

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 03/13/06;  
Decision Issued: 03/14/06; Agency: VDOT; AHO: David J. Latham, Esq.;  
Case No. 8285; Outcome: Agency upheld in full; **Administrative Review:**  
**HO Reconsideration Request received 03/28/06; Reconsideration Decision**  
**issued 03/30/06; Outcome: Original decision affirmed; Administrative**  
**Review: DHRM Ruling Request received 03/28/06; DHRM Ruling issued**  
**06/12/06; Outcome: HO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8285

Hearing Date: March 13, 2006  
Decision Issued: March 14, 2006

**APPEARANCES**

Grievant  
Facility Manager  
Representative for Agency  
Two 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

Grievant filed a timely grievance from a Group I Written Notice issued for disruptive behavior.<sup>1</sup> Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Virginia Department of Transportation (Hereinafter referred to as "agency") has employed grievant as a chief engineer for ten years.

Grievant is a member of a six-person ferry boat crew. Prior to the beginning of a shift, particularly on weekends, the crew usually gathers in a trailer office. Grievant's crew included five males and one female. The crew consists of the captain, mate, chief engineer (grievant), an oiler, and two crew members (one of whom is female).

On September 3, 2005, the captain, mate and the two crew members were in the office trailer at about 2:30 p.m., 15 minutes prior to the start of the shift. The female crew member had a real estate contract to review and went into a room normally used only by maintenance personnel. A shift coordinator had also been in the office at this time but he left to check out one of the ferries. The door to the room was open but the female was not visible from the room where the other three people were. She was able to hear conversations in the office. At about 2:35, grievant and the oiler entered the trailer, accompanied by the returning shift coordinator. Grievant and the oiler were not aware that the female crew member was in the adjoining room and were unable to see her from the office. Crew members rarely, if ever, go into the maintenance room, since it is only used by maintenance personnel. The oiler began a sexually graphic conversation that included talking about a medical situation and a description of his penis. Grievant joined in and talked about morning erections, and a past sexual experience with a female and their resultant mutual satisfaction.

By this time it was almost time to begin the shift. The shift coordinator noticed that the entire crew except for the female crew member was in the office. When he asked where the female was, she came out of the maintenance room and said, "Unfortunately, I am here." The crew then began leaving the office to report to their jobs. The female left but returned a few minutes later and told the shift coordinator that she was upset about the conversation and could no longer work with this crew. The shift supervisor allowed the female to go home, found a replacement for her, and then reported the incident to the facility manager.

The captain averred that he had not paid attention to the conversation, was busy with work, and was unaware that the female crew member was in the maintenance room. The female did not complain to grievant or the oiler at any time during their conversation. She did not leave the trailer although she could have done so at any time prior to the end of the conversation.

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<sup>1</sup> Exhibit 3. Group I Written Notice, issued November 8, 2005.

<sup>2</sup> Exhibit 2. Grievance Form A, filed November 17, 2005.

The office is accessible to the public. From time-to-time, the public comes to the office to ask for maps, directions, register complaints, or complete paperwork if an incident occurs on the ferry. Normally, a security guard will call ahead to alert office staff if a member of the public is coming to the office. However, at times the security guard does not call ahead either because someone may get by the guard without being noticed, or because the guard is distracted or less than alert.

Grievant and the oiler (the two who had the conversation) received Group I Written Notices for disruptive behavior. The captain was given a Group I Written Notice for unsatisfactory job performance. The mate and male crew member were counseled in writing. The shift coordinator was not given any corrective action.

### 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 his evidence first and must prove his claim by a preponderance of the evidence.<sup>3</sup>

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<sup>3</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

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. Policy No. 1.60 provides that Group I offenses are the least severe; disruptive behavior is one example of a Group I offense.

The agency has shown by a preponderance of evidence that grievant engaged in a sexually explicit conversation that caused a female employee to be upset and embarrassed. Although grievant does not recall all the details of the conversation, he concedes that he and the oiler did engage in a sexually-graphic conversation and that it was inappropriate. As a result, the female employee did not work her shift and another employee had to be called in to take her place on the crew. This resulted in the payment of overtime pay to the relief employee. In addition, the facility manager was required to come in on an off-duty day to investigate the incident, and the matter was referred for a civil rights investigation. Accordingly, because of these unusual occurrences in the normal course of business, grievant's behavior did cause a disruption in the workplace.

