

Issues: Group III Written Notice (workplace harassment), Suspension and Termination); Hearing Date: 01/05/09; Decision Issued: 01/12/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9000; Outcome: No Relief – Agency Upheld in Full; **Administrative Review**: **AHO Reconsideration Request received 01/26/09; Reconsideration Decision issued 02/12/09; Outcome: Original decision affirmed; Administrative Review: DHRM AR Request received 01/26/09; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9000

Hearing Date: January 5, 2009
Decision Issued: January 12, 2009

PROCEDURAL HISTORY

On September 4, 2008, Grievant was issued a Group III Written Notice of disciplinary action with suspension from August 21, 2008 through September 4, 2008 and removal effective September 4, 2008 for workplace harassment.

On September 25, 2008, 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 November 21, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 5, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Representatives
Witnesses

ISSUES

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 Substance and Abuse Services employed Grievant as a Truck Driver at one of its Facilities. He began working for the Agency approximately ten years ago. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency presented evidence regarding Grievant's interaction with at least three female coworkers from some date in April to August 8, 2008. Grievant did not know or have personal relationships with the women. Grievant selected them because of their gender.

Ms. F was working the 11 p.m. to 7 a.m. shift in her building. She took client breakfast trays into the basement. Grievant walked behind Ms. F and placed both of his arms around Ms. F in order to hug her. Ms. F was surprised and thought Grievant was attempting to feel her breasts. Ms. F "jabbed" him with her elbow. She exclaimed, "What the hell are you doing?" Grievant started laughing and asked her what her name was because he had not seen her before. Ms. F told him it was none of his business and walked off. A couple of months later, Ms. F left the Agency Facility after she had finished work. She stopped at a gasoline station and began pumping gas into her vehicle. Grievant was also at the gasoline station several gasoline pumps away from her. Grievant approached Ms. F and tried to hug her. As he did so she pulled away from him and told him "Don't do it!". Grievant smiled and said he liked her. Ms. F. told

Grievant she was in a relationship and was not looking for anything. Grievant got in his car and drove off.

Ms. M was in the kitchen in the basement of the building where she worked at the Facility. She was in a corner of the room between the coffee machine and a counter. Grievant came up to her and asked her what her name was and how long she had worked for the Agency. He also asked her if she had a “man friend or husband”. Grievant asked Ms. M for a kiss and took her hand. He then hugged her. Ms. M was frightened of Grievant and fearful but she could not get away because she was positioned in a corner of the room. Ms. F came downstairs into the basement. Grievant quickly backed up. Ms. M told Grievant never to do that again. Because of her interaction with Grievant, Ms. M stopped going into the basement alone.

Ms. R was working in the building on the evening shift. She took client dinner trays and placed them on the kitchen counter to sort snacks for clients. When she started to put the snacks on the trays, Grievant approached her from behind and pressed his body against her. Grievant was touching the bulge from his stomach and his penis on top of Ms. R’s tailbone and buttocks. Ms. R hit Grievant with her elbow and asked him “What are you doing?” Grievant responded “I’m reaching for the tray”.¹ Ms. R said “No!” She mentioned something about the trainees and then walked away as quickly she could to get away from Grievant.

Ms. F, Ms. M, and Ms. R were shown photos of nine male employees at the Facility. Each one correctly identified Grievant is the man who had approached them. They also identified Grievant at the hearing.

The Agency presented the testimony of Ms. E. However, she testified that she had not been sexually harassed by Grievant. Her testimony is not necessary to support the outcome in this case.

Grievant had received training on the Agency’s sexual harassment policy. His most recent training occurred on July 18, 2008.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”² Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include

¹ The Hearing Officer finds that Grievant did not accidentally touch Ms. R as he claimed. The Hearing Officer finds that Grievant intended to touch his body against Ms. R’s body.

² The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Workplace harassment is defined under DHRM Policy 2.30 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.

DHRM Policy 2.30 defines hostile environment as:

A form of sexual harassment when a victim is subjected 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.

