

Issue: Group II Written Notice (workplace harassment); Hearing Date:
07/17/03; Decision Issued: 07/21/03; Agency: State Police; AHO: David J.
Latham, Esq.; Case No. 5752



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5752

Hearing Date: July 17, 2003
Decision Issued: July 21, 2003

PROCEDURAL ISSUE

Due to availability of the participants, this case could not be docketed for hearing until the 30th day following appointment of the hearing officer.¹

APPEARANCES

Grievant
Attorney for Grievant
Major
Representative for Agency
Two witnesses for Agency

¹ § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, 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.

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for workplace harassment.² Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ The Department of State Police (Hereinafter referred to as "agency") has employed grievant for 33 years. He is a lieutenant.

The agency's policy on workplace harassment forbids harassment on the basis of nine protected classifications including gender.⁴ The policy defines workplace harassment to include any unwelcome verbal conduct that denigrates a person and that creates an offensive work environment or interferes with the employee's work performance.⁵

In July 2002, grievant was counseled, in writing, for inappropriate behavior that included unwelcome touching of female employees, unwelcome comments about the appearance of female employees, and other disruptive behavior.⁶

During the fall of 2002, a female first sergeant supervised by grievant had applied for promotion to lieutenant. As part of the consideration process, each applicant is evaluated by her superiors. Grievant and another lieutenant individually prepared draft leadership evaluations for the first sergeant, discussed their ratings and reached a consensus opinion. They then discussed their consensus opinion with their superior - a captain - and arrived at a final leadership evaluation ranking.⁷ Grievant was assigned to present the final leadership competency ranking form to the first sergeant and discuss it with her.⁸

² Exhibit 1. Written Notice, issued May 5, 2003.

³ Exhibit 8. Grievance Form A, filed May 21, 2003.

⁴ Exhibit 3. General Order No. 58, *Workplace Harassment*, revised October 1, 2002.

⁵ Exhibit 3. *Ibid.* The policy defines workplace harassment as: "Any unwelcome verbal, written, or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy 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."

⁶ Exhibits 5, 6, & 7. Internal Affairs investigation reports, and memorandum to grievant from captain, July 3, 2002.

⁷ Exhibit 9. Leadership evaluation worksheet of first sergeant.

⁸ Exhibit 2. Leadership Competency Rating Form, signed October 28, 2002.

On October 28, 2002, grievant met with the first sergeant and handed her the Leadership Competency Rating Form. As she began to read the form, grievant stated, "I did not take into account that you are a female."⁹ The first sergeant replied, "I hope not." Grievant stated, "Well, [sergeant's first name], I hope you know me better than that." The first sergeant was upset about grievant's remark because she felt belittled, degraded, and considered the remark to be unprofessional. The first sergeant did not complain to grievant, the captain or anyone else in a position of authority. Later on October 28, 2002, the first sergeant was still upset and told a secretary about grievant's comment.

In January 2003, during an investigation being conducted by Internal Affairs, all women in the office were interviewed and asked whether they felt that grievant had been unprofessional at any time. The first sergeant responded by relating, among others, the above incident. She then filed a written complaint on January 16, 2003. Following an investigation of the incident, the Group II Written Notice was issued to grievant on May 5, 2003.

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 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.

⁹ Grievant believes he used the word "woman" rather than "female," but either word would have conveyed the same message.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁰

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 Policy provides that workplace harassment can be either a Group I, Group II, or Group III offense depending upon the nature of the violation.¹¹ The Department of State Police has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 10 provides that workplace harassment may be addressed either by counseling or by one of the three disciplinary levels mentioned above.¹²

The essential facts in this case are undisputed. Grievant made a remark to a female subordinate that caused her to feel belittled and degraded. Accordingly, a preponderance of evidence demonstrates that grievant made an unwelcome verbal remark that denigrated the first sergeant on the basis of her gender and had the effect of creating an offensive work environment.

