Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: 07/20/06; Decision Issued: 07/28/06; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8380; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 08/10/06; Reconsideration Decision issued 10/23/06; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 08/10/06; DHRM Ruling issued 01/18/07; Outcome: HO's decision affirmed .**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8380

Hearing Date: July 20, 2006
Decision Issued: July 28, 2006

PROCEDURAL HISTORY

On March 29, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for approaching a female student along with his Supervisor about having the Student model for a boxing calendar. Grievant also approached other women and asked if they would be interested in posing for the calendar.

On April 27, 2006, 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 June 13, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 20, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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:

Virginia Polytechnic Institute and State University employed Grievant as a Residential Mail Supervisor until his removal effective March 29, 2006. He had been employed by the University for approximately 18 years. Approximately 16 employees reported to Grievant. Most of those employees were female. He had active prior disciplinary action consisting of a Group III Written Notice with suspension issued on April 8, 2005.[1]

The Student is a 20 year old female student at Virginia Tech. She was a Junior in December 2005. She was working for a student run organization delivering packages throughout the campus. Although the organization was student run, the Student's chain of command included University employees.

[1] Agency Exhibit 6.

Grievant's Supervisor was involved in a youth boxing organization.[2] His organization was attempting to raise funds by producing and selling a calendar with pictures. The Supervisor wanted to find women willing to model for the pictures.

On December 9, 2005, Grievant and the Supervisor were walking by the Student's office when Grievant indicated to the Supervisor that he may be interested in speaking with the Student about the boxing calendar. Grievant and the Supervisor entered the Student's office. After Grievant introduced the Supervisor to the Student, the Supervisor began talking about the boxing calendar. The Supervisor explained he was involved in a boxing organization and wanted to raise funds for the organization by creating a boxing calendar. He said he wanted to obtain models to pose in pictures for the calendars. The pictures would be tastefully done with the women wearing "short shorts" or bikinis. He asked the Student if she would be interested in posing for the calendar. The conversation lasted fewer than ten minutes.

During her conversation with the two men, the Student felt uncomfortable.[3] She felt that asking her to pose in the calendar was "objectifying" her. The Student grabbed a piece of candy and the Supervisor mentioned to her that she should watch what she was eating. The Student felt offended by the Supervisor's comment because she did not feel it was appropriate for him to comment on what she ate.

The Student was upset by her interaction with Grievant and the Supervisor. The Student used to leave her office door open. After her meeting with Grievant and the Supervisor, the Student began closing and locking her office door. For several months, the Student felt awkward walking into work because she did not wish to encounter Grievant or the Supervisor.[4]

The Student expressed her concerns to her parents and several co-workers. She also informed her supervisor who reported the matter to supervisors higher in the chain of command. The University 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).[5] Group II offenses "include acts and behavior which are

[2] Grievant and the Supervisor were good friends as well as co-workers.

[3] The Student did not ask the men to leave her office. Instead she mentioned about how much work she had to complete and that she needed to resume her work.

[4] Other female employees did not feel uncomfortable working with Grievant.

[5] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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 University adopted Policy No. 1025, Anti-Discrimination and Harassment Prevention Policy, on August 29, 2005. Prohibited acts under this policy include:

> Conduct of any type (oral …)" based upon a person's … gender … and which unreasonably interferes with the person's work or academic performance or participation in University activities ....

Grievant focused on the Student because she was female and he believed she might be interested in posing for the boxing calendar. Grievant was present while the Supervisor discussed the boxing calendar and the Student's participation in the fundraiser. As a consequence of that discussion, the Student regularly began closing and locking her office door and withdrawing from communication with Grievant and others in Grievant's office. By withdrawing into her office, the Student's work performance and participation in University activities was diminished. This interference was unreasonable because the degree to which the Student openly communicated with other employees was significantly reduced. In particular, the Student changed from a very extroverted outgoing employee to a secluded introverted employee. This change materially affected her and the others around her.

Grievant argues he merely introduced the Supervisor to the Student and that it was the Supervisor who engaged in inappropriate behavior.[6] Grievant's argument fails. Grievant knew that the Supervisor was trying to raise money by developing a calendar with attractive young women as models. The reason Grievant introduced the Supervisor to the Student was because he perceived the Student as a possible candidate to serve as a model for the Supervisor's calendar. Grievant knew or should have known that the Supervisor would discuss the calendar and the possibility of the Student serving as a model.[7] Grievant took no action to dissuade the Supervisor from discussing the boxing calendar. Thus, is it appropriate to hold Grievant responsible for the topics discussed by the Supervisor when he spoke with the Student.

Grievant contends he had a friendship with the Student sufficient to make him believe she would not object to his introducing her to the Supervisor. The evidence showed that both Grievant and the Student[8] were very friendly outgoing people.

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[6] Grievant testified he was sometimes distracted during the conversation and was looking at items in the room.

