

Issue: Group II Written Notice with suspension (failure to follow supervisory instruction, obscene or abusive language, disruptive behavior, and insubordination); Hearing Date: 10/02/06; Decision Issued: 11/03/06; Agency: DGS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8430; Outcome: Agency upheld in full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8430**

Hearing Date: October 2, 2006  
Decision Issued: November 3, 2006

**PROCEDURAL HISTORY**

On June 27, 2006, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for failure to follow a supervisor's instruction, obscene or abusive language, disruptive behavior, and insubordination. On July 26, 2006, 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 she requested a hearing. On September 6, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 2, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
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 General Services employs Grievant as a Customer Service Representative at one of its facilities. She began working for the Agency in 1992. The purpose of her position was:

Provide clerical help in shop office daily functions, provide customers with information or help (internal & external customers), and support shop service operations. Support the daily operation of the shop as required to ensure production goals are met. Assist in the functions required to issue or turn in vehicles. Assist the Shop Supervisor or ... management as needed on special projects or initiative to accomplish the ... mission. Will act as back up to the Parts Technician in his/her absence.<sup>1</sup>

Customers often arrived at the Agency's Facility to obtain State vehicles. Under the prior procedure, when these customers arrived, Grievant or another employee would receive the necessary paperwork from the customer in the front of the office, walk

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<sup>1</sup> Agency Exhibit 6.

to the back of the office, obtain the car keys, walk outside into a parking area<sup>2</sup>, locate the vehicle, drive the vehicle to the shop office located near the back of the Facility, and present the vehicle to the customer. Under this procedure, customers would arrive at the front of the building but have to walk through the building and obtain the vehicle in the back of the building.

Agency managers wanted to permit customers to arrive at the front of the building and obtain their vehicles at the front of the building without having to walk through the building. Agency managers changed the existing procedure so that the employee already located in the front of the building, Ms. W, would assume Grievant's responsibility for receiving paperwork from customers. Ms. W would then notify Grievant of the needed vehicle and Grievant would obtain the vehicle as she had done so in the past, except that Grievant would drive the vehicle to the front of the building where the customer remained instead of the back of the building.

Grievant and other staff were informed of the new procedure during several meetings. A specific start date for the new procedure was not set at the time of those meetings.

Agency managers decided to implement the change in procedure on June 20, 2006. Grievant's Supervisor testified that he informed Grievant of the change in procedure in the morning of June 20, 2006 prior to the Supervisor's leaving for a trip to Louisiana to return a rental car obtained by the Agency. Grievant testified she was not informed on June 20, 2006 by the Supervisor of the procedure change.

After the Supervisor left the Agency to drive to Louisiana, Ms. W left her office in the front of the building and walked back to Grievant's office area. Ms. W asked where Grievant kept the new car folders for the State vehicles because she intended to move the folders to her office since she would be the person responsible for giving and receiving paperwork to customers seeking State vehicles. Grievant told Ms. W the folders were located in Grievant's drawer. Ms. W went to the folders and began removing them. Ms. B held duties similar to those of Grievant and also worked near Grievant.

A discussion began between Ms. B, Grievant and Ms. W about when the new procedure became effective. Ms. B asked "are we doing this now?". Ms. W responded "yes." Grievant asked "who gets the car?" Ms. W responded, "You get the car." Grievant became angry because she believed she had not been adequately informed of the start date of the new procedure and she felt the details of the new procedure had not been adequately defined. Grievant began yelling and cursing while Ms. W was standing a few feet next to her. Grievant said, "it's 98 f—cking degrees outside." "You get the car!" Ms. W said, "That is not my job." Grievant responded, "I don't like it" and then cursed. During this interaction, Grievant said to Ms. W "damn", "f—k", and that she was "tired of this sh-t."

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<sup>2</sup> Grievant described this area as a field.

Midway during the incident, the Mechanic entered the office where Grievant and Ms. W were located. The Mechanic heard Grievant say to Ms. W, “f—k that, I don’t have to do that.” The Mechanic described Grievant as yelling at Ms. W. Ms. W felt threatened by Grievant and left Grievant’s area. Ms. W reported her concerns about Grievant’s behavior to a supervisor.

