

Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: 09/06/06; Decision Issued: 09/27/06; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8381; Outcome: Employee received partial relief; **Judicial Review: Appealed to the Circuit Court, Montgomery County, October 2006; Outcome: HO's decision found contradictory to law – decision reversed (04/12/07); Judicial Review: Appealed to the Court of Appeals, May 18, 2007; Outcome pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8391

Hearing Date: September 6, 2006
Decision Issued: September 27, 2006

PROCEDURAL HISTORY

On March 29, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal effective March 29, 2006 for approaching a female student and asking about her interest in posing in a boxing calendar. On April 18, 2006, Grievant timely filed a grievance to challenge the University's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 23, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 6, 2006, a hearing was held at the University's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 Business Manager A until his removal effective March 29, 2006. He had been employed by the University for approximately 29 years. He received favorable performance evaluations. On October 4, 2004, Grievant received an Acknowledgement of Extraordinary Contribution because of one of his suggestions to improve the University's operations.¹ Grievant had active prior disciplinary action consisting of a Group II Written Notice with suspension issued on April 8, 2005.²

Grievant is a volunteer coach, trainer, and board member of a Boxing Club in a nearby locality. The Boxing Club is a non-profit organization intended to benefit disadvantaged youth by helping them develop self-esteem and self-discipline. The average age of the boxers is 12 years old.

¹ Grievant Exhibit 1.

² Agency Exhibit 1.

In order to provide funds to operate the Boxing Club, the board members devised various ways to raise money. For example, the Boxing Club organized car washes and golfing tournaments. At some point, board members started discussing the possibility of producing a boxing calendar and selling the calendar to businesses in order to raise money for the Club. One of the board members was planning on running for political office and insisted that any such calendar must be in "good taste." He did not wish to have a calendar sold that might be used against him during his campaign for office. Grievant concurred that the calendar must be presented in good taste. The calendar would show photographs of attractive young women posing in the context of boxing activities. One of the other board members became ill and the board suspended its consideration of a boxing calendar while the board member was ill.

The Residential Mail Supervisor reported to Grievant and worked in the mail room located in a building a short distance from the building in which Grievant's office was located. During a time when the Residential Mail Supervisor was in Grievant's office, Grievant received a telephone call from a caller who spoke about the boxing calendar. The Residential Mail Supervisor overheard the conversation and became enthusiastic about the project even though he was not affiliated with the Boxing Club. When women students came to the mail room he would ask some of them if they might be interested in appearing in the calendar.³ He acted on his own initiative and not at Grievant's request.

On another day when the Residential Mail Supervisor was in Grievant's office, Grievant mentioned that the calendar fundraiser was in the initial stages. Grievant learned the Residential Mail Supervisor had been discussing the calendar with others. Grievant asked the Residential Mail Supervisor to refrain from further discussing the calendar. After that meeting, the Residential Mail Supervisor discontinued asking students about posing for the calendar.

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.

On December 9, 2005, Grievant and the Residential Mail Supervisor were leaving the mail room when the Residential Mail Supervisor told Grievant that he wanted Grievant to meet the Student. Grievant and the Residential Mail Supervisor entered the Student's office. The Residential Mail Supervisor introduced Grievant as his supervisor. The Residential Mail Supervisor said to Grievant, "she might be interested in your fundraiser."⁴ Grievant told the Student he was involved in the Boxing Club and the Club was looking into possible fundraising ideas. Grievant said he wanted

³ The Residential Mail Supervisor asked approximately five or six female students.

⁴ The Residential Mail Supervisor initiated discussion of the calendar even though Grievant had previously explained to him that the calendar fundraiser was in an initial planning stage.

to obtain models to pose in pictures for the calendars. The pictures would be tastefully done with the women wearing “short shorts” or bathing suits. He asked the Student if she would be interested in posing for the calendar. The conversation lasted between eight and fifteen minutes.

During her conversation with the two men, the Student felt⁵ uncomfortable.⁶ She felt that asking her to pose in the calendar was “objectifying” her. The Student grabbed a piece of candy and Grievant mentioned to her that she should watch what she was eating. The Student felt offended by Grievant’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 Residential Mail Supervisor. The Student used to leave her office door open. After her conversation with Grievant, 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 Residential Mail Supervisor. She would walk a longer route into her office in order to avoid the possibility of encountering Grievant and the Residential Mail Supervisor in the mail room.