[7] Grievant testified he had talked to approximately six other women about the boxing calendar. At least two of the women were very interested in participating, according to Grievant.

[8] A woman working in the office with Grievant often referred to the Student as "Little Buddy" because the Student was often friendly towards her.

Although the Student would speak to Grievant as she would to other co-workers, her friendship with Grievant was not so close as to mislead him into believing she would be accepting of discussions regarding posing for pictures in a boxing calendar.[9]

"Failure to … comply with established written policy" is a Group II offense.[10] Grievant failed to comply with Policy No. 1025 thereby justifying the issuance to Grievant of a Group II Written Notice. An employee with an active Group III Written Notice who receives another Written Notice may be removed from employment. Accordingly, the Agency's decision to remove Grievant must be upheld based on the accumulation of disciplinary action.

The Agency contends Grievant's behavior justifies the issuance of a Group III Written Notice. Failure to follow written policy is a Group II offense and, thus, the level of a Group II offense is the starting point in this case to determine whether that level of offense should be increased or decreased. Policy No. 1025 is similar to DHRM Policy 2.30, *Workplace Harassment*. Violations of DHRM Policy 2.30 may be considered Group I, Group II, or Group III offenses depending on the severity of the behavior.[11] The distinction between a Group I and a Group III offense is often determined by examining the employee's intent to commit the offense. For example, Group III offenses include falsifying records, willfully damaging state property, theft, gambling, and fighting. An employee engaging in this behavior typically intends to misbehave. Group I offenses include excessive tardiness, inadequate work performance, and disruptive behavior. An employee engaging in this behavior may intend to perform his or her duties well but fail to meet the agency's standards.

In Grievant's case, he did not intend to engage in inappropriate behavior. He believed he was being complementary to the Student and helping his Supervisor accomplish a personal task. In other words, Grievant believed he was behaving in a positive, not a negative manner. Grievant did not intend to misbehave as might be the case for employees committing Group III offenses. In the absence of a reason to increase the disciplinary action from a Group II for failure to follow written policy, the disciplinary action against Grievant should remain a Group II.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[12] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the

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[9] Prior to the incident, Grievant and the Student spoke briefly approximately one time per week.

[10] DHRM § 1.60(V)(B)(2)(a).

[11] DHRM § 1.60(V)(B)(3)(n).

[12] *Va. Code § 2.2-3005.*

employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy."

Grievant contends the disciplinary action should be mitigated because he did not know his actions might be considered contrary to policy. It is not necessary for an Agency to notify an employee of examples of every factual basis upon which the employee may be disciplined. The Agency is only obligated to provide the employee with reasonable notice of the applicable policy. In this case, Grievant was given training regarding sexual harassment and informed of Policy No. 1025 or its predecessors. Grievant should have been aware of the language in Policy No. 1025 describing prohibited conduct.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[13]

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 **reduced** to a Group II Written Notice. Based on the accumulation of disciplinary action, Grievant's removal is **upheld**.

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:

[13] Grievant also argued that the Agency failed to comply with its policy regarding investigating the Student's claim. Nothing in Policy No. 1025 states that disciplinary action must be reversed if the Agency fails to comply with all of the investigation provisions of the policy. Thus, if the Hearing Officer assumes for the sake of argument that the University failed to properly investigate the matter, the error was harmless and does not affect the outcome of this case.

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 all of your appeals to the other party and to the EDR Director. 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.[14]

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

[14] 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: 8380-R

Reconsideration Decision Issued: October 23, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Grievant argues the Hearing Officer incorrectly determined the facts. Grievant testified that he wanted the Supervisor to meet the Student and never mentioned they were going to approach the Student about the calendar. Grievant's argument fails because Grievant's objective was to introduce the Supervisor to the Student and also for the Student and the Supervisor to discuss the boxing calendar. Whether it was immediately before entering the Student's office or immediately after entering the room, Grievant initiated discussion of the boxing calendar by raising the topic as something to be discussed. To the extent he may have testified to the contrary, his testimony lacked credibility.

Grievant argues the definition of sexual harassment has changed from the time Grievant was trained on the predecessor policy and the August 29, 2005 policy and, thus, mitigating circumstances exist. Grievant's argument is untenable because in order for an agency to meet its burden of proof, it is not necessary for the agency to show that the employee had actual specific knowledge of the terms of the policy that the employee violated. Once the agency has met its burden of proof to show a violation of policy, an employee may establish mitigating circumstances if the employee can show he had no reason to believe his behavior might be governed by policy. In this instance, Grievant's prior training in sexual harassment informed him that the University had policies governing interactions between employees based on gender. Grievant has not established he had no knowledge his behavior might be governed by policy. Thus,

Grievant has not established mitigating circumstances based on the absence of notice of Policy 1025.