Grievant argues that his remark was not denigrating. However, the dictionary lists as a synonym for denigrate the word “belittle,” one of the very words used by the first sergeant to describe her feeling at the time grievant made his remark.¹³

Grievant avers that he made his remark without malice and did not intend it to be condescending. While that may be, it does not change the fact that the recipient of the remark had a very different perception. Grievant has advanced no cogent reason for making the remark. He suggests that he was attempting to reassure the first sergeant that he had not considered her gender as a factor in the evaluation. However, he should have recognized that his remark constituted an anticipatory defense, and that *merely by voicing it*, a question would be raised

¹⁰ § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

¹¹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹² Exhibit 4. Section 10, General Order No. 19, *Separation from the Service and Disciplinary Measures*, Revised October 1, 2002.

¹³ *Webster's Ninth New Collegiate Dictionary*.

in the first sergeant's mind about the remark's validity. If, on the other hand, the first sergeant had been the first to raise the issue of whether her gender had been a factor, it would have been entirely appropriate for grievant to deny it.

Grievant correctly observes that the first sergeant did not file a complaint until nearly three months later when grievant's behavior came under investigation by Internal Affairs because of an anonymous complaint. However, the first sergeant explained that she had initially believed that filing a complaint might make matters worse and was therefore reluctant to do so. The fact that the incident was not promptly reported does not change what grievant said on October 28, 2003.

It must also be observed that the first sergeant did not agree with the leadership evaluation rating she received. Thus, it might be inferred that part of her anger was attributable to the rating. However, the rating was derived from the evaluations of three supervisors, not just grievant. Moreover, even if the rating did bother the first sergeant, grievant's offensive remark stands alone as an independent source of her anger for the reasons previously discussed.

Grievant postulates that the first sergeant might have been in a disagreeable mood because they had earlier disagreed about performance evaluations that the sergeant had prepared for two of her subordinates. However, gender was not a part of the difference of opinion about the evaluations. Moreover, if grievant believed that the first sergeant was upset about the earlier discussion, grievant should have known that making a reference to the sergeant's gender would be like pouring fuel on a fire. Grievant knew, or reasonably should have known, his remark could only have been perceived negatively.

Grievant argues that the written counseling he received in July 2002 should not be considered because the types of behavior he was warned about were unrelated to the issue in this case. The hearing officer must disagree. While the earlier conduct (unwelcome touching and unwelcome compliments) is different from the instant case (belittling comment), both types of behavior fall under the wider umbrella of inappropriate conduct towards women solely on the basis of their gender. Because both the earlier conduct and the instant conduct were unwelcome, grievant's behavior in both cases constituted workplace harassment. Moreover, both the earlier and present behavior involved making comments that were should not have been made.¹⁴ While we cherish our First Amendment right to freedom of speech, an unwritten corollary is that some thoughts are better left unspoken.

¹⁴ Grievant himself recognized this. See Exhibit 1, p. 14, *Internal Affairs Investigation Report*, February 19, 2003, in which grievant admits to the investigator, "**Maybe it would have been a statement that [was] better off unsaid**, I mean, I can't take it back."

Grievant suggests that his offense was unsatisfactory job performance and should therefore be disciplined with a Group I Written Notice. While grievant's offense does, in a very broad sense, constitute unsatisfactory job performance, offenses should always be described with particularity when possible. The narrower and more accurate description of the offense in this case has been correctly identified by the agency as workplace harassment. As noted above, the offense of workplace harassment can be disciplined at different levels of seriousness depending upon the circumstances. In this case, grievant had been investigated and counseled, in writing, only four months earlier for inappropriate behavior towards women. This should have alerted him to be especially sensitive in his dealings with the opposite gender in the workplace. Given this background, and the lack of any justifiable reason for making the remark to the first sergeant, the agency's assessment of discipline at a Group II level is not unreasonable.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on May 5, 2003 is UPHeld. The disciplinary action shall remain active for the period specified in Section 15 of General Order No 19.

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.¹⁵ 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.¹⁶

[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]

David J. Latham, Esq.
Hearing Officer

¹⁵ 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*, 39 Va. App. 439, 573 S.E.2d 319 (2002). See also *Virginia Department of Agriculture and Consumer Services v. Tatum*, 2003 Va. App LEXIS 356, which holds that Va. Code § 2.2-3004(B) grants a hearing officer the express power to decide de novo whether to mitigate a disciplinary action and to order reinstatement.

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.