Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 08/14/14; Decision Issued: 08/27/14; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10357; Outcome: No Relief – Agency Upheld.

# *COMMONWEALTH of VIRGINIA*

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## DECISION OF HEARING OFFICER

In re:

**Case Number: 10357**

Hearing Date: August 14, 2014
Decision Issued: August 27, 2014

## PROCEDURAL HISTORY

On January 7, 2014, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On February 4, 2014, 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 he requested a hearing. On July 9, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 14, 2014, a hearing was held at the Agency's office.

## APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

## ISSUES

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 Virginia Department of Transportation employs Grievant as a District Pavement Engineer at one of its locations. He began working for the Agency in October 1989. No evidence of prior active disciplinary action was introduced during the hearing.

Ms. G began working for the Agency on July 1, 2013 as a consultant/trainee. Her employer was one of the Agency's vendors but her job duties included reporting to Grievant. Grievant was in a position to influence whether she remained as a consultant reporting to him.

On July 5, 2013, Grievant and Ms. G spoke by cell phone for approximately 45 minutes regarding non-work matters.

On September 12, 2013, Ms. G filed a claim alleging Grievant sexually harassed her from July 3, 2013 through September 12, 2013. The Agency began an investigation.

On October 9, 2013, Grievant travelled to work as part of a "vanpool." He intended to return home in the afternoon using the vanpool. He did not have his personal car at work that day. Grievant received a call from his aunt asking him to come to her house because of his uncle's illness. Because Grievant did not have his personal vehicle with him, he asked Ms. G if she would transport him to his aunt's house which he believed was in the direction she took to drive home. He provided her

with a map of the route and told her he could get a ride with another employee if she could not take him. The aunt's house was within approximately four miles of Grievant's office building. Ms. G later complained not about having to give Grievant a ride but that the route was out of her way.

On October 15, 2013, the Investigator interviewed Grievant and asked several questions. For one of those questions, the Investigator asked Grievant, "Did you offer to massage her feet?" The Investigator listened to Grievant's oral response. The Investigator typed what he considered to be Grievant's response as:

> He stated that he did offer to massage her feet because she said that her feet were hurting. He said that she did not wear her safety boots in the office and often wore sandals because the boots hurt her feet. He also stated that he offered to massage her feet because she looked tense and this was a stress reliever for his daughter who often got a pedicure/massage to relax her. He also said that it was a joke.[1]

On November 14, 2013, the Investigator presented the typed statement to Grievant for his signature. Grievant refused to sign the statement because Grievant did not tell the Investigator that he offered to massage Ms. G's feet. The Investigator refused to amend the words in the proposed statement. The Investigator amended the statement to say that Grievant "refused to sign statement because he wanted to change the statements he made on October 15, 2013."[2]

Based on the investigation, the Agency concluded that while Grievant's behavior did not rise to the legal definition of sexual harassment, Grievant's behavior towards the subordinate/consultant was inappropriate and created an offensive and hostile work environment for the consultant/employee.

The Agency took disciplinary action against Grievant because:

You admitted to the following allegations:

- You did ask the complainant for a ride to a relative's house.
- You did call the complainant after work hours which was not work related.
- You did offer to massage the complainant's feet during a work meeting.

On December 18, 2013, Grievant responded to the Agency's Notice of Intent to issue disciplinary action by writing, in part:

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[1] Agency Exhibit 5.

[2] Agency Exhibit 5.

> The accuser readily agreed to drive me two minutes to my aunt's house because the vanpool I'm in leaves me without a car.
>
> The accuser put her personal cell phone number and her home telephone number on her own accord into my personal cell phone.
>
> I did not offer to massage the accuser's feet during a work meeting, but suggested she might benefit from one after the accuser came into my office flustered and upset.[3]

During the second Step meeting, Grievant denied admitting to the Civil Rights staff that he offered to massage Ms. G's feet.

The Agency did not call Ms. G as a witness or attempt to contact her to arrange for her testimony during the hearing. The Agency relied solely on the Agency's investigation regarding what the Investigator believed Grievant had admitted.

