

Issue: Workplace violence; Hearing Date: 12/11/06; Decision Issued: 03/28/07;
Agency: Department of Social Services; AHO: Carl Wilson Schmidt, Esq.; Case No.
8470; Outcome: No relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8470

Hearing Date: December 11, 2006
Decision Issued: March 28, 2007

PROCEDURAL HISTORY

On April 24, 2006, Grievant timely filed a grievance. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 13, 2006, the EDR Director issued Ruling No. 2007-1391 qualifying Grievant's grievance for hearing solely on the issue of whether the Agency has misapplied or unfairly applied the workplace violence policy. On November 9, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 11, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate

ISSUE

1. Whether the Agency misapplied or unfairly applied the workplace violence policy.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency misapplied or unfairly applied the workplace violence policy. 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 Social Services employs Grievant as a Support Enforcement Specialist Senior at one of its Facilities. Grievant has been employed by the Agency for approximately 17 years. She began reporting to the Supervisor in November 2005. The Supervisor¹ reported to the District Manager.

On December 6, 2005, Grievant spoke with the Supervisor in the Supervisor's office. Grievant told the Supervisor that Grievant had collected a lump sum payment of \$10,307. The Supervisor stood up and said "very good" and kissed Grievant on the neck. Grievant left the office.²

On several occasions, the Supervisor informed her coworkers including Grievant that the Supervisor was friends with the Agency's Commissioner. Their friendship was long standing and did not arise because they presently worked for the same Agency. On December 8, 2005, Grievant walked into the Supervisor's office while the Supervisor was looking at her computer. The Supervisor said she was reading an email from the Commissioner. The Supervisor said she had sent the Commissioner an email with a prayer. The Supervisor read the prayer to Grievant. On September 11, 2006, the Supervisor met with Grievant and discussed a problem both of them had with payroll. In June and July 2006, Grievant was out of work on medical leave. The Supervisor was also out of work during that time. Both experienced problems with their payroll checks. The Supervisor told Grievant that she had called [First name of the Agency Head] and told him about the problem and about being irritated with the way the problem was handled by the Human Resource staff. Grievant perceived the Supervisor's comments to be intended to show that the Supervisor had a close personal relationship with the Agency Head. Other employees also had overheard the Supervisor referring to the

¹ On many occasions, the Supervisor was loud, gregarious, and outgoing.

² The District Manager first learned of this allegation once Grievant filed a grievance.

Commissioner by his first name in a manner intended to show her relationship with the Commissioner.³

Grievant filed a grievance on April 24, 2006 expressing her concerns about the Supervisor. The Supervisor learned Grievant filed a grievance against her on May 1, 2006.

On April 26, 2006, Grievant and the Supervisor were speaking in the second floor hallway of their work building. The Supervisor used her finger to poke Grievant in her shoulder several times during the discussion. Grievant drafted a memorandum dated April 26, 2006 and sent it to the Supervisor. The memo described how the Supervisor poked Grievant and stated, "Please do not establish any physical contact in the future."⁴ Grievant gave a copy of the memorandum to the District Manager. The District Manager met with the Supervisor and counseled the Supervisor regarding touching other employees even though the Supervisor denied having hit Grievant.

The District Manager felt that she was receiving information from all of her staff that she did not need to hear directly. She wanted staff to go through their supervisors with work related issues.⁵ On May 2, 2006, Grievant attended a team meeting during which the Supervisor told staff to follow the chain of command. Grievant was instructed that any problems, issues, or grievances should go through the employee's immediate supervisor. On May 5, 2006, the Supervisor sent Grievant an email stating, "Effective immediately: All communiqué for the [District Manager] and myself, from you should be sent to me and I will forward it to the [District Manager] in accordance with the chain of command."⁶

During the step process of the grievance, the Agency offered to transfer Grievant to another office or engage in mediation with the Supervisor. Grievant declined the Agency's offer.

As a result of Grievant having filed a grievance, the Agency assigned an individual to investigate Grievant's allegations regarding the Supervisor. The investigator spoke with various staff. The investigator found that the Supervisor had many favorable qualities such as being a creative thinker with excellent ideas, very competitive, and having a strong desire to improve operations at the Facility. The investigator also found evidence of inadequate behavior. Several of the Supervisor's inadequacies were consistent with Grievant's objections with the Supervisor. The

³ One witness testified the Supervisor suggested she could get an employee a promotion given her close relationship with the Commissioner.

