

Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 09/19/18; Decision Issued: 11/23/18; Agency: ABC; AHO: Neil A.G. McPhie, Esq.; Case No. 11247; Outcome: No Relief - Agency Upheld; Administrative Review Ruling Request received 12/07/18; EDR Ruling No. 2019-4824 issued 01/25/19; Outcome: AHO's decision affirmed.

COMMONWEALTH OF VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re: Virginia Department of Alcoholic Beverage Control

Case Number: 11247

Hearing Date: September 19, 2018

Decision Issued: November 23, 2018

PROCEDURAL HISTORY

On June 5, 2018, Grievant was issued a Group III Written Notice of disciplinary action with termination for “creat[ing] an uncomfortable and intimidating work environment by harassing a female employee. (Agency Ex. 13) Specifically, the Written Notice alleged that in a meeting with the store manager and a female sales associate Grievant, a male, called the female associate crazy and said, “she spoke like prostitution”. The Notice also alleged that Grievant verbally and physically intimidated the female associate by barking orders and maintaining an intimidating physical presence near her as the associate completed the work Grievant ordered her to do.

On or around July 3, 2016, Grievant timely filed a grievance. On July 31, 2018, the Department of Human Resource Management (DHRM) assigned the matter to the undersigned Hearing Officer, effective July 31, 2018. On September 19, 2018, a hearing was held.

APPEARANCES

Grievant
Grievant Advocate
Agency Advocate
Agency Representative
Seven 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 1, 11, or 111 offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, aggravating circumstances existed that would overcome the mitigating circumstances?

EXHIBITS

The Agency timely submitted a three-ring binder containing 13 exhibits numerically tabbed. Grievant did not object to any of the agency's exhibits. Grievant submitted a total of 22 exhibits. Exhibits 1 – 18 were submitted pre-hearing in a numerically tabbed three-ring binder and 19 – 22 were submitted at the hearing and admitted over the agency's objections.

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. Grievant has the burden of raising and establishing any affirmative defenses to the discipline and any evidence of mitigating circumstances related to the discipline. (GPM § 5.9)

FINDINGS OF FACT

After carefully reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact.

At the time he was discharged, Grievant was an Assistant Manager at one of the larger ABC stores in Virginia (hereinafter Store XXX). He was hired as a part time Sales Associate in 2009 and subsequently promoted to Assistant Manager. He worked at store XXX for approximately one year and ten months. At the time of his discharge he had no prior disciplinary record.¹ As a Sales Associate and as an Assistant Manager, Grievant received ongoing training in ABC's policies and procedures including the Workforce Harassment Policy. (Testimony of Store Manager and Regional Manager). Grievant is from Ethiopia and is fluent in Amharic and English.

Grievant's supervisor is an experienced manager. He was hired by ABC in 2001 and worked his way up the agency structure first as a Sales Associate, an Assistant Manager and finally the Manager of ABC store XXX, one of the larger ABC stores in Virginia. Store XXX served restaurant licensees and retail customers. He managed both operations. During his employment with ABC he received ongoing training in ABC's policies and procedures including the Workforce Harassment Policy. He is from Ethiopia and is fluent in Amharic and English.

Beginning in January 2018, the work environment at ABC Store XXX was disrupted by Grievant's treatment of female Sales Associate.

As a sales associate, her principal responsibility was to operate a cash register to serve customers in the store. She was also required, on occasion,

¹ The Notice of Pending Disciplinary Action (NOPDA) lists two prior counselling. The evidence does not support this assertion.

when the store was not busy to break down liquor boxes in the back-storage room. She is also from Ethiopia and is fluent in Amharic and somewhat fluent in English.

The Sales Associate complained to the store manager that Grievant frequently yells at her, orders her to stop her cashier duties and break down boxes in the back room when other employees are available to do so, then follows her into the back room and laughs at her as she is breaking down boxes. She also complained that Grievant treats her differently from other sales associates by requiring her to ask him for her bag of money to operate the cash register. Other managers provide the money bag to cashiers without waiting for the associate to ask for the bag.

