

Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: 10/25/05; Decision Issued: 10/31/05; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8183



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8183**

Hearing Date: October 25, 2005  
Decision Issued: October 31, 2005

**PROCEDURAL HISTORY**

On August 15, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Sexual and workplace harassment and creating a sexually hostile work environment for 3 female staff members in subordinate roles.*

On August 18, 2005, 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. On September 21, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 25, 2005, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

## **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 Department of Mental Health Mental Retardation and Substance Abuse Services employed Grievant as a Charge Aide at one of its Facilities. He had been employed by the Agency for approximately 20 years until his removal effective August 15, 2005. No evidence of prior disciplinary action against him was introduced during the hearing.

Ms. L worked as a direct care worker at the Facility. She had been working on side 2B and then asked to move to side 2D of a building. Grievant worked as a Charge Aide on side 2D. He and Ms. L began working together in May 2005.<sup>1</sup> As a Charge Aide, Grievant was responsible for assigning certain tasks to employees including some of those of Ms. L. Grievant was not Ms. L's direct supervisor. He was not responsible for preparing her performance evaluations.

On May 28 or 29, 2005, Ms. L was in the dining room standing but leaning forward to cut up a client's food on a meal tray. She was preparing the food so it could be more easily eaten by a client later in the day. She was wearing her customary work clothing including jean pants. Without announcing himself, Grievant walked to Ms. L from behind. He reached forward with one hand and grabbed Ms. L's bottom with his palm facing upward. As Ms. L turned, Grievant said "What kind of underwear are you wearing?" Ms. L was not expecting Grievant to touch her. She had not taken any action prior to this to indicate she would tolerate or permit Grievant to grab her bottom.

Ms. L did not immediately report Grievant's behavior. After Ms. L's 11 year old daughter left her home for several weeks during the summer, Ms. L believed she would

---

<sup>1</sup> The Agency moved Ms. L back to side 2B in July 2005.

focus on her concerns about Grievant. The incident was reported and the Agency began an investigation.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).<sup>2</sup> Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

“The Commonwealth strictly forbids harassment of any employee ... on the basis of an individual’s ... sex.” Sexual harassment is, “[a]ny unwelcome ... physical conduct of a sexual nature by a ... [co-worker].” Hostile environment is a “form of sexual harassment when a victim is subjected to unwelcome and severe ... touching ... which creates an intimidating or offensive place for employees to work.”<sup>3</sup> When Grievant grabbed Ms. L’s bottom, his action was unwelcome. He grabbed her bottom because she is female. Grievant’s question to her about her underwear is consistent with expressing an interest in her because of her sex. Grievant created an intimidating or offensive place for Ms. L to work as shown by her desire to move to another part of the Facility so that she would not have to work with Grievant. Accordingly, the Agency has presented sufficient evidence to support its allegation that Grievant created a sexually hostile work environment. Group III offenses include violation of DHRM Policy 2.30 *Workplace Harassment* depending on the nature of the offense. The Agency’s assertion that Grievant’s behavior rises to the level of a Group III offense is supported by the evidence. The Agency’s issuance of a Group III Written Notice with removal must be upheld.<sup>4</sup>

Grievant contends that Ms. L’s behavior following the incident shows Grievant should not be disciplined with removal. For example, Ms. L continued to have a playful relationship with Grievant.<sup>5</sup> They continued to talk and joke. On occasion, when Ms. L would ask Grievant to do something and he refused, she would throw her keys towards

---

<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>3</sup> DHRM Policy 2.30.

<sup>4</sup> No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

<sup>5</sup> Ms. L did not immediately report Grievant’s behavior. Her explanation that she did not wish to address immediately her concerns about Grievant does not diminish her credibility; it shows she required sufficient time in order to decide what action to take.

him with the keys landing on the ground. She would feign outrage in a joking manner. Although Ms. L's behavior may seem inconsistent with her claim that she was offended by Grievant's behavior, when the totality of the facts of this case are considered, it is clear that Ms. L genuinely wished to be moved to an area away from Grievant to avoid the risk that he might inappropriately touch her again.<sup>6</sup> This is sufficient to establish an intimidating or offensive place to work.<sup>7</sup>

Grievant argues that the Written Notice alleges Grievant engaged in inappropriate behavior on July 7, 2005 yet no evidence was presented showing any inappropriate behavior occurred on July 7, 2005. The Hearing Officer finds that although Grievant did not engage in any inappropriate behavior on July 7, 2005, the Agency has presented sufficient evidence of Grievant's inappropriate behavior and gave Grievant adequate notice of the facts upon which it alleged he should be disciplined. The incorrect date shown in the Written Notice is harmless error.

The Agency contends Grievant harassed Ms. B, a housekeeper working at the Facility. A significant portion of Ms. B's testimony lacked credibility. Accordingly, the Hearing Officer will disregard her testimony. Without this testimony, the Agency has not presented sufficient evidence to show that Grievant harassed Ms. B.

The Agency contends Grievant harassed Ms. G, a direct care worker at the Facility. Grievant and Ms. G were friends. On occasion, Grievant would slap Ms. G's bottom in a playful manner. On occasion, Ms. G would slap Grievant's bottom in a playful manner. Grievant's touching was not unwelcome to Ms. G; indeed, it was part of their friendship. Ms. G's complaint was that Grievant sometimes slapped her too hard on the bottom and it hurt. Although Grievant's behavior (as well as Ms. G's behavior) was inappropriate for the workplace, it did not amount to sexual harassment within the context of DHRM Policy 2.30.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

---

<sup>6</sup> Ms. L experienced financial difficulties in 2005. Several co-workers including Grievant contributed money to help her. One co-worker guaranteed Ms. L's apartment lease and became concerned when Ms. L failed to timely pay the landlord. Although Ms. L's financial difficulties may reflect her character with respect to financial management, they do not reflect her credibility with respect to expressing Grievant's behavior towards her.

<sup>7</sup> Ms. L's continuation of a friendly relationship may reflect the level of harm she may have experienced, but it is independent of the Agency's perception of the harm Grievant's behavior caused to the workplace.

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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>8</sup>

[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].

---

<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

---

Carl Wilson Schmidt, Esq.  
Hearing Officer