Grievant contends he did not know the Supervisor would bring up the issue of attire for the boxing calendar. Grievant's argument fails because he knew the calendar would consist of attractive women wearing bathing suits or short shorts prior to initiating the discussion between the Supervisor and the Student regarding the calendar.

Grievant argues he did not act contrary to Policy 1025 because the University did not establish that the Student's work performance was unreasonably affected by his behavior. The policy does not define work performance in as narrow terms as Grievant would prefer. Work performance should include how an employee interacts with co-workers. In this case, the Student transformed from an extroverted employee to someone walking a longer route in order to avoid the mailroom and then locking the door to her office to control who entered her office. The Student's work performance was materially affected by her interaction with Grievant and Grievant's Supervisor.

Grievant argues his offense can rise no higher than a Group I offense. As explained in the original hearing decision, Grievant's behavior was contrary to policy thereby justifying the issuance of a Group II offense.

Grievant argues fairness, objectivity, his long tenure, or his satisfactory work performance should be a basis to mitigate the disciplinary action. Although these are factors an agency may consider under the Standards of Conduct when it determines whether to mitigate disciplinary action, the Hearing Officer must apply the standard set forth in the EDR Rules for Conducting Hearings. Fairness, objectivity, long tenure or otherwise satisfactory work performance (without more) are not listed as reasons to mitigate disciplinary action. Accordingly, the Hearing Officer cannot mitigate the disciplinary action absent some amendment to the EDR Rules.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied.**

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 DHRM, 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Virginia Polytechnic Institute and
State University

January 18, 2007

The grievant, through his representative, has requested an administrative review of the hearing officer's decision in Case No. 8380. The grievant was issued a Group III Written Notice and dismissed from employment. He filed a grievance to have the disciplinary action reversed. In a decision dated July 28, 2006, the hearing officer reduced the Group III Written Notice with termination to a Group II Written Notice, "Failure to …comply with established written policy." However, the grievant remained terminated because he had an active Group III Written Notice in his file. The grievant appealed the hearing decision on the bases that (1) the hearing officer state on page 6 of his decision there is no basis for mitigation based upon Grievant's claim that he did not know his actions might be considered contrary to policy; (2) the Sexual Harassment policy states that the misconduct must unreasonably interfere with the person's work performance; (3) grievant believes that the instant offense would be a Group I offense; (4) the decision finds no basis for mitigation in this case. The agency head of the Department of Human Resource Management (DHRM) has asked that I respond to this request for an administrative review.

FACTS

The Virginia Polytechnic Institute and State University employed the grievant as a Residential Mail Supervisor until his removal on March 29, 2006. He had been employed by the University for about 18 years. Sometime in December 2005, the grievant and his supervisor entered the office of a student and the grievant introduced the student as someone who might be interested in posing as a model for a boxing calendar that the supervisor was promoting. The supervisor stated that the attire for the models would be shorts or bikinis. Apparently, the student felt uncomfortable during the conversation and felt that asking her to pose for the calendar was "objectifying" her.

As a result of the conversation with the grievant and his supervisor, the student started the practice of closing and locking her office door. She also felt awkward walking to work because she did not want to encounter the supervisor and the grievant along the way. She later told fellow students and her parents about the contents of the conversation. In addition, she told her supervisor and an investigation was conducted. After the investigation, agency officials took disciplinary action. The grievant was issued a Group III Written Notice with termination.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that 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. In addition, DHRM's Policy No. 2.30, Workplace Harassment, states as it purpose "To educate employees in the recognition and prevention of illegal workplace harassment and to provide an effective means of eliminating such harassment from the workplace." That policy 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." Policy 2.30 further 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, or co-workers or non-employee (third party)." Finally, Policy 2.30 states, "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." In addition, VPI has its own policy that parallels the provisions and conditions of the Workplace Harassment Policy.

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. 1.60, Standards of Conduct, and in the instant case, DHRM Policy 2.30, Workplace Harassment, provide guidance to agencies for handling workplace behavior and for taking corrective action. Also, VPI's Anti-Discrimination and Harassment Prevention Policy defines prohibited acts which warrant disciplinary action. DHRM has the authority to address the hearing officer's interpretation and application of policy issues.

In his appeal, the grievant raised four issues that he felt warranted reviewing. Upon review of those points and the hearing officer's original and reconsideration decisions, we find

that the grievant's objections are without merit. All the issues raised by the grievant as a result of the hearing officer's original decision were fully and adequately addressed in the hearing officer's reconsideration decision. It appears that the basis for the grievant's appeal is that he disagrees with the hearing officer's decision.

In summary, the Department of Human Resource Management does not disagree with the hearing officer's interpretation and application of the relevant policies in making his decision. Therefore, there are no bases for DHRM to interfere with the hearing officer's decision.

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Ernest G. Spratley
Manager, Employment Equity Services