On January 11, 2018, Grievant accused the Sales Associate of time wasting, refusing to work on the cash register he assigned her to, and taking a break without telling him. (Agency Ex. 5; Grievant Ex. 2). After reviewing the store's video which showed that the Sales Associate arrived on time for her 2 p.m. shift and was on the floor at 2:03 p.m. The store manager determined that the time-wasting allegation was false. The Sales Associate denied she refused to go to her assigned register. She asserts that Grievant did not clearly tell her which register to operate, and she operated a register that was further from the entrance door to stay warm. She also explained that she took her break at 6 p.m. as she was supposed to. The Hearing Officer credits the Store Associate's and the Store Manager's versions of these facts.

On January 16, 2018, the Store Manager had a meeting with the Sales Associate and Grievant to resolve the ongoing conflict. After letting them air their concerns, he told them essentially to act professionally and respect each other's position. He ordered Grievant to treat the Sales Associate as he did other employees and give her a cash bag as soon as she clocked in. Grievant was not satisfied and complained to the Regional Manager.

On March 16, 2018 the Store Manager had another meeting with the Sales Associate and Grievant to resolve the ongoing issues. Grievant accused the Sales Associate of not asking for her cash bag when she clocked in and leaving the cash

register to go to the back room to get an exclusive brand of scotch for a customer. That meeting ended prematurely with both the Sales Associate and Grievant calling each other names. (Agency Ex. 5). The Store Manager observed that “Grievant had a bad temper, everything should go the way he wants it 100 percent.” (Id)

The meeting resumed the next day and ended prematurely and badly. The Sales Associate accused Grievant of treating her like a servant. Grievant exploded with anger and told the Sales Associate “you speak like prostitution”, “you are crazy” and “you are inferior”. Grievant’s angry, vitriolic outburst left the Sales Associate shaken and in tears. The Store Manager stopped the meeting immediately.

All the attendees to that meeting, except Grievant, had the same recollection of the events. The words were spoken in English and Amharic which the attendees spoke and understood. The Hearing Officer credits the Sales Associate’s and the Store Manager’s versions of the events at the meeting.

The words were particularly offensive to the Sales Associate and to Ethiopians generally.

During her testimony, the Sales Associate struggled to retain her composure and cried when she recounted the meeting and the effect the words had on her.

The Hearing Officer finds that Grievant used the words with knowledge of the pain it would cause the Sales Associate at work and at home and disrupted the operations of the store.

Grievant denies he said the offensive statement and does not explain or defend that most serious accusation against him. Rather, in an apparent attempt to deflect and mislead agency investigators, he accused the store manager of favoritism to certain Ethiopian employees including the Sales Associate and Assistant Manager. (Grievant’s Ex. 3)

The Store Manager categorically denied the accusations and explained why they were false. The Hearing Officer credits the Store Manager's version and finds that the accusations are baseless and false.

The charges against Grievant were fully investigated by agency management. The investigation was led by the Employee Relations Manager who has worked in Human Resources for 18 years and is an experienced investigator.

Grievant and all Store XXX employees that worked on shifts with the Sales Associate and Grievant were independently interviewed by a panel of 3 agency investigators and their statements contemporaneously recorded (Grievant's Exhibit 17).

Grievant continued to work at the store during the investigation. The Sales Associate was transferred to two other stores for approximately 5 weeks before she was returned to Store XXX.

During her absence, Grievant acted as if he had succeeded in getting the Sales Associate transferred.

A female Assistant Manager complained that Grievant treated male employees different from her. He refused to assist her in performing job related tasks but works cooperatively with other male sales associates. In order to do her job, the female Assistant Manager avoided contact with Grievant. The Assistant Manager has worked for ABC for approximately 10 years.

