

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 12/20/06; Decision Issued: 02/05/07; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 8476; Outcome: Agency upheld in full. **Administrative Review: DHRM Ruling Request received 02/20/07; DHRM Ruling issued 05/08/07; Outcome: HO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8476**

Hearing Date: December 20, 2006  
Decision Issued: February 5, 2007

**PROCEDURAL HISTORY**

On August 4, 2006, Grievant was issued a Group I Written Notice of disciplinary action for involving customers in an administrative investigation. On August 30, 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 29, 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 an Administrative and Office Specialist III at one of its branch offices. The purpose of her position is:

Performs customer services transactions, administers vision, knowledge and road tests for driver licensing, and issued DMV credentials. Performs daily essential management functions as assigned in management's 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.<sup>1</sup>

Grievant began working for the Agency approximately 16 years ago. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.<sup>2</sup>

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

<sup>2</sup> As part of October 2005 performance evaluation, Grievant was advised that she "needs improvement in oral communications, when dealing with agency customers." See Agency Exhibit 1.

The Customer arrived at the Agency's branch office on July 8, 2006 in order to obtain documents necessary to enable him to operate a leased truck. He had been disruptive on numerous prior occasions by glaring at another branch employee, Ms. B, and making racial comments about her. Ms. B was extraordinarily uncomfortable when the Customer arrived at the branch office. When the Customer arrived on July 8, 2006, Ms. B was working. Ms. B's supervisor agreed to interact with the Customer but asked Ms. B to process certain information on a DMV database. When Ms. B refused to assist with the transaction for the Customer, the Agency began considering and investigating the need to take disciplinary action against her for failure to follow a supervisor's instruction. The Customer left without having his transaction completed.

Grievant did not work on July 8, 2006 and she did not know about the Agency's investigation. Grievant worked on July 10, 2006. She did not know the Customer or how he had behaved on prior occasions when Ms. B provided him with assistance. Grievant was working at Window 4 of the Agency's branch office. A co-worker, Ms. R, brought the Customer to Window 5 so that his transaction could be processed. Ms. R had to step away from Window 5 thereby leaving the Customer alone. The Customer began talking to the customer Grievant was assisting and who was standing in front of Grievant's window. The Customer told Grievant's customer, "Every time I come to this f—king place, I get the same stuff all the time and especially from that [race] bi—ch down there. The [race] one I can deal with but the [race] one [is a problem.]"

Ms. B and Grievant are friends and co-workers. Grievant has a lot of respect for Ms. B because Ms. B is an experienced and knowledgeable employee. It was Ms. B who the Customer was calling a bi—ch. Grievant did not want to hear the Customer's offensive comments. Grievant told the Customer, "You should write a letter of apology. You can get her in trouble [for saying that] because [the] customer is always in the right."

As a result of Grievant's comment to the Customer, the Customer obtained a piece of paper and wrote:

I [Customer] would like to apologize to [Ms.B]<sup>3</sup> the lady that helped me reopen my apportion tag account on 7-8-06. I spoke to you in a way that was un-professional in every which way and ... for something you really had nothing to do with. You just caught the tail end of frustration that was built up in me from one of your co-worker's shortcomings. So would you please find it in your hear to forgive me for the way I spoke to you, and if this incident caused you any problems at your employment I would greatly speak on your behalf.<sup>4</sup>

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<sup>3</sup> Although the Customer wrote Ms. B's name, it is unclear to whom he is referring. The Customer said Ms. B helped him reopen his account on July 8, 2006, but Ms. B did not provide services to the Customer on that date. Ms. B refused to interact with the Customer on July 8, 2006.

<sup>4</sup> Agency Exhibit 3.

## 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>5</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).

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant’s behavior was unsatisfactory to the Agency because she began a dialog with a customer about another employee. Her actions were not consistent with the Agency’s expectations of her work duties. In other words, Grievant’s actions were not in furtherance of the Agency’s business and, indeed, were contrary to Agency’s standard of customer service.<sup>6</sup> It was unnecessary for Grievant to engage the Customer in a discussion which resulted in him offering a written apology. Grievant had been advised to be cautious regarding her conversations with customers. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group I Written Notice.

