Issue: Group I Written Notice (violation of sexual harassment policy); Hearing Date: 06/02/05; Decision Issued: 06/07/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8079

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8079

Hearing Date: June 2, 2005
Decision Issued: June 7, 2005

PROCEDURAL ISSUES

Grievant requested as part of his relief that five employees be required to write an apology. A hearing officer does not have authority to take any adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance) or provide relief that is inconsistent with the grievance statute.[1] Therefore, the hearing officer is without authority to direct the form of relief requested by grievant. Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

Grievant also wants assurance that neither he nor his witnesses will be harassed or retaliated against. The grievance procedure prohibits an agency from retaliating against anyone who participates in the grievance process. Any employee may ask the Department of Employment Dispute Resolution to

[1] § 5.9(b)6 & 8. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

investigate allegations of retaliation. The results of such an investigation will be given to the agency head.[2]

APPEARANCES

Grievant
Attorney for Grievant
Six witnesses for Grievant
Right of Way Manager
Representative for Agency
Six 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? Did the agency retaliate against grievant?

FINDINGS OF FACT

Grievant filed a timely grievance from a Group I Written Notice issued for violation of the agency's sexual harassment policy.[3] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[4] The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant for 14 years. He is a right-of-way agent.

The Commonwealth's policy on workplace harassment prohibits any unwelcome verbal or physical conduct that has the purpose or effect of creating an offensive work environment.[5] One form of workplace harassment is sexual harassment, which is defined to include any unwelcome verbal or physical conduct of a sexual nature such as sexual comments, innuendoes, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work. The agency has promulgated its own sexual harassment policy which contains a similar definition of sexual harassment.[6]

Over a period of three to four years, grievant engaged in sexual banter with a young female secretary. During this period of time, the female participated in the sexual banter and gave no indication that grievant's comments were

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[2] § 1.5. *Ibid.*
[3] Agency Exhibit 1. Group I Written Notice, issued January 19, 2005.
[4] Agency Exhibit 2. Grievance Form A, filed February 14, 2005.
[5] Agency Exhibit 10. Department of Human Resource Management (DHRM) Policy 2.30, *Workplace Harassment*, effective May 1, 2002.
[6] Agency Exhibit 9. VDOT Policy 2.15, *Sexual Harassment Policy*, effective January 23, 2001.

unwelcome. On at least three occasions, the secretary was verbally counseled about her use of vulgar language. She discussed her relationship with her boyfriend with other females in the open office area where others can overhear the conversation. She admits that she hugged grievant on occasion, and as recently as one week prior to the filing of her complaint on December 1, 2004. By the spring of 2004, the female had begun to find grievant's comments unwelcome, however, she never told him so directly. She hoped that he would eventually "get the message" and tire of making such remarks.

During the summer of 2004, grievant pulled the top of the female's blouse out so he could see her brassiere, and made a comment about the small size of her breasts. She immediately grabbed her blouse, held it close, and told grievant to stop. A female engineering technician witnessed this incident. On another occasion in July 2004, grievant spoke to the secretary in the presence of others saying, "I would gladly be drug through broken glass behind a laundry truck to get a chance to sniff your panties."[7] The secretary heard the remark, tried to ignore it, and walked away. Grievant's supervisor learned about this remark and, in early August 2004, he verbally counseled grievant. Grievant maintained that he was just joking when he made the comment. Nonetheless, the supervisor warned grievant that if a complaint were filed, grievant would be subject to disciplinary action.[8] Grievant did not take this counseling seriously because he felt that he and his supervisor were "just having a talk."[9]

The supervisor reported the counseling to the right-of-way manager. She directed that sexual harassment training be conducted in the next staff meeting. A supervisor did conduct such training on August 18, 2004.[10] Grievant attended the training but said that he did not take it seriously because the person who conducted the training had also engaged in inappropriate conduct in the office. The secretary had a second job as a cashier on a part-time basis at a market. Grievant would come to the market and engage grievant in banter. The secretary quit that job in December 2004 because she became annoyed with grievant's behavior when he came to the market.

