Issue: Group II Written Notice (workplace harassment); Hearing Date: 04/19/07; Decision Issued: 06/12/07; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8565; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8565

Hearing Date: April 19, 2007
Decision Issued: June 12, 2007

PROCEDURAL HISTORY

On December 4, 2006, Grievant was issued a Group II Written Notice of disciplinary action for violation of DHRM policy number 2.30, Workplace Harassment. On December 28, 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 March 19, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 19, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Maintenance Supervisor at one of its facilities.

The Physical Therapist Assistant (PTA) began working for the Agency on August 25, 2006. When Grievant would see the PTA walking down the hall or in her office, Grievant would sometimes say to her, "I could be your best friend."[1] Usually the PTA would ignore Grievant's comment. She did not ask him to stop asking her that question. On one occasion she responded, "if what?" Grievant did not reply.

The PTA had been convicted of driving under the influence of alcohol on two occasions. The Court ordered that an ignition lock be placed on her vehicle. In order to start the vehicle, the PTA had to breathe into a tube, permit the instrument to measure the alcohol in her breath, and then start the vehicle. The ignition lock system was installed on the PTA's vehicle in October 2006.

[1] PTA testified that Grievant made this statement several times although she did not know the number.

The PTA had difficulty starting her car one day.[2] She told other staff that the oil light was on. The Receptionist called Grievant for assistance. When Grievant came to the front desk, the PTA gave him the keys to her vehicle. Grievant attempted to start the vehicle but he was unable to do so. Grievant returned to the Receptionist's desk and told the PTA that he could not start the car. She said that was OK. Grievant returned her keys. The PTA did not tell Grievant that an ignition lock had been placed on her vehicle and that she knew he would not be able to start the vehicle.

On either November 28, 2006 or November, 29, 2006, the PTA forgot to turn off the headlights to her vehicle when she left the parking lot and entered her building in the morning. When she returned to the vehicle in the afternoon, the vehicle battery would not start her vehicle. She returned to the building, walked inside and spoke to Grievant. She asked Grievant if he had any jumper cables. He said no and walked to another part of the facility to locate some jumper cables. Once he found jumper cables, he took them to the PTA's vehicle. He attached the cables between his vehicle and the PTA's vehicle. The PTA's vehicle would not start. The PTA used her cell phone to call the company that installed the ignition lock system.[3] An employee of the company told the PTA what to do. The PTA told Grievant to remove the battery cable for 10 seconds and then re-attach it. Grievant did so. The PTA said, "I got to blow into this" referring to the ignition lock system. That was a first time Grievant learned that the PTA had an ignition lock system on her vehicle. The PTA blew into the sensor and the vehicle started. Grievant took the jumper cables back into the building. The PTA drove away. Grievant delayed leaving work for approximately one hour and forty five minutes in order to assist the PTA.

Grievant began thinking about what had happened. He concluded that the PTA had improperly used him to circumvent the ignition lock system on her vehicle.[4] He did not believe it was appropriate for the PTA to delay his departure from work in order to help her start her vehicle.

On either November 29, 2006 or November 30, 2006, the PTA walked to the area where the time clock was located. She intended to leave for the day. Grievant came around the corner and saw the PTA. Grievant continued walking past the PTA to his office. Shortly thereafter Grievant walked back to where the PTA was standing. Grievant was "hyper" and "excited" and said in a loud manner, "you're going to regret not taking me up on my offer; you're going to want to beat your own ass."[5] Grievant had

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[2] It is unclear what date this first incident occurred, but it was after the PTA's ignition lock system was installed.

[3] Grievant did not know who the PTA called.

[4] Grievant later reported the PTA to the organization involved in installing the ignition lock system. The organization was informed that the PTA was attempting to circumvent her ignition lock system. Grievant testified he asked his son to call the organization.

[5] Grievant testified that he said, "Do you ever feel like beating yourself for making a wrong decision?"

unbuckled his belt and removed it from a few belt loops on his pants.[6] He gestured with the un-loosened belt so as to hit or slap himself.

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).

Sexual Harassment

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, natural origin, age, sex, religion, disability, marital status or pregnancy." State policy 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-employee (third party).
>
> - **Quid pro quo** – A form of sexual harassment when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors. Typically, the harasser requires sexual favors from the victim, either rewarding or punishing the victim in some way.
>
> - **Hostile environment** – A form of sexual harassment when a victim is subject to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

"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."

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[6] Grievant kept a set of work keys on his belt and in order to remove the keys he had to unhook his belt from several belt loops. He did this every day he worked.

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

The Agency contends Grievant engaged in workplace harassment for two reasons. First, Grievant made repeated comments that he could be the PTA's best friend. Second, Grievant made comments and gestures of a sexual nature to the PTA while she was using the time clock to check out for the day. The Agency has not presented sufficient evidence to support its conclusion.

Grievant made several comments to the PTA that he could be her best friend. Although it is possible Grievant's comments were of a sexual nature, there is insufficient evidence to establish this conclusion. Friendships do not have to be of a sexual nature. It could be the case that Grievant desired to develop a nonsexual friendship with the PTA. On one occasion when the PTA responded "what if?", Grievant did not reply. The conclusion that Grievant's comments were of a sexual nature is an inference. The Hearing Officer cannot uphold disciplinary action based on an unsupported inference.

When Grievant removed the keys from his belt and shook his belt while speaking to the PTA, Grievant was expressing frustration towards the PTA. During the hearing, the PTA was asked what was sexual about Grievant's gesture. She testified "I didn't say it was sexual", it was "not a sexual response", and "it was bizarre." Grievant's behavior towards PTA while she was standing at the time clock was not of a sexual nature and could not have been workplace harassment.

"Disruptive behavior" is a Group I offense.[8] On November 30, 2006, Grievant was disruptive because he removed a part of his belt from the loops in his pants and slapped his belt against his body in an unusual manner.[9] He spoke loudly towards the PTA. The PTA became upset because of Grievant's "bizarre" behavior. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.[10]

Grievant contends the disciplinary action should be mitigated. *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 *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of

[8] DHRM Policy 1.60(V)(B)(1)(e).

[9] According to Grievant, he was attempting to illustrate "beating himself" for assisting the PTA.

[10] Grievant was free to express his belief that the PTA had used him to circumvent the ignition lock on her vehicle. He failed to communicate that point and the point he communicated involved a "bizarre" gesture. The PTA's concern was understandable.

[11] *Va. Code § 2.2-3005.*

examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action for workplace harassment is **reduced** to a Group I Written Notice for disruptive behavior.

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.[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

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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.