

Issue: Group II Written Notice with suspension (failure to follow supervisory instructions); Hearing Date: 12/20/06; Decision Issued: 01/26/07; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 8440; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8440

Hearing Date: December 20, 2006
Decision Issued: January 26, 2007

PROCEDURAL HISTORY

On July 8, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. On July 21, 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 November 28, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 20, 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 Motor Vehicles employs Grievant as a DMV Customer Services Generalist Senior at one of its locations. She began working for the Agency in August 1988. The purpose of her position is:

Performs customer service transactions, administers visions, knowledge, and road tests for driver licensing, and issues DMV credentials. Performs daily essential management functions as assigned in management absence and performs other senior level functions as assigned. All programs and services are administered in a customer service-focused manner and in accordance with statutory and administrative procedural requirements such as the Motor Vehicle Code of Virginia, DMV policies, procedures, rules and regulations, the Privacy Protection Act and the Freedom of Information Act.¹

On July 8, 2006, Ms. W, an employee working at Grievant's branch office, was waiting on the Customer. She was assisting the Customer with his motor carrier registration. The Customer needed an IFTA sticker. Ms. W could not complete the

¹ Agency Exhibit 1.

IFTA sticker process so she asked Grievant if Grievant could complete the process.² Grievant said “no” and that the Customer had been nasty to her before and she was not going to do anything for him. Ms. W told Grievant that Grievant would not have to interact with the Customer since he was at Ms. W’s window. Grievant still refused to help the Customer. Ms. W told the Supervisor what had occurred.

The Supervisor approached Grievant and instructed Grievant to process the transaction for the Customer. Grievant said “no” and that the Customer was rude and she would not help him. Grievant added that every time the Customer came into the branch, he was rude and no one had done anything about it. The Supervisor replied that she had only learned a day earlier that he was a rude customer and that employees are expected to deal with rude customers. The Supervisor told Grievant all Grievant had to do was process the transaction and Grievant would not be expected to interact with the Customer. Grievant again refused to do so. Grievant said she would log into the Agency’s computer database and then another employee would enter the necessary information to complete the transaction. The Supervisor responded that what Grievant proposed would be a violation of the Agency’s computer security policy. Grievant responded, “I guess he won’t get his work done today then.”

Because Grievant was not willing to complete the IFTA sticker process, Ms. W told the Customer that the manager could not log in and that there was no one at headquarters who would give her access to the appropriate computer system. Ms. W told the Customer that DMV could make arrangements for him not to have to wait at another DMV branch or that he could come back to Ms. W on Monday. The Customer said he would come back on Monday.

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).

“Failure to follow a supervisor’s instructions” is a Group II offense.⁴ Grievant’s Supervisor instructed Grievant to process a specific transaction to assist an Agency

² Grievant testified she would require only a few seconds to complete the transaction.

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

⁴ DHRM § 1.60(V)(B)(2)(a).

customer. Grievant understood the instruction and knowingly refused to comply. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice for failure to follow a supervisor's instruction. An employee receiving a Group II Written Notice may be suspended for up to ten workdays. Grievant's five workday suspension is within that standard.

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."

Grievant contends the disciplinary action should be mitigated because of the ongoing behavior of the Customer. Grievant had assisted the Customer several times when he came to the branch office. He sometimes positioned himself in front of Grievant's window and glared at her until his name was called. He had made derogatory comments about Grievant because of her race and gender. The Customer blamed DMV for many motor vehicle problems he created for himself by failing to follow instructions.

Grievant's concerns about the Customer are understandable. Grievant had provided customer services to many difficult customers over the course of her work for the Agency. The Customer was an extraordinarily difficult person to work with. The Supervisor, however, appropriately accommodated Grievant's concerns.⁶ The Supervisor did not expect Grievant to speak or interact with the Customer. Grievant's only obligation was to go to an area where the Customer could not see her and then to access the appropriate data base that no other branch employee could access at the time. The Supervisor's expectation that Grievant provide limited assistance was not unreasonable. Grievant has not established that the disciplinary action should be mitigated.

DECISION

⁵ *Va. Code § 2.2-3005.*

⁶ The decision to deny services to a customer is a decision reserved to managers. Although the Customer's behavior on other days may have been of concern, he was not acting inappropriately on July 8, 2006 and Agency managers did not need to remove him from the branch office.

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 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 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.⁷

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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