Issue: Group III Written Notice with termination (workplace harassment, and unauthorized access of computer records); Hearing Date: 01/06/03; Decision Date: 01/23/03; Agency: DMV; AHO: David J. Latham, Esquire; Case No. 5587; **Judicial Review: Appealed to the Circuit Court in the City of Roanoke on 02/14/03; Outcome: 30-day timeframe for case to be heard has passed. Case stricken from the docket on 05/02/03 (Case No. CL 03-186)**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5587

Hearing Date: January 6, 2003
Decision Issued: January 23, 2003

PROCEDURAL ISSUES

Although this case was initially docketed for a hearing within 30 days of appointment of the hearing officer, inclement weather forced a postponement of the hearing. Because of the Christmas and New Year holidays, the next available date on which all parties were available was the 62nd day following appointment.[1]

Grievant requested, as part of his relief, a salary increase to the level of a District Manager. Although hearing officers are empowered to provide certain types of relief (including reinstatement and awards of back pay), other types of relief such as promotion, and revising compensation, are not available as forms of relief.[2]

[1] § 5.1, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.
[2] § 5.9(b), EDR *Grievance Procedure Manual*, effective July 1, 2001.

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Personnel Manager
Human Resource Generalist
Seven witnesses for Agency

ISSUES

Were the grievant's actions subject to disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant filed a timely appeal from a Group III Written Notice issued for actions which undermine the effectiveness of the agency.[3] The grievant was removed from state employment as part of the disciplinary action. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4]

The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant for 15 years; he was a hearing officer before his removal from employment. His performance evaluations in the recent past have either met or exceeded expectations. The dismissal of grievant had two bases – workplace harassment, and unauthorized access of computer records.

Workplace Harassment

The Commonwealth of Virginia's policy defines sexual harassment as including verbal or physical conduct of a sexual nature when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.[5] The Commonwealth's policy defines workplace harassment, in part, as "any unwelcome conduct" that has the purpose or effect of creating an intimidating,

[3] Exhibit 19. Written Notice, issued August 9, 2002.
[4] Exhibit 9. Grievance Form A, filed September 4, 2002.
[5] Exhibit 32. Department of Human Resource Management (DHRM) Policy No. 2.15, *Sexual Harassment*, effective September 16, 1993.

hostile or offensive work environment.[6] Grievant has received agency training on the sexual harassment policy.

During 1995, grievant was manager of a customer service center. The agency received allegations that grievant was sexually harassing females under his supervision. Internal Affairs investigators interviewed past and present employees and determined that grievant had engaged in inappropriate behavior including staring at employees, hugging them, making inappropriate comments about their bodies, and touching them in an inappropriate manner.[7] The overall effect was to create a hostile work environment for employees. As a consequence, grievant was counseled that his conduct was insensitive and inappropriate. Grievant was very apologetic and promised not to engage in such conduct in the future. Grievant was removed as manager, transferred to another location, and given a position as hearing officer that did not include supervision of employees.

In 1997 grievant was transferred to his present location. In 1999, the Chief Hearing Officer (grievant's immediate supervisor) investigated a complaint filed by an intern. She complained that grievant frequently invited her into his office, often shut the door, and made her feel uncomfortable. After one occasion when she felt that he was pressuring her to date him, she filed her complaint. The investigation revealed that grievant was spending an inappropriate amount of time with the female intern, and was making inappropriate comments to employees in the workplace. The conclusion was that grievant was guilty of workplace harassment. Disciplinary action was considered but decided against because the intern was not an employee, and because grievant is black. Grievant was counseled in writing that his inappropriate conduct was similar to his conduct in 1995, that it was prohibited behavior, and that appropriate disciplinary action would be taken if such behavior continued. Grievant promised that he would discontinue such practices immediately.[8]