After speaking with several other employees, Grievant’s Supervisor called Grievant to find out what happened. Grievant started yelling and cursing at the Supervisor. Grievant told the Supervisor, “I’m not getting these f—cking cars, its 98 degrees.” She also told him “I’m not doing this damn stuff.” The Supervisor responded to Grievant that, “you have a choice – you can either do your job or resign.”

Sometime later that morning, Grievant walked to the office of the Fleet Business Manager who was meeting with another person. Grievant said “I ain’t doing it” and then walked out.

### **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).<sup>3</sup> 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).

Insubordination is a Group II offense. Insubordination is a Group II offense because it is similar to the charge of failure to follow a supervisor’s instructions which is a Group II offense under the Standards of Conduct. Grievant was insubordinate to her Supervisor because she angrily yelled and cursed at the Supervisor and repeatedly stated that she refused to perform duties assigned to her by the Supervisor.<sup>4</sup> Grievant directly challenged and rejected the Supervisor’s authority to require her to perform tasks involving the retrieval of new State vehicles for Agency customers.

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> The Agency has not established that Grievant failed to follow a supervisor’s instructions. Although Grievant said she would not retrieve any vehicles that day, no evidence was presented showing a vehicle was requested by a customer and Grievant then failed to retrieve the vehicle. Even though this allegation was not proven, there remains sufficient evidence to support the Agency’s issuance of a Group II Written Notice.

The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice. A suspension of up to ten days is authorized by the Standards of Conduct for an employee who receives a Group II Written Notice. Since the Agency suspended Grievant for fewer than ten days, its suspension of her must be upheld.

Grievant contends she was inadequately informed of the date of the change to the new procedure to obtain vehicles. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, this does not authorize her to yell at co-workers. Ms. W was following her supervisor's instructions when she went to retrieve folders from Grievant. The change in procedure was a lessening of Grievant's responsibilities, not an increase.

Grievant contends others in the Agency curse on occasion and that her cursing was not any more disruptive than the cursing of other staff. Although the evidence showed that other employees in the Agency sometimes cursed, Grievant's cursing was directed at Ms. W and at the Supervisor and was part of an expression of anger. No credible evidence was presented suggesting other employees engaged in similar behavior and that the Agency sanctioned or ignored such behavior by other employees.

Grievant contends the Supervisor made inappropriate comments of a sexual nature to Grievant thereby constituting harassment and creating a hostile work environment. For example, Grievant was in the driver's seat of an inoperable vehicle while the Supervisor and a few other male employees were behind the vehicle pushing it forward. The Supervisor stated, "I wonder if [Grievant] has ever had this many guys pushing behind her."<sup>5</sup>

Although the Supervisor's comment may have been inappropriate, there is no credible evidence to suggest the disciplinary action against Grievant was part of or motivated as part of a hostile work environment.<sup>6</sup> The Agency took disciplinary action against Grievant because of her behavior and for no other reason.

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<sup>5</sup> Grievant also alleged that approximately six to nine months ago, she was seated at her desk while the Supervisor was standing on the side of her desk looking through work orders. Grievant scratched her leg and the Supervisor asked her what she was doing. When she said she was scratching her leg, the Supervisor allegedly said, "I would like to put my head between your legs." The Supervisor denied this allegation and his denial was credible. No other employee overheard the Supervisor's alleged comment.

<sup>6</sup> DHRM Policy 2.30 defines hostile work environment as:

A form of sexual harassment when a victim is subject to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

The Supervisor's comment alone is not sufficient to create a hostile work environment for Grievant. Grievant also complained that the Supervisor wanted her to resign. As the Supervisor explained, he regularly stated to all staff that they would either do their jobs or resign. He meant to emphasize the employees' obligations to perform their duties. Such comments are not contrary to State policy.

Grievant contends the disciplinary action should be mitigated. *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....”<sup>7</sup> 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:

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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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<sup>7</sup> *Va. Code § 2.2-3005.*

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 all of your appeals to the other party and to the EDR Director. 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.<sup>8</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.