the investigator's conclusion that because Grievant was involved in a similar prior incident that Grievant must have improperly touched the Representative. The Hearing Officer did not base the Hearing Decision on the investigator's method of investigation or his conclusions regarding Grievant. Accordingly, Grievant's argument is irrelevant.

Grievant argues the punishment was "a stiff fine. Punishment that stiff is not handed out for non-aggravated manslaughter." DHRM Policy 1.60 permits a ten workday suspension upon the issuance of a Group II Written Notice. Grievant's discipline was consistent with DHRM Policy, and the *Rules for Conducting Grievance Hearings* require the Hearing Officer to defer to the Agency's selection of discipline that is in accordance with policy.

Grievant questions footnote 4 because "[H]ow can it be said that I didn't follow my supervisor's instruction" Footnote 4 explained that DHRM Policy distinguishes between employee behavior depending in part on the level of intent displayed by an employee. It was not directed specifically at Grievant's behavior since the Agency did not allege Grievant failed to comply with a supervisor's instruction.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied**.

APPEAL RIGHTS

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

1. The 15 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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer