

Issue: Group I Written Notice (unacceptable or disruptive behavior); Hearing Date: 12/19/06; Decision Issued: 02/05/07; Agency: Department of Motor Vehicles; AHO: Carl Wilson Schmidt, Esq.; Case No. 8473; Outcome: Agency upheld in full;
Administrative Review: HO Reconsideration Request received 02/20/07; Reconsideration Decision 8473-R issued 03/01/07; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 02/20/07; EDR Ruling No. 2007-1555 issued 03/27/07; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8473

Hearing Date: December 19, 2006
Decision Issued: February 5, 2007

PROCEDURAL HISTORY

On August 17, 2006, Grievant was issued a Group I Written Notice of disciplinary action for challenging the authority of her supervisor and grabbing the supervisor in the workplace. On September 8, 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 27, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 19, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Program Support Technician. Grievant is responsible for opening incoming mail, recording information, preparing documents for imaging, making deposits, answering telephone calls and contacting dealer on line participants. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant reports to the Supervisor. The Supervisor speaks softly. She cannot raise her voice because of surgery to her vocal cords on June 13, 2006.

The Supervisor had informed her staff, including Grievant, that they should limit their personal conversations to no longer than five minutes.

On August 9, 2006, the Supervisor observed Grievant speaking to another employee for more than ten minutes. The Supervisor was sitting in her office cube and could see Grievant standing several feet away. The Supervisor stood up from her desk and walked down the aisle to where Grievant was standing. The Supervisor approached Grievant from behind Grievant. The Supervisor placed her hands on Grievant's shoulders and slightly turned Grievant's right shoulder towards Grievant's desk behind Grievant. The Supervisor asked Grievant to return to her desk. Grievant responded, "In a minute." The Supervisor said, "Now." Grievant said, "Okay."

The Supervisor turned around and began walking back to her desk. Grievant turned around and started walking towards the Supervisor's desk. Grievant was upset at being reprimanded for talking to another employee. Once Grievant reached the Supervisor's desk, Grievant used her right hand to grab the Supervisor's left wrist and began leading the Supervisor further back in the officer. Grievant moved her right hand from the Supervisor's wrist to the Supervisor's arm above her elbow. Grievant squeezed the Supervisor's arm. Grievant asked the Supervisor why the Supervisor past by Ms. F and walked directly to Grievant instead of instructing Ms. F to end her conversation. The Supervisor responded and then told Grievant to let go of her arm. Grievant did not immediately comply. The Supervisor repeated her instruction to Grievant. The Supervisor's facial expression and demeanor indicated to Grievant the seriousness of Supervisor's instruction. Grievant released the Supervisor's arm and said "Don't you touch me either!" Grievant returned to her desk. Within a 24 hour period,¹ the Supervisor noticed a bruise on her arm where Grievant squeezed her. The bruise was the size of a thumb print.

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).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." 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."

DMV contends Grievant should receive a Group I Written Notice because of her interaction with the Supervisor. The Agency's judgement is supported by the evidence. Grievant should not have grabbed the Supervisor with sufficient force to cause the Supervisor discomfort and possibly a bruise on the Supervisor's arm. Grievant should have immediately released the Supervisor upon the Supervisor's first instruction to release the Supervisor's arm. The Agency has presented sufficient facts to show that

¹ The Supervisor noticed the bruise several hours after the interaction, but the precise time was not established.

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

Grievant engaged in behavior requiring correction in the interest of maintaining a productive and well-managed work force.

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....”³ 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. Grievant question how she can be disciplined for touching the Supervisor while the Supervisor is permitted to touch other employees including Grievant.⁴ The evidence, however, showed that Grievant was not disciplined for touching the Supervisor but was disciplined for the manner in which she touched the Supervisor. Grievant grabbed the Supervisor with sufficient force to cause the Supervisor significant discomfort. Grievant did not immediately release the Supervisor when requested to do so. These facts show that Grievant’s touching was more severe than the Supervisor’s. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argues the Supervisor engaged in racial discrimination because the Supervisor passed by Ms. F, whose race is different from Grievant’s race, and only reprimanded Grievant. The evidence showed that the Supervisor did not believe Ms. F was engaging in a personal conversation exceeding five minutes. Thus, there is no basis to believe that the Supervisor acted against Grievant because of Grievant’s race.

DECISION

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

³ Va. Code § 2.2-3005.

⁴ Grievant is correct that the Supervisor should not have touched her, even in order to get her attention. An employee may not be touched unless that employee has given permission to be touched. The Supervisor’s inability to speak loudly does not mean other employees must give her permission to be touched. The Agency previously has counseled the Supervisor regarding touching other employees.

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.⁵

[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].

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8473-R

Reconsideration Decision Issued: March 1, 2007

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.⁶

Grievant seeks reconsideration “to protest the statement made by [the Supervisor] stating that I grabbed and bruised her arm ...” Grievant argues that the testimonies of other witnesses “were not weigh[ed] Equally to come to a fair conclusion.”

After considering all of the testimony presented and the credibility of each witness, the Hearing Officer finds that the Supervisor was the most credible witness regarding the manner in which Grievant touched her. Grievant was focused, in large part, on expressing her opinion. The Supervisor was more focused on how Grievant was touching her and, thus, better able to report what actually happened. The other witnesses were not as close, focused, or attentive as was the Supervisor and, thus, they were not as credible.

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**.

⁶ Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.

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