On May 24, 2018, Grievant was handed a Notice of Pending Disciplinary Action and he returned to work. He was ordered to stop working and leave the ABC store when upon returning to work, he told the store manager "you lied on me, I will make sure you pay for it."² The manager feared that Grievant would hurt him and reported the incident to the local police and a case file was opened. (Agency's Exhibit 9.)

² Grievant's counsel argues on constitutional due process grounds that Grievant's conduct after he met with the Regional Manager on May 24, 2018 and was given the Notice of Pending Disciplinary Action should not be considered because it was not included in the Written Notice. The Hearing Officer disagrees inasmuch as the evidence is pertinent to the immediate sending home of Grievant. Nevertheless, due process challenges are made to the Office of Employee Dispute Resolution and the court on appeal.

Based on the totality of the evidence, the Hearing Officer concludes that Grievant singled out the Sales Associate for harassment based on her sex.

Based on the totality of the evidence, the Hearing Officer finds that Grievant created a hostile work environment for female workers at Store XXX based on their sex.

ANALYSIS AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for the orderly administration of state employees and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989)

Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

“In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and show by a **preponderance of evidence** that the disciplinary action was warranted and appropriate under the circumstances. Grievance Procedure Manual. **The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline (GPM) § 5.8.**

The Department of Human Resource Management (DHRM) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees. Policy 1.60. (Agency Ex. 1; Grievant Exhibit 13) “The purpose of the policy is to set forth the Commonwealth’s Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee’s ability to do his/her job and/or influences the agency’s overall effectiveness.” A legitimate goal of the policy is to “enable agencies to fairly and effectively discipline and/or terminate employees.... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.” Id.

Under the Policy, unacceptable behavior is divided into three types of offenses, according to their severity. Group III offenses “include acts of misconduct of a more serious nature that significantly impact agency operations such as **Workplace Harassment**” (Attachment A of Policy 1.60).

APPLICABLE POLICIES

The Agency took the disciplinary action in this case pursuant to the Commonwealth’s Standards of Conduct, Policy 1.60 effective April 16, 2008, revised June 1, 2011 (Agency Ex. 1); the Commonwealth’s Workplace Harassment Policy 2.30 effective 5/1/02, revised 5/16/06 & 2/5/10 (Agency Ex. 2); the Virginia ABC Workplace Harassment Policy, effective 10/2017 (Agency Ex. 3); and the Governor’s Executive Order Number one (2018) (Agency Ex. 4).

Grievant Engaged in the conduct described in the Written Notice

The Written Notice alleged that Grievant “created an uncomfortable and intimidating work environment by harassing a female employee. (Agency Ex. 13) Specifically, the Written Notice alleged that in a meeting with the store manager and a female sales associate Grievant, a male, called the female associate crazy and said, “she spoke like prostitution”. The Notice also alleged that Grievant verbally and physically intimidated the female associate by barking orders and maintaining an intimidating physical presence near her as the associate

completed the work Grievant ordered her to do. The allegations are supported by the facts that are carefully laid out in the Findings of Fact.

The behavior constituted misconduct

The Standards of Conduct (SOC) expresses the “minimum expectations for acceptable workplace conduct and performance”. For example, “employees who contribute to the success of an agency’s mission must amongst other expectations, “demonstrate respect for the agency and toward agency co-workers, supervisors, managers, [and] subordinates...” and “[w]ork cooperatively to achieve work unit and agency goals and objectives.” The SOC defines misconduct as “behavior that is inconsistent with state or agency standards for which specific ... disciplinary action is warranted. Whereas here, the employee’s behavior is properly characterized as workplace harassment, the SOC expressly authorizes the imposition of a Group 111 with termination depending on the nature of the offense. Grievant’s behavior to female sales associates was disrespectful and reprehensible and appropriately determined by the agency to be a Group III violation for which termination was appropriate.

The Agency’s discipline was consistent with law and policy.

Grievant argues that terminating his employment as a first option, without considering a lesser penalty was inconsistent with policy 1.60. Grievant also argues that the Agency did not prove the allegations brought against him and the allegations, even if proved did not amount to workplace harassment as defined in the ABC’s Workplace Harassment Policy. These arguments are misplaced.