Grievant argues that she did not know the Agency was in the process of conducting an investigation and, thus, she could not have interfered with investigation. The Agency was unable to present any evidence showing that Grievant knew or should have known of the investigation. Although the Agency has not established that Grievant intentionally interfered with an investigation, there remain sufficient facts to support the Agency’s conclusion that Grievant should receive a Group I Written Notice.

*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

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<sup>5</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>6</sup> To some extent, Grievant articulated that standard when she told the Customer that Agency managers believe that the “customer is always in the right.”

<sup>7</sup> *Va. Code § 2.2-3005.*

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. She argues that the Customer’s comments were offensive and needed to be addressed especially because the Customer was making derogatory comments to another customer. Grievant is correct that the Customer was an especially offensive customer, but the Agency presented ample evidence that employees were expected to assist and not challenge or confront such customers. In light of the standard set forth in the *Rules*, 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 I Written Notice of disciplinary action 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

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].

*S/Carl Wilson Schmidt*

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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.

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Motor Vehicles  
May 8, 2007

The grievant, through her representative, has appealed the hearing officer's decision in Case No. 8476. The grievant is challenging the decision because she contends that the decision is inconsistent with state policy. For the reason stated below, the Department of Human Resource Management will not interfere with the application of this decision. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

**FACTS**

The Department of Motor Vehicles employs the grievant as an Administrative and Office Specialist III at one of its locations. Among other things, her position performs the following activities:

Performs customer service transactions, administers vision, knowledge and road tests for driver licensing, and issues DMV credentials. Performs daily essential management functions as assigned in management's 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.

On August 4, 2006, the agency issued to her a Group I Written Notice that stated the following: "The agency was investigating an act of misconduct. You approached a customer who was involved and obtained a letter of apology from him. Involving customers in an administrative investigation is inappropriate and intrusive. You interjected yourself into a situation which did not involve you directly or personally." The grievant filed a grievance and when she did not receive the relief she sought through the management steps, she asked for a hearing by an administrative hearing officer. The hearing officer upheld the disciplinary action taken by agency officials.

The relevant policy, the Department of Human Resource Management's Policy #1.60, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive.



In the instant case, the grievant got involved in an incident to which she was not an original party. According to the evidence, the grievant intervened and discussed a matter with a customer who, on an earlier date, had a verbal altercation with a fellow agency co-worker. Unbeknown to the grievant, the agency was deliberating as to what to do about the incident at the time of the grievant's intervention. While the grievant extracted an apology from the customer (the customer had called the grievant's co-worker a derogatory name), the agency determined that her interference in a matter not related to her was inappropriate and intrusive.

## **DISCUSSION**

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

The grievant opines that the hearing officer's decision is inconsistent with state policy. The grievant contends, in part, the following: "The Hearing Officer cited DHRM Section 1.60(V)(B) for the proposition that Group I offenses "include types of behavior less severe in nature but which require correction in the interest of maintaining a productive and well-managed work force". However, no such language appears in DHRM Policies and Procedures Manual which is available on the DHRM website. Furthermore, while the listing of Group I offenses is not all-inclusive, the notice given to Ms. Meadors fails to specify any offense other than that of involving customers in an administrative investigation."

Concerning the grievant's challenges, the grievant is correct that DHRM Policy 1.60, Section (V)(B) of the Policy and Procedures Manual on the website does not contain verbatim the language cited in the proceeding paragraph. However, because a Group I offense is the lowest level offense for which an employee may receive a written notice of disciplinary action, the hearing officer's summation is accurate. In addition, the examples listed in the policy are not all-inclusive. Accordingly, any offense which, in the judgment of the agency head, undermines the effectiveness of the agency's activities may be considered unacceptable and may be treated in a manner consistent with the provisions of Policy 1.60, Section V. It is management's right to identify an offense and to place it in its proper category of offenses. This Agency can find no violation of the relevant section of DHRM Policy 1.60 that the hearing officer violated when he made his decision. Rather, it appears that the grievant disagrees with the consideration and

assessment of the evidence by the hearing officer and the outcome of the hearing. Therefore, we have no basis to interfere with this decision.

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Ernest G. Spratley, Manager  
Employment Equity Services