

Issue: Group II Written Notice with suspension (workplace harassment); Hearing Date: 10/20/04; Decision Issued: 11/09/04; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 822



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 822

Hearing Date: October 20, 2004
Decision Issued: November 9, 2004

PROCEDURAL HISTORY

On January 7, 2004, Grievant was issued a Group II Written Notice of disciplinary action with suspension from January 8, 2004 to January 14, 2004 for "Violation of Policy 2.30, Workplace Harassment."

On February 3, 2004, 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. The EDR Director issued Ruling Numbers 2004-830, 2004-831, and 2004-832 consolidating this grievance with two others. On September 21, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 20, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

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

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for engaging in workplace harassment.

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 Health employs CS as an Environmental Health Specialist Senior at one of its offices. He has worked for the Agency for more than three years. No evidence of prior disciplinary action against him was introduced at the hearing.

LM is a female employee of the Agency. She knows CS, BC, and GD and interacts with them in varying capacities. She is able to recognize their voices when spoken during a telephone conversation.

On December 12, 2003, CS, BC, DW, PR, TL, GD, and JL took approved leave from work and went to a local mall to shop for Christmas gifts for their friends and families. At about noon, they went to a restaurant located inside the mall to have lunch. They sat on chairs at the restaurant bar, ate food, and drank alcoholic beverages. The bar was "U" shaped and they sat on one side of the bar. The restaurant was full of people speaking loudly and music was playing in the background.

After having consumed a number of alcoholic beverages, DW left the group and walked out into the open area of the mall to make a call on his mobile telephone. DW called LM while LM was working at the Agency's local office. DW spoke with LM for several minutes and as part of that conversation asked LM for her body measurements. LM handed the telephone to a female co-worker, VP. VP could tell DW was intoxicated. DW told VP he wanted to know LM's bra size. DW stated clothing sizes and then asked VP if the sizes are close to LM's size. VP handed the telephone back to LM. At some point, DW had walked back into the restaurant and sat with the group.

DW handed the phone to CS, seated at the bar.¹ CS told LM that there was a tradition of the men going on a shopping trip and buying a gift for a female. CS asked LM questions about her measurements. LM did not provide the information requested. CS twice asked LM what was her favorite color. LM did not provide an answer. LM handed her telephone to a co-worker VP. CS asked VP if VP could give LM's preferred color or a range of something LM would like.² VP did not provide the information. VP handed the telephone back to LM and LM spoke again with CS.

CS handed the mobile phone to GD.³ GD suggested to LM that she had a certain bra and underwear size and then asked LM to confirm his guess.⁴ LM refused to answer. She said she did not feel comfortable receiving underwear from co-workers. GD spoke with LM for less than one minute.

GD handed the mobile phone PR. PR is a professional engineer working for a private company whose services are utilized by the Agency. LM told PR she did not want co-workers buying underwear for her. PR said, "now, you have pi—ed off" GD.⁵

The group left the bar at approximately 1:30 p.m. and continued their shopping. Shortly thereafter, DW became sick and started vomiting due to his intoxication. DW had difficulty walking. The Group took DW to GD's van, placed DW in blankets and let him sleep in the vehicle. DW woke up at approximately 7:30 p.m.

Because of the various conversations she had with the group, LM felt humiliated, embarrassed and upset that she was being asked for intimate details of her body measurements. She was concerned that her co-workers and PR would not take her seriously. On December 15, 2004, LM contacted her supervisor on a "matter of grave concern." The supervisor was unavailable that day. LM met with him the following day.

In the morning, on December 15, 2003, CS sent LM an email stating:

I would like to apologize for Friday. I hope you were not too offended. I'm sorry to have given you such a hard time! I hope you still have at least some respect for me.

Don't worry we agreed, to let you off the hook.⁶

¹ CS consumed two alcoholic drinks while at the restaurant.

² CS denies speaking with VP. Whether CS and VP spoke is not essential to this case. The credible testimony of LM forms the basis of disciplinary action.

³ GD consumed four alcoholic drinks while at the restaurant.

⁴ GD denies asking for this information. He testified that he only told LM that he believed "the guys wanted to buy you a present."

⁵ PR denied making this statement. CS, however, heard someone possibly PR say that LM was getting angry towards the end of the conversation.

CS's apology was sincere. He did not know LM had complained to the Agency at the time he offered his apology. LM considered his apology to be sincere. CS also apologized to LM in person. GD did not apologize to LM because he did not realize she was offended. He would have apologized had he known LM was offended, but the Agency instructed him not to have any contact with LM pending the Agency's investigation.⁷

BC supervises approximately six employees. BC did not speak with LM while on the shopping trip on December 12, 2003.

Groups of male employees had taken shopping trips over the prior nine years. Each year, the group purchased gifts for family, friends, and sometimes co-workers. BC and GD had been on several of those trips. CS had been on one prior shopping trip but no one purchased underwear for female employees on that trip.

On a prior shopping trip, BC contributed money towards a gift for CaS who was an employee working for BC. It was cotton underwear with a holly print. CaS had asked that the gift be purchased. She did not care what the gift was as long as it was expensive and had a holly berry print. She was not offended by the gift and did not feel as though she was being harassed by receiving the gift. CaS considered BC to be "dedicated" "conscientious" and one who "always tried to do his best."

On several prior shopping trips, BC purchased gifts for RR, an Agency employee. RR knew of the shopping trips and sometimes baked cookies for the group to take with them. RR is a fan of the character Eeyore from Winnie the Pooh. The group purchased RR gifts including an Eeyore with a picture frame, a small Eeyore Christmas tree, and an Eeyore toy. RR appreciated all of these gifts and enjoyed receiving them.

Two or three years ago, SC spoke with BC by telephone and BC asked her if his group could purchase a gift for her which would probably be from Victoria Secrets. She agreed. SC received lingerie from BC. She was not offended by the gift and did not feel harassed by receiving it. Prior to this, BC and SC had discussed possibly dating.

⁶ Agency Exhibit 14. CS testified that he sent the email after he heard someone else in the group say LM had gotten angry. He testified that he was apologizing for the group's actions, but the statement "I'm sorry to have given you such a hard time" shows he was apologizing for his own poor behavior. Had he wished to apologize for the group's behavior he would likely have said "I'm sorry we gave you such a hard time." Although CS's apology reflects decency on his part, it confirms LM's assertion that CS asked her for more information than simply her favorite color.

⁷ In an email dated December 22, 2003 to the Medical Director, GD states, "I realize that if anything I said made her [LM] feel uncomfortable, it would have to be considered as inappropriate. It certainly was not my intent. I wish to offer my apologies now and personally when appropriate." See, Agency Exhibit 11.

GD participated in prior shopping trips. He contributed money for the purchase of gifts for female employees. No evidence was presented suggesting any of the gifts purchased were unwanted by the female employees.

CONCLUSIONS OF POLICY

The Commonwealth forbids harassment of any employee on the basis of that person's gender. DHRM Policy 2.30 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.

Any employee who engages in conduct determined to be harassment, or who encourages such conduct by others, shall be subject to corrective action under Policy 1.60, Standards of Conduct, which may include discharge from employment.

Agency Policy 2.30 supplements DHRM Policy 2.30 by stating:

VDH reserves the right to take corrective and/or disciplinary action for any conduct or behavior deemed by management to be inappropriate or unprofessional, including but not limited to jokes, inappropriate comments, innuendos, or inappropriate touching, if such conduct or behavior may tend to demean or denigrate an individual on the basis of race, color, national origin, age, religion, disability, sex, marital status, or pregnancy, regardless of whether such conduct has reached the level of creating an intimidating, hostile or offensive work environment as set forth in DHMR Policy No. 2.30.⁸

"Failure to ... otherwise comply with established written policy" is a Group II offense.⁹ An employee receiving a Group II Written Notice may also receive a suspension up to ten workdays.

CS denigrated LM by asking her questions about her underwear while she was carrying out her duties as an Agency employee. His conduct was not welcomed by LM and offended her. CS's statements were inappropriate and unprofessional. CS acted

⁸ Agency Exhibit 3.

⁹ DHRM § 1.60(V)(B)(2)(a).

contrary to the *Workplace Harassment* policy thereby justifying the Agency's issuance of a Group II Written Notice.

The Agency took disciplinary action against CS for three reasons. First, CS behaved inappropriately on December 12, 2004. Second, CS sent LM an email presenting a "bullying tone" contrary to the *Workplace Harassment* policy. Third, CS participated in prior shopping trips.¹⁰ The Agency believed these prior shopping trips were similar to the December 12th trip and that those prior trips resulted in harassment of female employees.

The Agency has presented sufficient evidence to support its first reason for taking disciplinary action. The Agency has not presented sufficient evidence to support its second reason for taking disciplinary action. CS sent LM an email on December 15, 2003, wherein CS says "I would like to apologize for Friday" and then says "Don't worry we agreed, to let you off the hook." The Agency construes the latter statement as presenting a "bullying tone" contrary to the *Workplace Harassment* policy. The plain language of the email does not support this conclusion and no other evidence was presented to suggest CS intended to bully LM. In all respects, it appears his apology was genuine. The Agency has not presented sufficient evidence to support its third reason for taking disciplinary action. No credible evidence was presented showing that employees on the prior shopping trips engaged in behavior that was workplace harassment.

When the Agency fails to prove all of the facts supporting its disciplinary action, the Hearing Officer has greater discretion regarding whether to uphold Agency disciplinary action. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. The suspension associated with that notice is unnecessary, however. CS apologized to LM prior to being aware of any disciplinary investigation and it is clear he regrets his association with the group actions that offended LM. Accordingly, CS's suspension must be reversed.

The testimony of LM and CS conflict. If the testimony of CS is to be believed, his actions would not have constituted a violation of policy. It is not necessary for the Agency to prove its allegations beyond any doubt. By presenting the credible testimony of LM, the Agency has met its burden of proof. LM's testimony is to be believed over the testimony of CS because (1) CS had consumed two alcoholic drinks, (2) CS was in a relaxed or less guarded environment increasing the odds of his speaking without first thinking about how his comments may be perceived, (3) CS admitted to asking LM about her favorite color thereby showing he knew the group intended to purchase a gift for LM, (4) CS's email apology states, "I'm sorry to have given you such a hard time"

¹⁰ The importance of shopping trips occurring in prior years is confirmed by the Agency's discipline of CS, GD, and BC. CS and GD participated in the telephone conversation on December 12, 2003 and they had some limited participation in prior shopping trips. They received Group II Written Notices with five workdays suspension. In contrast, BC did not participate in the conversation on December 12, 2003, but he had actively participated in prior shopping trips. The Agency issued BC a Group II Written Notice with a ten workday suspension.

thereby indicating personal responsibility for inappropriate behavior, and (5) LM's recollection of CS's statements was definitive.

Grievant contends the Agency issued inconsistent disciplinary action. DW was a probationary employee whose discipline consisted of an extension of his probationary period and a counseling memorandum. The Agency referred to the memorandum as being equivalent to a Group II Written Notice.

Probationary employees are not subject to the Standards of Conduct from which Group Written Notices arise. The Agency was not able to issue DW a Written Notice and then suspend him from employment. Accordingly, the Agency has not inconsistently disciplined employees.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**, however, Grievant's suspension must be **rescinded**. The Agency is directed to provide the Grievant with **back pay** for the period of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, Policy No. 1.60(IX)(B)(2).

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 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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 give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-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. 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.¹¹

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.