## CONCLUSIONS OF POLICY

The Agency's disciplinary action was based solely on Grievant's admission to the allegations against him. The question becomes whether the Agency has presented sufficient evidence to show that Grievant admitted to the allegations and whether those allegations rise to the level of disciplinary action.

Grievant admitted to calling Ms. G after work hours and speaking about non-work related matters. Grievant called Ms. G on July 5, 2014. He began calling her at 1:18 p.m. but his cell phone call dropped. Ms. G returned his call at 1:19 p.m. and spoke with Grievant for approximately 13 minutes until their call dropped. Grievant called Ms. G at 1:35 p.m. and she answered the call. The continued their conversation for approximately 32 minutes.

Contacting a subordinate contractor outside of work hours and discussing non-work related matters for approximately 45 minutes on one day does not rise to the level of disciplinary action. The Agency has not established that the content of the conversation was inappropriate. Attempting to develop a friendship with a subordinate co-worker is does not rise to the level of disciplinary action. The Agency argued that because Grievant was a supervisor and Ms. G was a subordinate working for a contractor, Ms. G may have felt obligated to speak with Grievant when she would otherwise have refused to do so. Ms. G did not testify and, thus, there is no credible evidence that Grievant's decision to speak with Ms. G was inappropriate. No credible evidence was presented during the hearing to show that Grievant used his power as a supervisor to inappropriately influence Ms. G.

[3] Agency Exhibit 1.

Grievant admitted that he asked the complainant for a ride to his aunt's house. Grievant arrived to work using the vanpool and did not have or drive his personal vehicle. He received a call in the morning from his aunt asking that he go to the aunt's home because Grievant's uncle was ill. Grievant asked Ms. G if she could take him to the aunt's home which was approximately four miles from the Agency's office. He provided her with a map showing directions to the aunt's location. He told her he could get a ride with another employee if she was unable to assist. Ms. G agreed to drive Grievant to his aunt's house. She later complained not about having given a ride to Grievant but that the aunt's house was out of the way for her.

Grievant did not engage in behavior giving rise to disciplinary action when he requested and received a ride from Ms. G. Grievant's request was based on a legitimate and unexpected need for transportation. He informed Ms. G that it would be all right if she declined his request because he could obtain a ride from another employee. Ms. G did not object to offering Grievant a ride, she complained that the aunt's house was out of her way. Grievant had provided her with a map to the aunt's house. Traveling four miles from the office was not an excessive distance.

Unnecessary touching in the workplace may form a basis for disciplinary action. The Agency, however, has not presented sufficient evidence to show that Grievant offered or admitted to offering to massage Ms. G's feet.

The Agency could have presented the testimony of Ms. G to confirm Grievant's statements to her. The Agency did not do so and instead chose to rely on the Investigator's interpretation of what Grievant admitted to him. The Agency could have adopted an investigative practice of having its employees write their own incident statements in which case what Grievant admitted would not be subject to the Investigator's interpretation. Instead, the Agency chose to have the Investigator write what he believed Grievant told him and then ask Grievant to sign that statement. Grievant reviewed the Investigator's proposed statement and refused to sign it because he believed it to be in error. Grievant refused to sign the statement because he did not admit to offering to massage Ms. G's feet. Grievant has consistently maintained he made no such admission. The Hearing Officer cannot conclude that Grievant admitted to offering to massage Ms. G's feet.

Grievant admitted to saying that Ms. G "might benefit" from a foot massage. Responding to an employee who complains that her feet hurt by saying the employee "might benefit" from a foot massage is not the same as saying "I am willing to give you a foot massage" or words to that effect. The Agency has not established that Grievant admitted to offering to give a foot massage to Ms. G.

No basis exists in this case to take disciplinary action. The Group I Written Notice must be rescinded.

## DECISION

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

## 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 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

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

   Office of Employment Dispute Resolution
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.[4]

[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

[4] Agencies must request and receive prior approval from EDR before filing a notice of appeal.