During 2001, a female generalist noticed that grievant would pay more attention to her than to other employees, frequently stare at her, attempt to engage her in conversation, and either invite her into his office or come into areas where she was working. Initially, she was not bothered by this behavior. Grievant then began to compliment the generalist on her looks. Although the words grievant used were not suggestive, the generalist was uncomfortable with the tone, manner and innuendo of his remarks. On one occasion when she walked into the stockroom, grievant was already in the room and asked her to give him a hug because no one could see them. The generalist told grievant he was being silly and she immediately left the stockroom. This incident made the generalist very uncomfortable. Since that time, she tried to avoid being alone with grievant at any time. She often left the office by using a less convenient

[6] Exhibit 33. DHRM Policy No. 2.30, *Workplace Harassment*, effective May 1, 2002.
[7] Exhibit 8. Investigation report, October 12, 1995.
[8] Exhibit 19. Memorandum from Chief Hearing Officer to grievant, March 4, 1999.

door so that she could avoid walking by grievant's office. She did not say anything to her supervisor because she believed (incorrectly) that grievant outranked the manager and that he had authority over the office manager and, by extension, over the generalist.[9]

Grievant continued to pay more attention to the generalist than he did to others during the first part of 2002. Whether the generalist was working at the customer service counter, in the audit unit, or at the photo unit, grievant would often go to those areas to speak with her. The generalist attempted to be polite when grievant approached her but always attempted to mention in conversations that she was married with the hope that grievant would take the hint and leave her alone.[10] In May 2002, grievant mentioned the stockroom incident to an assistant manager saying that she was uncomfortable about it and about grievant's continuing attention to her. Prior to this, the assistant manager had noticed that grievant was spending more time with the generalist than with others but assumed that the two were just good friends. The manager had also noticed over a 6-8 month period that grievant was staring at and talking to the generalist more than others.[11] Because the generalist had been assigned to a teller window close to the restroom area, the manager felt that grievant was talking to her because she was on the route from his office to the restroom. Thereafter, the manager reassigned the generalist to a teller window at the opposite end of the customer service counter.

In late June 2002, the manager and assistant manager walked into a corridor outside the assistant manager's office. They observed the generalist standing in front of a credenza and saw grievant put his right arm around the generalist's shoulder. As he hugged the generalist, she stiffened, her right foot came off the floor, and she had a surprised look on her face. She was slightly paler than usual and her eyes were described as slightly "bugged out." Upon seeing the manager and assistant manager, grievant removed his arm from the generalist. The manager then called the generalist into her office and asked if she had welcomed the grievant's hug. The generalist said the hug was unwelcome and that she felt very uncomfortable.

On one occasion the office had an employee appreciation day which included posting employee photographs on a bulletin board. Each employee brought to the office a photograph of himself or herself for the bulletin board. Afterward, the generalist's picture was missing from the board. Later, grievant called her into his office and revealed that he was taking her photograph and was

[9] In fact, grievant had no subordinates and reported to the Chief Hearing Officer who is located in the Richmond central office. Although grievant utilized office space at the facility, he had no authority over any employees. The generalist's manager reports to a district manager in a separate organizational branch of the agency.

[10] Exhibit 10. Generalist's written statement, signed September 16, 2002.

[11] Before her promotion, the customer service manager had been grievant's subordinate several years earlier. She had a good working relationship with grievant at that time, had no problems with him, and does not have any reason to bear ill will toward him.

keeping it. The generalist frequently brought fudge to the office to share with coworkers. On one occasion in early 2002, she left a piece of fudge on the desk of those who were not in their offices. She left a piece of fudge on grievant's desk on a small piece of notepad paper that said, "Choc. Fudge for you."[12] Grievant retained the note and took it with him when his employment was terminated.