Nothing in the applicable policies require the agency to consider a lesser penalty for a first offense. While an intended purpose of Policy 1.60 encourages agencies to “follow a course of progressive discipline,” it does not require that they do so in every circumstance. Indeed, the policy expressly authorizes agencies to terminate employees.... where the misconduct and/or unacceptable performance is of such a serious nature that a first offense warrants termination.”

As laid out in the Findings of Fact, Grievant asserts a blanket denial that he victimized the female sales associate as the Agency alleged. He never attempted

to explain why his supervisor, the store manager, and the victim, the only persons present at the March 2018 meeting, would lie about his statements. The Hearing Officer finds their version of the events more credible. The female sales associate was visibly distressed giving testimony at the hearing. In addition, another female sales associate testified that she too was treated differently by the Grievant.

Policy 2.30 **“strictly forbids harassment of any employee... on the basis of an individual’s ... sex...”** The policy states that **“[a]ny employee who engages in conduct determined to be harassment ... shall be subject to corrective action, up to and including termination under Policy 1.60, Standards of Conduct.”** And workplace harassment is defined in Policy 2.30 as **“[a]ny unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion toward a person on the basis of ...sex ...that (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee’s work performance; or (3) affects an employee’s employment opportunities or compensation.” (Agency Ex.2).** Grievant’s conduct in this case had the purpose and effect of unreasonably interfering with the Sales Associate’s work performance and was properly characterized as workplace harassment.

ABC Workplace Harassment Policy **“strictly forbids harassment of any employee... on the basis of an individual’s ... sex ... in accordance with the Governor’s Executive Order of Equal Opportunity EO-1 (2014) and state and federal discrimination laws”.** (Agency Ex. 3). ABC’s Harassment Policy defines **“Hostile environment [as] A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.”** Grievant argues that his conduct which did not involve unwelcome and severe or pervasive repeated sexual comments, innuendoes, or touching was not prohibited workplace harassment.³ However, consistent with Policy 2.30, ABC’s policy defines Workplace Harassment broadly to include **“Any unwelcome verbal, written or physical conduct that either**

³ The Hearing has found no legal precedent interpreting ABC’s Workplace Harassment Policy and Grievant’s counsel has not provided any supporting citation.

denigrates or shows hostility or aversion towards a person on the basis of ... sex that (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation." Grievant's conduct in this case was clearly intimidating, hostile and unwelcome and had the purpose or effect of unreasonably interfering with the Sales Associate's work performance. His conduct was properly characterized as prohibited workplace harassment.

There were no mitigating circumstances justifying a reduction or removal of the disciplinary action

In hearings contesting formal discipline, if the hearing officer finds that (1) the employee engaged in the behavior described in the Written Notice, (11) the behavior constituted misconduct, and (11) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated unless under the record evidence, the agency's discipline exceeds the limits of reasonableness."(GPM at § 5.9). The Standards of Conduct Policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that compel a reduction to promote the interests of fairness and objectivity, or based on an employee's otherwise satisfactory work performance; or (2) an employee's long service or otherwise satisfactory work performance. Grievant had approximately 9 years of service when he was disciplined. Grievant testified that he was a contributing employee. That testimony was not disputed. Grievant had no prior disciplinary record. These factors were outweighed by the offensiveness of the words themselves, the intended effect they had on the Sales Associate, the disruption of the workplace, and Grievant's steadfast refusal to accept responsibility for his actions. Instead, he accused his supervisor of favoritism to certain employees, lying and threatened to make him pay for it. Moreover, at the hearing, Grievant showed no remorse or contrition for his conduct towards the Sales Associate and female Assistant Manager. Grievant's demeanor and testimony did not demonstrate a willingness or ability to resume employment at ABC without disrupting the workplace.

DECISION

The disciplinary action of the Agency is affirmed.

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].

Neil A.G. McPhie
Hearing Officer