

Issue: Group I Written Notice (workplace harassment); Hearing Date: 12/07/06;
Decision Issued: 12/11/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8462; Outcome: Employee granted full relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8462

Hearing Date: December 7, 2006
Decision Issued: December 11, 2006

PROCEDURAL HISTORY

On August 4, 2006, Grievant was issued a Group I Written Notice of disciplinary action for:

On 7/19/06 you admitted that you made the following statement to [a Subordinate Employee]; "That you had heard she had gone to bed with your husband and also with [Grievant's Supervisor]. This comment was unwelcomed by [the Subordinate Employee] and it created an intimidating work environment. This statement was unprofessional and unwelcomed and considered to be Workplace Harassment.

On August 21, 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 she requested a hearing. On November 6, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Grievant's Representative
Agency Party Designee
Agency Advocate
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:

The Department of Corrections employs Grievant as a Food Operations Manager B at one of its Facilities. The purpose of her position is to "manage the delivery of food services." Grievant supervised the Subordinate Employee who Grievant considered to be a friend and who Grievant had known for many years.¹ Grievant, Grievant's Supervisor and other Agency employees learned of a rumor among staff that the Subordinate Employee had sexual relations with Grievant's Husband and Grievant's Supervisor.

¹ The Subordinate Employee no longer worked for the Agency at the time of the hearing.

On July 19, 2006, the Subordinate Employee entered Grievant's office. They began a conversation. During that conversation, Grievant told the Subordinate Employee, "it's a lot of rumors going around on you, from going with my husband to going with [name], [Grievant's Supervisor]."² Grievant made this statement because she believed she was following her "open door" practice of speaking to employees reporting to her. Grievant believed she was being "honest and professional" with the Subordinate Employee. The Subordinate Employee became concerned regarding Grievant's ability to evaluate her and wrote a letter to Agency managers regarding her concern.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."³ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

Violation of DHRM Policy 2.30, *Workplace Harassment*, can be a Group I, Group II, or Group III offense depending on the nature of the violation. DHRM Policy 2.30, *Workplace Harassment*, 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, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability**, 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. (Emphasis added).

When Grievant spoke to the Subordinate Employee, Grievant did not act on the basis of the Subordinate Employee's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Accordingly, Grievant

² Although Grievant may have used the phrase, "going with" both Grievant and the Subordinate Employee understood the phrase to mean having sex.

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

did not engage in workplace harassment as defined in DHRM Policy 2.30 and as alleged in the Written Notice. The Written Notice must be reversed.

The Agency's Written Notice to Grievant incorrectly described the Agency's basis for taking disciplinary action. Although the Written Notice stated Grievant had engaged in workplace harassment, the evidence presented during the hearing showed that the Agency's actual basis to discipline Grievant was its belief that her work performance was unsatisfactory. Inadequate or unsatisfactory work performance is a Group I offense.⁶ In other words, the Agency believed that Grievant, as a supervisor, should have exercised better judgment and avoided asking a subordinate about a rumor involving sexual behavior between the subordinate and Grievant's husband.

Procedural Due Process is inextricably intertwined with the grievance procedure. The *Rules for Conducting Grievance Hearings* state:

In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principal, the *Rules* cite O'Keefe v. USPS, 318 F.3d 1310 (Fed. Cir. 2002). In O'Keefe, the agency removed an employee with the general charge of "improper conduct/fraudulent use of personal identifiers." The Court reversed the agency's action because the facts and reasons for the removal were not written in the Notice of Proposed Removal given to the employee.

To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. Whether an agency has met this standard is often a matter of degree.

The Written Notice describes Grievant's conduct as "Workplace Harassment", "unwelcomed" and creating "an intimidating work environment." As part of her Grievance Form A, Grievant wrote, "This was not a type of harassment." The First Step Respondent referred to DHRM Policy 2.30, *Workplace Harassment*. Grievant advanced her grievance, in part, because "The response that I gave the employee was not [intended to be] harassment, hardship or uneasiness." She added, "I feel that my response was not [inappropriate] and was not work harassment." The Second Step Respondent referred to workplace harassment and then quoted the definition contained in DHRM Policy 2.30 including the language "on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability." Grievant advanced her grievance beyond the Second Step, because "I did not harass this employee."

⁶ DOC Operating Procedure 135.1(X)(4).

Based on the questions presented by Grievant's Representative, it is clear to the Hearing Officer that Grievant expected to defend a workplace harassment allegation. In particular, Grievant's Representative attempted to prove that Grievant had not created a hostile work environment. Grievant's defense included some reference to Grievant's judgment about asking a subordinate about the rumor, but the defense did not focus on defending Grievant's judgment. For example, Grievant defended the Written Notice by saying her work performance was adequate, but the weight of her defense was focused on showing she did not create a hostile work environment as a form of workplace harassment. Because the weight of her defense was focused on workplace harassment, it is clear that Grievant did not receive adequate notice of the charge against her. Had the Agency properly alleged its objection to Grievant's judgement in the Written Notice, Grievant would have been able to focus her defense on that issue.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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:

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.⁷

[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

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