During the fall of 2004, grievant continued to make sexually-oriented remarks to the secretary. She would usually laugh, or ignore him, or tell him that what he was saying was nasty. She never told him to stop the remarks or that the remarks were unwelcome. On November 30, 2004, grievant described to the secretary the manner in which he ate oysters. The secretary found his description to be nasty and disgusting because of how he described his eating and, because of the implied sexual innuendo (the alleged aphrodisiac quality of

[7] Grievant avers that he said "I would be dragged through a mile of glass to be able to smell the hubcaps on the laundry truck carrying your underwear."

[8] Agency Exhibit 5. Supervisor's written documentation of verbal counseling, week of August 1, 2004.

[9] Agency Exhibit 4. Right-of-way Manager's notes from discussion with grievant, January 7, 2005.

[10] Agency Exhibit 6. Grievant's training record, documenting sexual harassment training on August 18, 2004 and October 26, 1999.

oysters). Grievant also said he would like to lie in bed with the secretary and just hold her, "Not f___, just hold you."[11] The secretary did not respond and grievant then said, "If I were 25 I would make you give it up." The secretary took this to mean that he would attempt to have sexual intercourse with her.

On December 1, 2004, grievant encountered the secretary and asked, "Did you miss me last night?" Later in the day, when the secretary was decorating a Christmas tree, she was bent over when grievant entered the room. The upper part of the secretary's derriere cleavage was exposed and grievant said, "Have you had your Christmas goose?" as he looked directly at the exposed area. As a result of the comments on both days, the secretary reported the matter to a supervisor and filed a complaint of discrimination form.[12] A civil rights manager conducted an investigation of the complaint.[13] Grievant admitted to the investigator that what he did was wrong.[14] Although the Attorney General recommended a Group II or Group III disciplinary action, the agency found mitigating circumstances and issued a Group I Written Notice.

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.

[11] Grievant maintains that he did not use the word f___.
[12] Agency Exhibit 7. Complaint of Discrimination Form, December 1, 2004.
[13] Agency Exhibit 8. Investigative Report.
[14] Agency Exhibit 8. *Ibid.*

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 his evidence first and must prove his claim by a preponderance of the evidence.[15]

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.1 of Policy No. 1.60 provides that Group I offenses include acts and behavior that are the least severe.[16] Violation of DHRM Policy 2.30, *Workplace Harassment*, is one example of an offense that can be a Group I, Group II, or Group III offense depending on the nature of the violation.

The agency has demonstrated by a preponderance of evidence that grievant has engaged in banter with a significantly younger, single, female secretary over an extended period of time. The comments made by grievant included sexual comments, sexual innuendo, vulgar language, and remarks that can be interpreted as sexual propositions. In addition, grievant had pulled out the top of the secretary's blouse and made an inappropriate comment about her breasts as he looked down her blouse. Grievant has acknowledged that he made most of the remarks, although he disagrees with the exact wording of some of the comments.

The secretary did not initially object to grievant's remarks and allowed it continue for a considerable length of time. Moreover, she often participated in sexually-oriented banter with grievant. Her use of vulgar language was sufficiently frequent that she was counseled on at least three occasions to stop using such language. She never told grievant to cease making sexually-oriented remarks to her. Even as recently as one week prior to filing her complaint, she voluntarily hugged grievant. She did, however, gradually begin to demonstrate that grievant's behavior was unwelcome by ignoring some comments, and by telling him that this remarks were nasty and disgusting. Nonetheless, despite the secretary's failure to give grievant an unambiguous warning to desist, grievant's supervisor did give him such a warning when he verbally counseled grievant in August 2004.