⁴ Grievant Exhibit H.

⁵ The District Manager was attempting to improve the work process. She was not trying to stifle complaints from Grievant about how the Supervisor supervised employees.

⁶ Grievant Exhibit W.

investigator found no hostile work environment existed, but that the Supervisor needed to undertake “some behavior modifications.” The investigator wrote:

She is to be reminded that she is a supervisor and there are limitations to the type of relationship she should maintain with her staff; consequently, she will be required to take agency-sponsored courses in the principles of supervision. Additionally, she will be required to tone down her boisterous manner, as the office is a place of work. Although, it is normal that staff will periodically engage in non-work related conversations, it should never be disruptive and must be kept to a minimum if outside of breaks or lunch periods.⁷

Several persons interviewed, however, perceived the Supervisor lacked professionalism by expressing loud and disruptive behavior. She also had difficulty keeping her personal life out of the workplace.

On September 13, 2006, the Supervisor was speaking with another employee. As the Supervisor left the employee’s work station, the Supervisor said “Why would I get into an elevator with a non-believer ... I’ve got enough non-believers around me anyways, I’d be crazy to get in an elevator with one.” Grievant overheard the Supervisor’s comment and believed the Supervisor was intending for Grievant to overhear the conversation and, thus, criticize Grievant’s religious beliefs.⁸

On September 15, 2006, the Supervisor was speaking with another employee whose workstation was about three feet from Grievant’s work area. The Supervisor said, “God is blessing me, this time all I had to do was stand still. It is a shame that people don’t want to hear the name of Jesus. I hope my haters keep on hating me because the more they hate on me the more I get blessed.” The Supervisor continued her conversation saying, “God is taking care of my haters one by one. Let me tell you about my girl friend that was beat up this weekend” Grievant was upset by the Supervisor’s comments and left the building. Grievant called the District Manager and asked if Grievant would be safe in the office during the next week when the District Manager was scheduled to be out of the office. The District Manager said that Grievant should take whatever action necessary to make her feel safe.

During an employee team meeting on September 26, 2006, the Supervisor continuously berated the Operations Manager. Grievant attempted to change the tone of the meeting. After approximately 30 minutes of what Grievant perceived as unprofessional comments by the Supervisor, Grievant asked that the meeting be adjourned. After the meeting, the Supervisor walked up to Grievant and placed her left hand on Grievant’s shoulder and said, “This was a hard meeting for you ... you worked

⁷ Grievant Exhibit Q. The Supervisor attended courses designed to improve her knowledge as a manager.

⁸ Mr. KE also overheard the Supervisor’s comments but he did not know to whom the Supervisor was referring. Another employee also overheard the Supervisor’s statement.

hard in this meeting.” Grievant responded, “I just wanted to keep it professional and not personal.”

On October 16, 2006, Grievant and the Supervisor met to discuss Grievant’s evaluation.⁹ The Supervisor told Grievant that the office missed its goal by \$400 because Grievant was out of the office. The Supervisor hit Grievant on her right arm and said, “I told you I would find someone to blame for the office not meeting our goal.”¹⁰

On October 31, 2006, following a meeting with the Grievant and another employee, the Supervisor hit Grievant on the arm.

Grievant presented testimony from several other employees formerly supervised by the Supervisor. Several employees sought transfer or left the Agency in order to avoid being supervised by the Supervisor.

Although Grievant and several other employees objected to the Supervisor’s behavior, no evidence was presented suggesting the Supervisor unfairly evaluated Grievant or other employees. The Supervisor was able to evaluate her subordinates without considering any conflicts those employees had with her.

CONCLUSIONS OF POLICY

DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;

⁹ The Supervisor rated Grievant’s overall job performance as an extraordinary contributor.

¹⁰ Although it is not clear Grievant considered the Supervisor’s comments to be in jest, it is likely that the Supervisor intended her comments to be in jest and touched Grievant in what the Supervisor intended to be a playful manner.

- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and
- retaliating against any employee who, in good faith, reports a violation of this policy.

DHRM Policy 1.80 is violated if an employee subjectively experiences a supervisor's conduct as threatening or intimidating. Based on the evidence presented, it is clear that one of the Supervisor's approaches to working with subordinate employees is to intimidate them. For example, the Supervisor communicated with her hands and by touching other employees. When she became angry, the Supervisor's physical communications became hostile. By poking, hitting, and touching Grievant, the Supervisor acted inappropriately. The Supervisor used her friendship with the Commissioner to portray that she had additional power above and beyond the power normally associated with her position.

In order to show that the Agency misapplied or unfairly applied the workplace violence policy, Grievant must show that the Supervisor engaged in workplace violence and the Agency failed to take appropriate action in response to that workplace violence. Grievant has established that the Supervisor engaged in workplace violence but has not established that the Agency misapplied or unfairly applied the workplace violence policy.

DHRM Policy 1.80 sets forth several expectations for Agency:

Each agency is expected to create and maintain a workplace designed to prevent or deter workplace violence through the development of agency policies and procedures that articulate how this policy will be implemented in their agency. At a minimum, each agency must:

- communicate a policy statement prohibiting workplace violence, and agency procedures for addressing such situations;

- designate a coordinator to be responsible for the overall implementation of a workplace violence prevention program;
- assess the agency's vulnerability for workplace violence (threat assessment);
- develop and implement a plan to address and prevent workplace violence (crisis management plan);
- establish a mechanism for employees to report threats that protects the safety and anonymity of anyone who comes forward with concerns about a threat or act of violence;
- **protect victims of workplace violence;**
- provide for the training of supervisors and managers in recognizing conditions that might contribute to workplace violence, and to properly address and respond to these situations;
- provide training to employees about recognizing and responding to potentially violent or violent situations in the workplace;
- establish relationships with appropriate supportive services that may need to be contacted in response to workplace violence; and
- provide information to employees about resources and services available to them in response to workplace violence, and the potential for domestic violence to enter the workplace. (Emphasis added)

The Agency took appropriate action to investigate Grievant's concerns about the Supervisor. When the District Manager learned of Grievant's claim that the Supervisor touched her, the District Manager counseled the Supervisor to refrain from touching employees. The District Manager had spoken to the Supervisor about not speaking loudly when discussions became heated. The Agency's investigator reached logical conclusions and made appropriate recommendations which the Agency implemented. The Agency began mentoring the Supervisor when necessary and required her to attend training designed to enhance her supervisory skills.

Agency managers are not responsible for failing to stop workplace violence for which they are unaware. The Supervisor engaged in several instances of inappropriate behavior after being counseled, but Grievant did not report those actions to the District Manager as she had done in the past. Grievant interpreted the "chain of command" instruction she received to mean that any complaints she had with the Supervisor had to be taken first to the Supervisor who then decided whether to relay the information up the chain of command. This was not the intent of Agency's managers, however. The

District Manager initiated the chain of command instruction because employees were taking issues relating to the Agency's work product directly to the District Manager rather than trying to seek resolution from an immediate supervisor. The District Manager did not intend to stop Grievant from complaining to the District Manager about the Supervisor, although Grievant may have perceived the Agency's actions as an attempt to stifle her complaints. Enforcing the chain of command regarding the flow of work is within an agency's management discretion. In this case, enforcing the chain of command reporting resulted in a misunderstanding between Grievant and Agency managers. This misunderstanding is not a violation of DHRM policy 1.80.

Recommendation

The Hearing Officer recommends that the Agency, in its sole discretion, establish a direct line of communication between Grievant and the District Manager or other appropriate manager to enable Grievant to communicate difficulties she is having with the Supervisor's behavior. Grievant should continue to rely on the chain of command to resolve policy issues, but be permitted to speak directly to Agency Managers regarding her concerns about how she is being supervised by the Supervisor.

The Hearing Officer recommends that the Agency, in its sole discretion, set forth written instructions to the Supervisor regarding her interactions with and supervision of Grievant (and other subordinates). The Agency should take into consideration Grievant's concerns.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

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.¹¹

[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

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.