There is no evidence of sexual harassment in this case. Grievant was unaware of the female's presence in an adjoining room during the conversation. None of the males in the room, including the captain and the shift supervisor, objected to the subjects being discussed and no one asked grievant to stop the conversation. The female did not object to the conversation, did not leave the trailer at any time during the conversation, and did not make her presence known until after the conversation had ended. More significantly, the female had repeatedly demonstrated in the past that she was not only willing to participate in such talk but also to initiate such conversations.<sup>4</sup> Grievant testified that the female crew member had initiated sexually-oriented conversations with the crew including one instance when she discussed her sexual relationship with her boyfriend. The agency did not rebut this testimony and did not call the female crew member as a witness. The captain corroborated that the female was not a stranger to sexually-oriented talk, stating that she had said equally bad things in the past.

However, the bases for the agency's decision to discipline grievant were that such conversations are inappropriate in the workplace, and that they are particularly inappropriate in an office to which the public has access. As noted above, although a guard is supposed to alert the office that a visitor is on the way, that does not always happen and, therefore, a visitor may come into the office without warning at any time. Therefore, grievant should not be engaging in

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<sup>4</sup> Exhibit 2, pp. 28 & 29.

such conversations in the workplace and certainly not in an office to which the public has access.

### Mitigation

Grievant concedes in the attachment to his written grievance that, "It appears my actions do not meet the test for a Group II or III offense, but a Group I offense."<sup>5</sup> The normal disciplinary action for a Group I offense is issuance of a Written Notice. The *Standards of Conduct* policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has both long service and an otherwise satisfactory performance record. The agency did not cite in Section IV of the Written Notice either any mitigating or aggravating circumstances. However, in the third step response to the grievance, the district administrator asserts that grievant's length of service and good behavior had been considered because the discipline could have been more severe if the agency had elected to characterize the offense as creating a hostile work environment.

### DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice for disruptive behavior issued on November 8, 2005 is hereby UPHELD.

### APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date this 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

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<sup>5</sup> Exhibit 3. Attachment to grievance.

Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> 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.<sup>6</sup> 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>7</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]

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David J. Latham, Esq.  
Hearing Officer

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<sup>6</sup> 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).

<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8285

Hearing Date:	March 13, 2006
Decision Issued:	March 14, 2006
Reconsideration Request Received:	March 28, 2006
Response to Reconsideration:	March 30, 2006

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.<sup>8</sup>

OPINION

In his request for reconsideration, grievant asserts his belief that the hearing officer's decision contains an incorrect legal conclusion and is inconsistent with state policy and federal law. Grievant cites the following to support his belief.

First, grievant suggests that agency management provided incorrect information regarding the number of security guards. Testimony established that there is at least one security guard; grievant contends there are two or three guards. However, whether there are one, two or three guards is irrelevant because grievant agreed with agency testimony that, on occasion, the public can get by the security guards. Therefore, while

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<sup>8</sup> § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.



most members of the public are detected by guards, this does not always happen and thus there is a possibility for a citizen to arrive at the office unannounced.

Second, grievant argues that the agency could not have elected to characterize the incident as creating a hostile work environment. It is not necessary to argue this point because, in fact, the agency ultimately did not charge grievant with creating a hostile work environment. The agency cited grievant *only* for the offense of disruptive behavior. The evidence in this case is sufficient to conclude that grievant's behavior did cause a disruption in the workplace.

Grievant takes issue with certain Findings of Fact, and with the hearing officer's Opinion. The grievant's disagreements, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

### DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on March 14, 2006.

### APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.<sup>9</sup>

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David J. Latham, Esq.  
Hearing Officer

<sup>9</sup> 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).

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of  
Virginia Department of Transportation  
June 12, 2006

The grievant has requested an administrative review of the hearing officer's decision in Case No. 8285. The grievant was issued a Group I Written Notice. He filed a grievance to have the disciplinary action reversed. In his decision, the hearing officer upheld the Group I Written Notice. The grievant presented several arguments to support his claim that the hearing officer did not interpret and apply properly Department of Human Resource Management's (DHRM) Policy 1.60. The agency head of the Department of Human Resource Management has asked that I respond to this request for an administrative review.

