

Issues: Management Actions (removal of supervisory duties), Group II Written Notice (Workplace Harassment), Demotion, Group III Written Notice (Workplace Harassment), and Termination; Hearing Date: 06/20/08; Decision Issued: 09/09/08; Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8806, 8807, 8808, 8835; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 09/16/08; Reconsideration Decision issued 09/19/08; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8806 / 8807 / 8808 / 8835

Hearing Date: June 20, 2008
Decision Issued: September 9, 2008

PROCEDURAL HISTORY

On December 14, 2007, Grievant was issued a Group II Written Notice of disciplinary action with demotion and disciplinary pay reduction for making inappropriate remarks to a subordinate employee within the police department. On January 4, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace harassment and sexual harassment.

On December 13, 2007, Grievant filed a grievance challenging a memo he received entitled "Notification of administrative action." On December 28, 2007, Grievant filed a grievance challenging another memorandum issued by the Agency. Grievant also filed grievances challenging the disciplinary actions taken by the Agency. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and he requested a hearing. The EDR Director issued Ruling No. 2008-1943, 2008-1944, 2008-2945 and Ruling No. 2008-2018 consolidating all four grievances for a single hearing. On June 2, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 20, 2008, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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. The burden of proof is on the Grievant to show the relief he seeks should be granted regarding the Agency's memoranda to him. 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 State University employed Grievant as a Sergeant in its police department. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued December 15, 2004.

Grievant was issued a University travel credit card. He incurred expenses using the credit card. He did not timely pay the bill he received from the credit card issuer.

In late August 2007, Officer S was shopping at a local retail store. Grievant was driving his personal vehicle when he recognized Officer S and waved. Later that evening, Grievant and Officer S were at work. Grievant said, "Um you look good as a bitch in your plain clothing!" Officer S was offended by Grievant's comment.

On occasion, Grievant would make comments in Officer S's presence about the rear ends of other women and how they compared to Officer S's rear end. Officer S was offended by these comments.

Grievant was Officer S's field training officer. She was released from field training on December 6, 2007. Grievant signed off on some of her required paperwork. While¹ training Officer S, Grievant said, "I'm not going to f--k with you right now but as soon as you get off your field training I am going to eat that p--sy."² Officer S told Grievant that she did not have sex with married men and did not get involved the people who worked with her. She also told him she was not interested in him from the beginning because she had already been told about him and how he talks to women. Officer S was offended by Grievant's comment.

On December 5, 2007, the Agency issued Grievant a memorandum entitled "Notification of Administrative Action". The memorandum notified Grievant that he was being relieved of all supervisory responsibilities within the Department of Police and Public Safety.

On December 23, 2007, the Agency placed Grievant on administrative leave. During that time Grievant could not perform any business as a University police officer and could not enter the University campus.

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."³ 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

Group II Written Notice

The Agency contends Grievant made inappropriate remarks to a subordinate employee within the police department thereby justify the issuance of a Group II Written Notice. The Agency's own investigation, however, concluded that there was no corroborating evidence to support the allegations of the subordinate employee. The Investigator concluded that, "the allegations were not substantiated and there was insufficient evidence to determine that sexual harassment occurred." The Hearing Officer agrees with this conclusion.

The Agency contends Grievant failed to comply with established written policy because he did not timely pay the bill for his University issued credit card. The Agency

¹ Grievant made the statement sometime between November 18, 2007 and December 3, 2007.

² Grievant admitted making the statement to the Agency's investigator.

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

did not present as exhibits or otherwise identify with specificity the written policy Grievant allegedly violated. Based on the evidence presented, the Hearing Officer cannot find a Grievant acted contrary to established written policy.

The Group II Written Notice must be reversed. Grievant was demoted from Sergeant to Law Enforcement Officer I with a five percent disciplinary pay reduction effective December 15, 2007. Grievant's demotion must be reversed and he must be restored to his pay prior to the demotion.

Group III Written Notice

Agency Policy 1101 sets forth the Agency's "Prohibition of Workplace Harassment." This policy states:

Workplace harassment (hereinafter referred to as harassment) is defined as any unwelcome verbal, written, or physical conduct that is based on race, color, sex, religion, national origin, disability, and/or age, that: (1) has the purpose or effect of creating an intimidating, hostile, or offensive work or academic environment; (2) has the purpose or effect of run reasonably interfering with an individual's work or academic performance; or (3) affects an individual's employment opportunities or compensation. A work or academic environment is "hostile" when unwelcome verbal, non-verbal or physical behavior of a sexual or a nonsexual nature is severe and pervasive enough to interfere with the victim's work or academic performance or create a work or academic environment that is intimidating, offensive, or abusive.