Unauthorized access of records

State policy on electronic communication systems prohibits "downloading access-restricted agency information contrary to policy or in violation of agency policy."[13] Grievant attended agency training on procedures for security of information and signed an agency Information Security Policy that prohibits employees from accessing any agency records except as necessary to perform assigned duties.[14] Compliance with the agency's Information Security Policy was a specific objective of grievant's Employee Work Profile, which he signed annually.[15] Personal records in the computer system are to be accessed by employees only for the purpose of assisting customers. Most customers who request assistance provide their driver's license number (generally their social security number) so that their records can be accessed. Hearing Officers do not have any responsibility to assist customers, unless a customer for whom grievant is conducting a hearing has a question or concern.

When employees first access the computer system each day, the screen will automatically display a security warning banner that states:

> DMV's customer records are considered privileged and the access, use, and release of these records is restricted by federal and state laws. **The access and use of these records is considered as consent to agency monitoring at all times.** Violation of the laws governing these records could result in civil penalties and/or criminal prosecution. **DMV employees violating these laws or the agency's information security policy also may be subject to disciplinary action.** Information on any possible violations may be provided to law enforcement officials.[16] (Emphasis added)

The Chief Hearing Officer had observed in early 2002 that grievant was completing just enough cases to meet the minimum expectation and that he was the lowest producing hearing officer. In the course of his work as a hearing officer, grievant utilized the computer system to access hearing schedules and other relevant information relating to the hearings he was conducting. In

[12] Exhibit 34.
[13] DHRM Policy No. 1.75, *Use of Internet and Electronic Communications Systems*, effective August 1, 2001.
[14] Exhibit 2. DMV Information Security Policy, *Employee Responsibilities*, signed May 25, 1994.
[15] Exhibit 3. Grievant's Employee Work Profile, signed March 13, 2002.
[16] Exhibit 11. Security warning banner.

connection with his investigation of grievant, the Chief Hearing Officer examined grievant's access of computer records for the period from July 1, 2001 through July 23, 2002. He found that of 109 records reviewed, only 53 were related to hearings conducted by grievant.

The review of grievant's computer transactions revealed that he also accessed the records of 56 people for whom he was not conducting hearings. In many cases he accessed a personal customer record by first entering a vehicle license plate number. Among the customers who did not have hearings, he accessed personal information records of his neighbors, sister, fiancée, himself, the generalist referred to earlier in this decision,[17] and a large number of vehicles whose sole owner was a female.[18] Grievant had also been providing personal records information on customers to attorneys and others for free.[19] While DMV policy permits attorneys and others to obtain certain information, agency procedure requires that a written use agreement be on file and that a fee of $10 be charged for each access of records.

The Chief Hearing Officer also examined other aspects of grievant's performance to ascertain whether there were any circumstances that might mitigate his offenses. He found that grievant had been gaming the rating system by conducting hearings in-person when they could have been conducted by telephone. Because in-person hearings result in more credit for a hearing officer, grievant's performance was artificially inflated. Grievant had also been omitting from his hearing decisions required language that informs appellants of their appeal rights. This resulted in fewer appeals of grievant's decisions and made his reversal rate appear to be lower than it otherwise would have been. For these reasons, it was concluded that there were no circumstances that could mitigate the disciplinary action.

Other employees who have been found to harass others have been removed from employment. Other employees found to have accessed records inappropriately and without authorization have also been discharged.

APPLICABLE LAW 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 orderly administration of state employment and personnel practices with

[17] The generalist testified that she had never requested grievant for any assistance that would necessitate his accessing her DMV records.
[18] Exhibit 14. Summary of grievant's unauthorized access of computer records.
[19] Exhibit 31.

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 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, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[20]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Standards of Conduct groups offenses according to their severity and lists some examples of each group. However, the Standards also note that:

> The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.[21]

Workplace Harassment

[20] § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

[21] Exhibit 6. Section V.A, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

The agency has demonstrated by a preponderance of evidence that grievant's actions with regard to the generalist constitute workplace harassment. His behavior towards the generalist was unwelcome and she perceived it as offensive. Both the manager and assistant manager observed his staring, and frequent attempts to converse with her. His attempt to hug the generalist in the stockroom, and his hug of her in the corridor were not only unwelcome but also repulsive to her. The fact that he took her photograph without permission, retained the fudge note for months, and accessed her driver's license information without authorization all suggest that grievant may be obsessed with the generalist.

