

Issue: Group III Written Notice with Termination (workplace harasssment); Hearing Date: 03/19/19; Decision Issued: 04/05/19; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 11309; Outcome: No Relief - Agency Upheld.

VIRGINIA: IN THE VIRGINIA DEPARTMENT OF HUMAN RESOURCE
MANAGEMENT, OFFICE OF EQUAL EMPLOYMENT AND DISPUTE
RESOLUTION

IN RE: DHRM CASE NO.: 11309

DECISION OF HEARING OFFICER

HEARING DATE: MARCH 19, 2019

DECISION DATE: APRIL 5, 2019

I. PROCEDURAL BACKGROUND

The agency issued the grievant a Group III Written Notice and terminated him from employment on November 30, 2018. He submitted his Form A on December 20, 2018. I was appointed as Hearing Officer effective January 11, 2019. I conducted a prehearing conference call on February 8. The hearing was held on March 19, 2019 at the district office of the agency.

II. APPEARANCES

The agency was represented by an attorney advocate. It presented four witnesses, including one by telephone. Ten exhibits were submitted by the agency.

The grievant was represented by counsel. He presented not witnesses or exhibits.

III. ISSUE

Whether the agency acted appropriately in issuing the grievant a Group III Written Notice and terminating him from employment for failure to follow policy and workplace

harassment?

IV. FINDINGS OF FACT

This matter involves events that occurred on October 30 and October 31 in 2018. The defendant was an employee of the agency for a significant number of years at the time of these events. He was stationed at a district office of the agency. The grievant and other employees from the district office were attending training in the Richmond area on October 30 and the following day. Because of the distance from the district office to the training, these employees planned to stay overnight in a motel on the night of October 30.

At the conclusion of the training on that day, the defendant and two female coworkers returned to the motel. The female coworkers were sharing a room. The grievant had a separate, unconnected room. The grievant accompanied the coworkers to their room when they arrived at the motel. He was not expressly invited to do so but the coworkers did not ask him to leave even though they desired to change clothes and prepare to go out to dinner as a group.

The grievant laid on one of the two beds in the room. He complained of back pain and asked one of the coworkers, (hereafter "Employee 1") to walk on his back in an attempt to see if it would pop. Employee 1 refused to do so. The other female employee, (hereafter "Employee 2") pointed out to the grievant that any attempt would be ineffectual unless he moved to the floor and that the small stature of Employee 1 would also likely impede any attempts to provide relief from the back pain. The grievant would not move from the bed, despite the suggestion of Employee 2.

The grievant eventually went to his own room. The dinner plans were not confirmed at

that point and he contacted Employee 1 electronically. He suggested that the others come to his room prior to leaving for dinner. This suggestion was declined.

At the agreed upon time to meet for dinner, the defendant returned to the room of the coworkers. It was suggested that a group picture be taken of the three. The grievant suggested that he wanted a picture of only him and Employee 1 together. She declined to do so. The picture of the three of them was taken by Employee 2. After she took that picture, she turned her back on the other two. At that point the grievant grabbed Employee 1 by the hips from behind and attempted to pull her toward him. She was able to spin out of the grasp of the grievant. She said nothing to him at that time.

The three employees drove to a nearby restaurant, a trip of approximately fifteen minutes. When they arrived at the restaurant, the grievant and Employee 1 were seated on the same side of a booth. Employee 2 was seated opposite from them. While seated there, the grievant placed his hand upon the thigh of Employee 1 at multiple times. He rubbed his hand up and down her thigh on multiple occasions, at times rubbing her upper inner thigh area. This made Employee 1 extremely uncomfortable and she moved herself to the place in the booth that would put her furthest from the grievant. Her attempts to move away from him resulted only in his moving closer.

Employee 2 observed the discomfort of Employee 1 while this was happening. She positioned herself to better see what was occurring. She observed the hand of the grievant on the thigh of the Employee 1. The grievant attempted to block the view of the employee with a restaurant menu. Employee 1 made no verbal objection to the grievant in the restaurant. Employee 2 also said nothing to him about his behavior. Throughout the dinner, the grievant

focused his comments and attention on Employee 1, tending to ignore Employee 2. He encouraged them to drink alcohol while there.

After dinner, the grievant suggested they walk around the shopping area in which the restaurant was located. The other stores were closed and after a brief walk, the coworkers were able to convince the grievant to return to the motel.

Upon the return to the motel the grievant again accompanied the coworkers to their room. Employee 1 went to the bathroom to change into her night clothes. She realized that those clothes included shorts that she was not comfortable wearing around the grievant. She immediately climbed into the bed shared by her and Employee 2 and placed the covers over herself. At some point, she even pulled the covers over her head. The grievant was laying on the other bed in the room when Employee 2 went into the bathroom to shower. She did not close the door completely so that she could monitor what was occurring in the remainder of the motel room. While Employee 2 was in the bathroom, the grievant asked Employee 1 to get into the other bed with him. She refused.