Sexual harassment, a form of workplace harassment, is defined as unwelcome sexual advances, request for sexual favors or other conduct of a sexual nature, or action taken in retaliation for reporting such behavior, when: ***

C. such conduct has the purpose or effect of one reasonably interfering with a person's work or academic performance or creating a hostile and offensive work or learning environment.

Sexual harassment may include, but is not limited to: (1) Sexually suggestive conduct or remarks about clothing, body, or sexual activities directed personally and a member of the University community; (2) Whistling in a suggestive manner directed personally at others in the University community; (3) Sexual propositions, invitations, or other unwanted pressures for sexual contact; (4) Obscene gestures directed personally at other members of the University committee; (5) Padding, pinching, or any other sexually suggestive touching or feeling; (6) Attempted or actual kissing or fondling; (7) Coerced sexual acts; (8) Assault; (9) unwanted nonsexual conduct or language that pressures for the development or continuation of a relationship, and (10) Explicit or implicit request for sexual favors as a condition of employment, e.g.,

promising or granting continued employment, promotion, training, or favorable evaluation, or academic performance in return for sexual favors.⁴

Grievant engaged in sexual harassment. He made comments about Officer S's body and clothing and personal appearance. He stated that he would perform oral sex on her as if it was a certainty without regard to her consent. His actions were unwelcome and were offensive to Officer S. Grievant's actions were severe and pervasive enough to create a hostile work environment by an objective standard of a reasonable person.

Agency Policy 1101 states, "[a]ny employee or faculty member who engages in conduct determined to be harassment or who encourages such conduct by others, will be subject to corrective action which may include discharge from employment." The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice with removal based on Grievant's sexual harassment of a coworker.

Grievant argues that he did not engaged in sexual harassment because there was no promise of anything sexual happening between Grievant and Officer S. The type of sexual harassment Grievant is referring to is called quid pro quo. This is 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. Another form of sexual harassment is when an employee creates a hostile work environment. The Agency has not established quid pro quo sexual harassment, but it has established Grievant created a hostile work environment for Officer S.

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...."⁵ 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 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.⁶

⁴ The Agency had similar sexual harassment policies prior to this one which became effective November 9, 2007.

⁵ *Va. Code § 2.2-3005.*

⁶ Although Grievant alleged that the Agency inconsistently disciplined its employees, he did not present any credible evidence to support the allegation.

Other Claims

Grievant challenged the Agency's issuance to him of a December 5, 2007 memorandum entitled "Notification of Administrative Action". That memo notified Grievant that he was being relieved of all supervisory responsibilities within the Department of Police and Public Safety. In addition he was directed to attend a special training session on sexual harassment scheduled for Friday, December 7, 2007. Grievant also challenged the Agency's issuance to him of a December 23, 2007 memorandum placing Grievant on administrative leave pending investigation which could result in removal. In light of Grievant's removal from employment, any relief that could be granted in response to the memorandums is moot.

Grievant contends he should be permitted to resign in lieu of termination. Grievant submitted a letter dated January 4, 2008 saying that he would be resigning his position effective February 1, 2008. Nothing in policy requires the Agency to accept his letter of resignation with an effective date after the issuance of disciplinary action with removal effective January 4, 2008.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice with demotion and adverse pay action is **reversed**. In light of the subsequent Group III Written Notice, Grievant is to be restored to his status of being a Sergeant but he is not to be reinstated. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of demotion and credit for leave and seniority that the employee did not otherwise accrue.

The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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.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.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8806 /8807 /8808 /8834-R

Reconsideration Decision Issued: September 19, 2008

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.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant argues that he did not create a hostile work environment for Officer S. Grievant contends the Chief of Police perjured himself. Grievant contends the Agency did not investigate Officer S's complaint as a sexual harassment complaint.

These are arguments that Grievant raised at the hearing or could have raised at the hearing. Grievant's arguments are not supported by the evidence. There is no basis to reverse or change the original Hearing Decision. The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For these reasons, the 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.

Carl Wilson Schmidt, Esq.
Hearing Officer