When grievant's behavior in this case is compared with his behavior in the two previous situations in 1995 and 1999, his conduct is similar in each case. Grievant has established a pattern of attempting to pursue female employees, and possibly female customers. This type of predatory behavior is not only inappropriate but is unacceptable in any workplace. The agency gave grievant two previous opportunities to eliminate his offensive behavior. Grievant promised in both cases that he would not repeat such conduct. Unfortunately, grievant either has a short memory, or is incapable of changing his behavior without assistance.

It must be noted that the generalist voluntarily agreed to testify at this hearing even though she is no longer employed with the agency.[22] She had nothing to gain by testifying but said she wanted to testify in order to prevent other employees from being subjected to the same type of harassment. The generalist had not directly told the grievant to desist; she believed that her constant hints that she was happily married should have been sufficient that grievant would understand that she was not interested in his unwelcome attention. Prior to April 2002, she had not said anything to supervision because she was fearful of possible retaliation by grievant. The generalist's testimony was calm, collected and credible.

Unauthorized access of records

Grievant points out that a primary mission of the agency is to help customers. He also notes that no one ever told him that he was not permitted to assist customers. He had previously worked in customer service centers and was accustomed to helping customers as part of his job. However, grievant was removed from the customer service division in 1995 and transferred into the hearing department. His new role as a hearing officer required him to "conduct administrative proceedings, and issue appropriate decisions or recommended decisions in a timely manner."[23] The agency agrees that it is reasonable to assist a customer who has a hearing, if that customer asks a question the hearing officer can answer by accessing the computer system.

[22] The generalist was laid off in October 2002 as a result of state budget reductions.
[23] Exhibit 3. Grievant's Employee Work Profile, March 13, 2002.

However, grievant's job does not include helping other customers who should be referred to employees in the customer service center. Grievant contends that he received calls from people he knew, from attorneys and others, and calls that were inadvertently transferred to his office. If all of his accesses of the computer system were the result of such calls, his overzealous efforts to put the customer first would be a mitigating circumstance. However, the fact remains that a significant number of computer accesses had no demonstrated business purpose. Rather, it appears more likely than not that grievant was accessing personal records of friends, relatives and females for his own personal purposes.

Grievant contends that the customer service center manager resented the fact that grievant received a promotion 13 years ago and that she harbored resentment until now. The hearing officer finds the manager's testimony that she held no such grudge more credible because of the length of time intervening between the two events, and because the preponderance of evidence establishes grievant's culpability in engaging in workplace harassment. Grievant argues that the generalist received coaching on the preparation of her letter detailing grievant's behavior. However, this allegation is outweighed by credible denials from the generalist, the manager, and the assistant manager.

Grievant contends that his removal from employment was arbitrary, capricious and without merit. Grievant presented no testimony or evidence to show that his discharge was either arbitrary or capricious. The evidence established that the agency's decision to terminate grievant's employment was based on an investigation, a review by appropriate management and human resource personnel, and an objective evaluation of the evidence. Therefore, not only is there no evidence of arbitrariness or capriciousness, but also the discharge was merited by a preponderance of the evidence. The repeated pattern of workplace harassment, culminating in the most recent episode in 2001-2002, is more than sufficient by itself to justify termination of employment. The unauthorized access of computer records, gaming of the hearing officer point system, and deliberate omission of required appeal language from official agency decisions are all aggravating circumstances. No circumstances that would warrant mitigation have been demonstrated.

DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice and removal from employment on August 9, 2002 are UPHELD. The disciplinary action shall remain active pursuant to the guidelines in the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 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.

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.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-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.[24] 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.[25]

[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]

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David J. Latham, Esq.

[24] An 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, Record No. 2853-01-4, Va. Ct. of Appeals, (December 17, 2002).

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

Hearing Officer