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).⁷ 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 University adopted Policy No. 1025, Anti-Discrimination and Harassment Prevention Policy, on August 29, 2005.⁸ Prohibited acts under this policy include:

⁵ In a written statement, the Student said, “[t]he men started to talk about topics that made me uncomfortable.” Agency Exhibit 4.

⁶ 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.

⁷ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ Grievant stipulated to having notice of the policy.

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 intended to select only women to appear in the boxing calendar. He focused on the Student because she was a young attractive female. Grievant asked the Student if she wished to pose for the boxing calendar wearing short shorts or a bathing suit. The Student felt uncomfortable being asked to pose wearing short shorts or a bathing suit because she felt it was inappropriate and she did not believe the calendar would be in "good taste" as claimed by Grievant. As a result of her conversation with Grievant, the Student regularly began closing and locking her office door and withdrawing from communication with other employees working in offices next to her 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.

The University has presented sufficient evidence to support the issuance of a Group II Written Notice. Accumulation of a second active Group II Written Notice "normally should result in discharge."⁹ Accordingly, Grievant's removal from employment must be upheld.

The University 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.¹⁰ 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 University's standards.

In Grievant's case, he did not intend to engage in inappropriate behavior. He intended to respond to the Residential Mail Supervisor's comments and explain a

⁹ DHRM § 1.60(VII)(D)(2)(b).

¹⁰ DHRM § 1.60(V)(B)(3)(n).

project in which he was interested. 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.

Grievant contends the Student did not fill out a formal written complaint as required by Policy 1025 and that the University has not complied with the policy requiring a formal written complaint. This argument fails because there is nothing in the *Standards of Conduct* requiring the University to comply with investigation policies prior to taking disciplinary action. Although the University's failure to comply with investigative procedures may be evidence in a hearing, it is not a condition preventing the University from taking disciplinary action.

Grievant contends the Student "overreacted" to his comments. He argues a reasonable and prudent person would not have reacted in the way the Student reacted. Within the context of harassment based on gender, Grievant's argument is to some extent true. The Student did not believe the calendar would be done in "good taste." The evidence is clear that Grievant and the other board members intended only to publish a calendar containing pictures of models dressed in "good taste" and that could be posted by business owners in their businesses and in public view. In addition, the Student felt uncomfortable, in part, because of the ages of the two men in her office. They were more than twice the Student's age. Whether there was a violation of policy did not depend on the ages of the parties involved. Furthermore, the Student felt uncomfortable because of the sizes of the men. She is petite and was intimidated because she was alone in an office with two much larger men. Whether there was a violation of policy did not depend on the relative sizes of the individuals involved. When these factors are considered, the Student overreacted.

If the Hearing Officer disregards the Student's behavior to the extent she overreacted, the remaining facts support the University's position that the Student's reaction was reasonable. By any objective standard, it was inappropriate for a female to be asked to pose wearing short shorts or a bathing suit for a calendar unrelated to the University's mission. Although some women would not be offended by being asked to pose in a calendar, Grievant should have known that some other women might be offended and feel objectified because of their physical appearance and gender. Although Grievant's behavior was not sexual harassment in the legal sense because it was neither severe nor pervasive, his actions could have been a piece of the foundation of a sexual hostile work environment claim. For this reason, Grievant should have avoided asking the Student to pose in the boxing calendar.

Mitigation

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....”¹¹ Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the 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 did not initiate the discussion with the Student regarding the calendar. The Residential Mail Supervisor began discussing the project and suggested the Student might be interested. This would appear to be a mitigating factor that might otherwise reduce the disciplinary action. There are several aggravating factors, however. Grievant supervised the Residential Mail Supervisor. Grievant could have reminded the Residential Mail Supervisor that Grievant had told the Residential Mail Supervisor not to pursue discussions about the calendar. Grievant could have ended the conversation at that point. If Grievant did not wish to remind the Residential Mail Supervisor, Grievant could have told the Student that the boxing calendar was a project in the early stages of consideration and he would let her know if it developed further. Instead, Grievant described the boxing calendar and asked the Student if she would be interested in posing for the calendar. In short, although the Residential Mail Supervisor initiated the topic of the boxing calendar, Grievant chose to describe the calendar and ask the Student’s involvement in the project.

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

DECISION

For the reasons stated herein, the University’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Based on the accumulation of disciplinary action, Grievant’s removal from employment 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:

¹¹ Va. Code § 2.2-3005.

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 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.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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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