

Issues: Group III Written Notice (workplace (sexual) harassment), Group II Written Notice (failure to follow instructions), and termination; Hearing Date: 10/18/07; Decision Issued: 10/23/07; Agency: DMV; AHO: William S. Davidson, Esq.; Case No. 8711; Outcome: No Relief, Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8711

Hearing Date: October 18, 2007
Decision Issued: October 23, 2007

PROCEDURAL HISTORY

On May 23, 2007, the Grievant was issued a Group III Written Notice for attempting to kiss a fellow employee while at work and was also issued a Group II Written Notice on that same date for failing to follow his Supervisor's instructions to not discuss the aforesaid incident with any of his coworkers. Pursuant to these two (2) Written Notices, the Grievant was terminated from employment at The Department of Motor Vehicles.

On June 22, 2007, the Grievant timely filed a Grievance to challenge the Agency's action. The outcome of the Second Resolution Step was not satisfactory to the Grievant and he requested a hearing. On September 19, 2007, the Department of Employment Dispute Resolution assigned this Appeal to a Hearing Officer. On October 18, 2007, a hearing was held at the Agency's location.

APPEARANCES

Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether the Grievant engaged in the behavior described in the two (2) Written Notices that were issued to him on May 23, 2007?
2. 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 Hearing Officer was appointed to serve in this matter on September 19, 2007. On September 20, 2007, the Hearing Officer sent a notice by mail to the Grievant that the Hearing Officer had been appointed and that the Grievant needed to provide the Hearing Officer with dates for a pretrial conference and for the hearing itself. The Hearing Officer’s paralegal also attempted to contact the Grievant by telephone, at all times leaving a message on the machine that answered the number provided, and telling the Grievant that he needed to be in touch with the Hearing Officer’s office. Subsequent to this time, several attempts were made to reach the Grievant by telephone and several more mailings were sent to the address provided, telling the Grievant the date that a pretrial conference would be held and the date that the hearing would be held.

On the morning of the pretrial conference, the Hearing Officer attempted to call the Grievant and, being unsuccessful in reaching the Grievant, left a message on the answering machine, telling the Grievant that he needed to be in touch with the Hearing Officer. On the afternoon of the day prior to the hearing, someone identifying himself as the Grievant, called the Agency Representative, indicating that he requested a continuance. He left a phone number. The Agency Representative attempted to reach the Grievant at that number and, being unsuccessful, contacted the Hearing Officer. The Hearing Officer attempted to reach the Grievant at the phone number provided to the Agency Representative and left a message indicating that the Grievant needed to be in touch with the Hearing Officer. The Hearing Officer never heard from the Grievant.

After a Hearing Officer is assigned, a request for postponement of the hearing must be directed to the Hearing Officer.¹ Further, at the Hearing Officer’s discretion, a hearing may proceed in the absence of one of the parties. A hearing so conducted will be decided on the Grievant’s record and the evidence presented at the hearing.² The Hearing Officer finds that the Grievant has abused any right that he may have had to request a continuance, inasmuch as he has not responded to any mailing or phone call from the Hearing Officer nor has he made any request of the Hearing Officer that a continuance be granted.

¹ GPM Section 8.4

² GPM Section 5.5

The Agency introduced as Agency Exhibit 1, a notebook containing seven (7) Tabs. The Hearing Officer heard from two (2) witnesses. The first was the employee whom the Grievant attempted to kiss. She testified that she was at work and was on the phone when the Grievant came up behind her and attempted to move her hair so that he might kiss her on the neck. She felt him moving her hair and turned and saw him very close to her and told him to go back to work. She testified that she had done nothing whatsoever to invite such an action from the Grievant. The Hearing Officer heard from the Human Relations Manager who investigated this matter and who instructed the Grievant not to talk to any fellow employees about this matter until it had been fully investigated. This witness testified that the Grievant went to his fellow employees and told them everything that had happened.

The Hearing Officer finds that the Grievant did make an unwanted sexual advance toward a fellow employee and that he did fail to follow specific instructions provided to him by management not to discuss the matter.

MITIGATION

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 Rules for Conducting Grievance Hearings, “a hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

The Hearing Officer finds no basis for mitigation in this matter. The Grievant was disciplined properly.

DECISION

For reasons stated herein, the Agency’s removal of the Grievant from employment is **upheld.**

APPEAL RIGHTS

³Va. Code § 2.2-3005

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 Street, 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 Street, Suite 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 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.⁴ 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

⁴An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

⁵Agencies must request and receive prior approval from the Director of EDR before filing

[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]

William S. Davidson
Hearing Officer

a notice of appeal.