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[15] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

[16] Agency Exhibit 11. Section V.B.1, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

There is no question but that the secretary is vulgar and has freely discussed a wide range of sexual matters in the workplace. However, grievant's sexually-oriented remarks, comments, innuendo, and veiled suggestions to the secretary were coarse, very vulgar, and clearly constituted sexual harassment because they made the secretary uncomfortable. Grievant's credibility was tainted by inconsistent testimony. For example, he testified during the hearing that he did not tell the secretary on November 30, 2004 that he wanted to lie in bed with her, but he told the investigator that he did make such a statement. Similarly, at the hearing grievant denied telling the secretary that he would make her "give it up" if he were 25, but he admitted to the investigator that he had made a similar statement. During the hearing, grievant said that he didn't know what the Christmas goose statement meant when he said it. However, he told the investigator that his statement to the secretary was, "Have you had your Christmas goose yet?" Such phrasing strongly suggests that grievant clearly knew that a goose is a "poke between the buttocks."[17]

Grievant has received sexual harassment training on at least two occasions during the past five years. Grievant asserts that he has previously worked in management positions in the private sector for many years. With his training and management experience grievant knew, or reasonably should have his known, that his behavior and comments are unacceptable in any employment setting. They are especially unacceptable in state employment where both state and agency policy prohibit such conduct. Until 2004, grievant may reasonably have concluded that his conduct was not unwelcome because the secretary did not rebuff his comments, and even participated in the banter herself. However, after grievant was warned in August 2004, he knew that such behavior was viewed unfavorably. More importantly, grievant was warned that a complaint about his behavior would likely result in disciplinary action.

Given the totality of grievant's repeated sexually-oriented comments to the secretary, his behavior was sufficiently disturbing, disruptive, unbecoming, and unwelcome as to constitute a violation of policy. The agency has appropriately concluded the secretary's participation in the banter constitutes a mitigating circumstance. However, now that she has made clear that grievant's behavior is unwelcome, the agency must take corrective action. The *Standards of Conduct* permits the agency to take any corrective action deemed appropriate to the situation; such action can range from counseling to formal disciplinary action.[18] In this case, because grievant had already been verbally counseled, the agency determined that a Group I disciplinary action was necessary to emphasize the seriousness of the offense. Formal discipline was appropriate given the fact that grievant had admitted to not taking the previous counseling seriously. The evidence reveals no reason to overturn the agency's action.

Retaliation

[17] *Merriam-Webster's Collegiate Dictionary.*
[18] Agency Exhibit 11. Section II.A, DHRM Policy 1.60, *Ibid.*

Grievant alleges that the agency conspired and retaliated against him. However, other than allegation, grievant offered no probative evidence of either a conspiracy or retaliatory actions. Grievant suggests that some of the district management, and in particular the right-of-way manager, are resentful because he received a Governor's Award for Customer Service. However, the right-of-way manager testified credibly that she had initiated the paperwork that ultimately resulted in grievant's nomination for the award. Moreover, when grievant received the award, the manager personally funded part of the congratulatory reception for grievant. Grievant did not rebut her testimony.

Grievant also concluded that his supervisor was part of an alleged conspiracy to retaliate because grievant learned that the supervisor had said he wanted "to get rid of [grievant]." The supervisor testified credibly that he had made the statement but in the context of having grievant moved under the supervision of a different supervisor. In fact, in order to avoid supervising grievant, the supervisor had at one point requested a transfer to a different location. Grievant offered no rebuttal to this testimony.

Grievant alleged that when a move of several employees took place, he was given the worst cubicle. The agency offered testimony that grievant was in fact given a larger cubicle and an additional table that he did not have before. Grievant had initially expressed satisfaction with the new cubicle and only later began to complain about it.

Grievant further asserts that the manager's decision to restrict him from driving state vehicles was retaliatory. In fact, the evidence is undisputed that grievant had told the manager that on more than one occasion he had fallen asleep while driving and lost control of his state vehicle spinning out on a major state highway. Accordingly, the manager restricted grievant from driving. If the manager had not taken the action she did, she would have been derelict in her responsibilities. Therefore, the manager's decision to restrict grievant from driving a state vehicle was not only *not* retaliatory, but it was for grievant's own safety.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on January 19, 2005 is hereby UPHELD.

Grievant has not borne the burden of proof to sustain his allegation of conspiracy and retaliation.

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.[19] 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.[20]

[19] 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).

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

[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