Employee 2 then returned and got into the bed where Employee 1 was laying. The females repeatedly stated to the grievant that they were tired and wanted to go to sleep. He ignored their implicit requests that he leave the room. After approximately sixty minutes, he removed himself from the bed and prepared to leave. He told the coworkers that he was going to leave his boxed dessert in their refrigerator, despite his room having a similar appliance. He left the room. Later that evening he contacted Employee 1 and asked her to bring him his dessert. She declined.

The following morning the employees needed to check out of their motel and leave for

the additional training to be conducted. The grievant volunteered to assist Employee 1 with her luggage. He made no similar offer to Employee 2.

While traveling back from the training, the employees encountered traffic backup resulting from an accident on the interstate. They decided to stop for lunch. At the restaurant, the female employees placed themselves on the same side of a table so that the grievant would not be sitting next to Employee 1. When the grievant first saw this arrangement, he commented that he guessed that he would not be sitting next to Employee 1. The employees attempted to determine alternative routes home that would avoid the traffic backup. The Employee 1 went to the restroom and when she returned the grievant asked her to come sit next to him to look at the alternative routes he had found. His arm was placed in such a way that it would have been close to, or around, the employee. She declined. When they reached the local area, the grievant was able to observe Employee 1 return safely to her home. Nevertheless, a few minutes later, he proceeded to contact her electronically and inquired whether she was okay. She did not respond.

The following morning, Employee 1 informed her Supervisor of the events of the prior two days involving the grievant. The Supervisor contacted an appropriate official and an investigation was commenced. This investigation resulted in the issuance of the subject disciplinary action of the grievant.

Prior to October 30, 2018, the grievant and Employee 1 had a friendly relationship. Employee 1 had different job responsibilities than the grievant. He was not her Supervisor nor was she his. The grievant had not previously made any express efforts to have a romantic or sexual relationship with the grievant. He had exchanged text messages with her. The grievant had expressed anger at one thing that Employee 1 had done in the past, taking his picture without

his consent. Otherwise, nothing out of the ordinary in their relationship was apparent to Employee 1.

V. DISCUSSION AND ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Equal Employment and Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

My factual findings are set forth above. As noted, the grievant did not testify nor present

any evidence at the hearing that the testimony of Employee 1 and Employee 2 was inaccurate. Counsel did vigorously cross-examine the witnesses for the agency. The grievant argued that he has consistently denied the allegations prior to the hearing. Based on my observation of the demeanor of Employee 1 and Employee 2 while testifying, I find them to be extremely credible. Also, the grievant has offered no explanation of why these employees would fabricate what happened on the subject trip.

Agency Operating Procedure 135.1 sets forth the Standards of Conduct expected of agency employees and a range of disciplinary actions that may be taken if it is shown that the employee has not lived up to those standards. Offenses are categorized by the seriousness of the offense. The grievant was issued a Group III Offense. Those offenses are defined as being “acts and behavior of such a serious nature that a first occurrence should warrant termination.” A list of illustrative offenses is further included in Operating Procedure 135.1. Those offenses are specifically stated not to be exclusive.

One of the listed offenses is a violation of Agency Operating Procedure 145.3, Equal Employment Opportunity. It is stated that a violation of this policy can be considered as a lesser offense depending on the nature of the violation. Operating Procedure 145.3 prohibits sexual harassment of an employee. As used in that policy, sexual harassment includes unsolicited, unwelcome behavior of a sexual nature including physical conduct. The policy provides that sexual harassment creates a hostile environment when “a target is subjected to unwelcome and severe...touching.” Counsel has stated with credible candor that the allegations against the grievant are extremely serious. I find that the actions did qualify as sexual harassment and created a hostile work environment. Although the grievant and Employee 1 did not work

together, they worked out of the same set of offices and would have regular, if not frequent, contact. Employee 1 testified as to her level of discomfort in being around the grievant after his actions during the trip. I have no choice that to conclude these actions created an intimidating work environment.

The grievant has argued that the actions of the grievant, although serious, cannot support the discipline as they occurred away from the normal work environment and during hours when the employees were not “on duty.” Actions of one employee of the Commonwealth directed toward another employee can serve as the basis for disciplinary action regardless of whether they occur during working hours. See, e.g. *Compton v. Commonwealth*, 47 Va. App. 202 (2005). It is the unprofessional conduct of an employee, not the location of the conduct, that can give rise to disciplinary action. A hostile environment can easily be caused by conduct and statements away from the workplace.

The grievant has also argued that the termination should not be upheld as being too harsh. Although reasonable minds may disagree on that, I am not in a position to accept that argument. Under Section VI(B)(2) of the *Rules for Conducting Grievance Hearings*, I am required to give due deference to the actions of the agency in issuing the level and extent of discipline. Prior to the Written Notice being given to the grievant, his Supervisor discussed with the Regional Administrator lesser alternatives. Although the alternatives mentioned may also have been reasonable, the decision to issue the termination notice is also within the bounds of reasonableness. Had the grievant made the physical contact with a female not employed by the agency, serious criminal charges could have been placed against him. Given his job responsibilities with the agency, the arguably criminal conduct by him amply supports the

decision to terminate him from employment.

VI. DECISION

For the reasons stated herein, I uphold the issuance of the Group III Written Notice and the termination of the grievant from employment by the agency,

VII. APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

SO DECIDED this April 5, 2019.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer