Issue: Group III Written Notice with suspension (creating hostile, intimidating, offensive work environment); Hearing Date: 02/15/05; Decision Issued: 02/22/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 7956

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 7956

Hearing Date: February 15, 2005
Decision Issued: February 22, 2005

PROCEDURAL ISSUES

Grievant and a coworker were disciplined on the same date for essentially similar offenses. The two grievances were consolidated for the purpose of hearing. However, separate decisions are being issued for each of the two grievants in order to address the individual circumstances of their cases.

APPEARANCES

Grievant
Co-Grievant
Three witnesses for Grievants
Human Resource Generalist
Representative for Agency
Five witnesses for Agency

ISSUES

Was the grievant's conduct such as to 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 grievance from a Group III Written Notice issued for creating an intimidating and hostile or offensive work environment, and interfering with an individual's work performance by requesting sexual favor and other verbal conduct.[1] Grievant was suspended for ten work days as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant as a transportation operator for 16 years.

The Commonwealth's policy on Workplace Harassment prohibits sexual harassment, which includes verbal or physical conduct by a co-worker. The 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."[3] Grievant received training on preventing sexual harassment in 2001.[4]

On April 13, 2004 a female contract employee assigned as a flagger complained to the superintendent that she had been subjected to inappropriate touching by grievant. Over the course of the next two days, a number of employees made smart remarks to the female. She quit her job on April 15, 2004 and the following week, on April 19, 2004, she filed a complaint with a Human Resource Generalist. The Generalist notified the Civil Rights Manager who conducted an investigation by interviewing 14 employees on April 26 & 27, 2004. The Civil Rights Manager filed a written report three months later on July 20, 2004.[5] Disciplinary action was issued two additional months later on September 17, 2004.

The female employee reported that she had heard off-color jokes and sexually-oriented conversations during 13 months in her position but did not consider this to be a major problem. However, she reported that during the

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[1] Agency Exhibit 3. Written Notice, issued September 17, 2004.
[2] Agency Exhibit 3. Grievance Form A, filed October 12, 2004.
[3] Agency Exhibit 4. Department of Human Resource Management (DHRM) Policy No. 2.30, *Workplace Harassment*, May 1, 2002. [NOTE: As part of Agency Exhibit 4, the agency proffered DHRM Policy 2.15, *Sexual Harassment Policy*, however, that policy was superseded by Policy 2.30].
[4] Agency Exhibit 6. Employee Training History.
[5] Agency Exhibit 4. Investigation Report, July 20, 2004.

weeks preceding her complaint, she had offered to buy a coat from grievant. She claimed that his response was that he would sell her the coat only if she performed oral sex on him. She also alleged that on a different occasion, grievant attempted to grab her breast but that she told him to stop or she would hit him. Grievant denies both allegations.

The female had assisted a male employee on weekends when he maintained a booth at gun shows and he paid for her work at the shows. On one occasion he paid the female $100 in cash and this was observed by other employees at the work site. When word of this circulated among the operators, it was promptly joked about that the male employee was paying the female for sexual favors. On one occasion, grievant made joking comments to the female suggesting that the male employee had paid her $100 to have sex with him. The female sometimes went along with such joking but did not like this particular allegation.

The female flagger returned to work on June 14, 2004 and still works as a contract employee for the agency at the present time.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[6]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. 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. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Violation of Policy 2.30 Workplace Harassment is considered a Group I, II, or III offense depending upon the nature of the violation.[7]

A preponderance of the testimony and evidences establishes that there was a significant amount of off-color joking and sexually-oriented banter occurring at grievant's work site. Virtually all of the operators participated to one degree or another, including the females (although they tended to participate less than the males).

The female complainant alleged only one incident of inappropriate touching – that grievant attempted to grab her breast. Grievant denies the allegation and there were no witnesses. Both the female and grievant testified equally credibly about this incident and therefore the agency has not borne the burden of proof to sustain the allegation.[8] Grievant's denial that he requested oral sex is corroborated by an agency witness who said that it was the female who asked grievant, "What else can I offer for the coat (in addition to money)?"

Grievant has admitted to inappropriate sexually-oriented banter and off-color joking. The preponderance of evidence supports a conclusion that such talk was common, frequent, and primarily engaged in by almost all the male employees. The female employee did not have a problem with such talk during the first several months of her employment. However, when the talking and joking became personal and besmirched her, she became more upset. She adamantly denied having sex with the male employee and resented fellow

[6] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

[7] Agency Exhibit 1. Section V.B.3.n, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

[8] It is interesting to note that this alleged incident was not even mentioned in the agency's Investigation Report.

employees joking about the situation. This may well have been the motivation behind her complaint to the superintendent. Nonetheless, grievant's participation in such joking and talk, particularly when it became personal, constituted unwelcome sexual comments and innuendo that resulted in an offensive work atmosphere for the female.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. Supervisors should be aware of inadequate or unsatisfactory work performance or behavior on the part of employees and attempt to correct the performance or behavior *as soon as a supervisor becomes aware* of the offense.[9] When issuing the employee a Written Notice, *management should issue a Written Notice as soon as possible*.[10] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless an extensive, detailed investigation is required, most state agencies issue disciplinary actions within a few weeks after an offense.

In the instant case, the interviews of all employees were conducted on April 26 & 27, 2004. However, the agency failed to issue discipline until nearly five months later – on September 17, 2004. Such a lengthy delay in the issuance of discipline suggests that the agency did not take the charges against grievant very seriously. If grievant's offenses were deemed so serious, disciplinary action should have been issued *promptly* in order to prevent a recurrence of such offenses.

Summary

The evidence does not support a conclusion that grievant engaged in any unwelcome touching of the female. However, the evidence is sufficient to conclude that grievant's unwelcome sexual comments and innuendo helped contribute to an offensive work atmosphere for the female employee. Violation of the Workplace Harassment policy can be considered either a Group I, Group II, or Group III offense depending upon the nature of the violation. In considering the totality of the evidence, the lack of proof of any unwelcome physical touching, and the inordinate delay in issuing discipline, the most appropriate level of grievant's offense is Group II.

[9] Agency Exhibit 1. Section VI.A, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[10] Agency Exhibit 1. Section VII.B.1, *Ibid*.

DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued on September 17, 2004 is hereby REDUCED to a Group II Written Notice with 10 work day's suspension. The agency shall revise the disciplinary action to reflect this decision and the disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 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.[11] 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.[12]

[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.
Hearing Officer

[11] 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).

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