FACTS

The Virginia Department of Transportation employs the grievant as a chief engineer on a ferry. On November 8, 2005, he was issued a Group I Written Notice because of disruptive behavior and using inappropriate language in an office setting. Summarily, he and other employees were charged with creating a work environment which upset a female employee to the point where she requested to go home for the day and a replacement had to be called in for her.

The grievant and other members of a crew who work on one of the ferries had gathered in the office before their shift began. The crew consisted of six employees, five males and one female. The male crewmembers were meeting in one room and the female crewmember was in another room, her presence unknown by the male crewmembers. The male crewmembers engaged in a conversation that may be considered by most standards as sexual in nature. The female crewmember overheard the comments and was offended. She expressed her displeasure to the male employees when she went into the main office. Based on the female crewmember being upset by what she overheard, the operations manager was called in, on his day off, to handle the situation and to ensure that the operation of the ferry was restored. The complainant was told to go home by the replacement was called in.

Because the female employee was offended, a representative from the district human resource office conducted an investigation. Based on statements made by the employees, including the grievant, it was determined that sexual harassment did not occur. However, it was determined that the behavior of the grievant and the entire crew, other than the female employee, were disruptive in that it caused an employee to be sent home, a replacement had to be called in an paid overtime, the operations manager had to be called in, and the charges of sexual harassment triggered an investigation. Everyone in the crew, except for the female employee, was issued either a disciplinary action or counseling memoranda. The grievant filed a grievance and requested that the disciplinary action be reversed. In his decision, the hearing officer upheld the agency's disciplinary action. The hearing officer did not modify his decision.

The relevant policy, the Department of Human Resource Management's Policy No.2.30, defines Workplace Harassment as "Any unwelcome verbal, written or physical contact 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." That policy also defines Sexual harassment as "Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employees (third party)." Also DHRM Policy 1.60 states as its objective, "It is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive.

### DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

DHRM Policy No 2.30, Workplace Harassment, and DHRM Policy No. 1.60, Standards of Conduct, provide guidance to agencies for handling workplace behavior and for taking corrective action. DHRM has the authority to address the hearing officer's interpretation and application of policy issues.

In the instant case, agency officials did not find evidence to support the female's allegations that sexual harassment occurred. Rather, they determined that the grievant's behavior in the workplace was disruptive and that he was using inappropriate language in the workplace. For those violations they issued to him the lowest level of disciplinary action, a Group I Written Notice.

In his decision, the hearing officer stated, in part, the following:

There is no evidence of sexual harassment in this case. Grievant was unaware of the female's presence in an adjoining room during the conversation. None of the males in the room, including the captain and the shift supervisor, objected to the subjects being discussed and no one asked grievant to stop the conversation. The

female did not object to the conversation, did not leave the trailer at any time during the conversation, and did not make her presence known until after the conversation had ended. More significantly, the female had repeatedly demonstrated in the past that she was not only willing to participate in such talk but also to initiate such conversations. Grievant testified that the female crew member had initiated sexually-oriented conversations with the crew including one instance when she discussed her sexual relationship with her boyfriend. The agency did not rebut this testimony and did not call the female crew member as a witness. The captain corroborated that the female was not a stranger to sexually-oriented talk, stating that she had said equally bad things in the past.

The hearing decision continued, in part, as follows:

However, the bases for the agency's decision to discipline grievant were that such conversations are inappropriate in the workplace, and that they are particularly inappropriate in an office to which the public has access.

Concerning the issues raised by the grievant, this Agency finds that the hearing officer properly addressed all relevant issues and considers these arguments without merit. The intent of the policy is to hold employees accountable for ensuring a work environment that is free of harassment and use of inappropriate language. As such, supervisors who do not take appropriate action may be subject to disciplinary action. The evidence supports that, when notified, management officials acted responsibly and in a timely manner to ensure that the activity about which the employee complained was investigated promptly and the appropriate corrective action was taken. This Agency concurs with the interpretation and application of the relevant policy by the hearing officer and therefore has no basis to interfere with the execution of the decision.

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Ernest G. Spratley  
Manager, Employment Equity Services