Grievant engaged in workplace harassment because he created a hostile environment for Ms. F, Ms. M, and Ms. R. Grievant's behavior towards the three women was not welcome by them. Grievant's behavior towards Ms. R was severe because he pressed his body against Ms. R's rear end in such a manner that she could feel his penis. Grievant's inappropriate touching was repeated because he touched three women during a period of four months. He inappropriately touched Ms. F on two separate occasions.³ Grievant's behavior had the effect of creating an intimidating or offensive place for employees to work, because all three women were fearful of Grievant and were reluctant to go into the basement alone. When the evidence is considered under both a subjective and objective perspective, it is clear that Grievant created a hostile work environment.

Grievant contends that the women are not credible because they gave several statements that varied in detail. This argument fails. It is not unusual for witnesses to have some variation in their written statements given at different times. The consistency of written statements and verbal statements may vary depending upon who is asking the witness questions and the nature of those questions. It may also vary depending upon the ability or desire of the witnesses to effectively communicate what they experienced. For example, all three women were reluctant to come forward with the details of their interaction with Grievant because they were uncomfortable or

³ Even though the second occasion that Grievant improperly touched Ms. F occurred at a gas station and not at the workplace, the hearing officer will consider that behavior because it affected Ms. F ability to work with Grievant during work hours. Grievant approached Ms. F at the gasoline station because he knew she was a coworker.

embarrassed regarding what he had done to them. To the extent minor details were omitted in their statements, this is understandable. During the hearing, the three witnesses testified credibly. The Hearing Officer has no reason to doubt the accuracy of their testimony.

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. DHRM Policy 1.60, Attachment A states that workplace harassment can be a Group I, II, or III offense depending upon its severity. The Agency in this case contends that Grievant should receive a Group III Written Notice. Based on the severity of Grievant's behavior and its impact on the three women he harassed, the Hearing Officer finds that the Agency's decision to issue a Group III Written Notice was justified. Upon the issuance of a Group III Written Notice, an agency may suspend and remove an employee from employment. Accordingly, Grievant's suspension and removal must be upheld.

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...."⁴ 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension and removal 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:

⁴ *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
600 East Main St. STE 301
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.⁵

[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

⁵ 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: 9000-R

Reconsideration Decision Issued: February 12, 2009

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 contends the Agency’s witnesses were not credible because of inconsistencies in their statements. Grievant outlines what he considers to be those inconsistencies. Grievant argued at the hearing that the Agency’s witnesses were not credible and should not be believed. Disputing credibility is not new evidence or an example of an incorrect legal conclusion. The evidence in this case is not merely credible; it is overwhelming that Grievant engaged in behavior justifying the disciplinary action against him.⁶

⁶ Witnesses sometimes omit details from statements based on what questions they were asked and what information they were asked to put in their statements. Details also may be omitted based on the

Grievant contends the Agency's discipline was not free of improper motive. No credible evidence was presented of any improper motive by the Agency. Grievant was disciplined because he approached three women whom he did not know and touched and interacted with them in an improper manner. The Agency's motive was to protect these and other women at the Facility and to discipline Grievant for his misbehavior.

Grievant contends he was denied procedural due process at the Second Step of the grievance process. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, his remedy would have been with the EDR Director as the case had not yet been assigned to the Hearing Officer. Grievant contends he was denied documents under the Virginia Freedom of Information Act. The Hearing Officer has no control over documents produced pursuant to the VFOIA. Grievant's remedy for being denied documents under the VFOIA would be pursuant to the terms of that statute and not before the Hearing Officer.

Grievant contends the Agency did not comply with the Hearing Officer's order to produce documents.⁷ To the extent this occurred, Grievant's remedy is to ask the Hearing Officer to make an adverse inference on the nature of the document omitted. Grievant has not offered a credible description of what any omitted documents may have stated and what adverse evidentiary inference should be drawn.

Grievant contends the Agency failed to comply with DHRM Policy 1.60 requiring that he be provided immediately with the reason why he was being removed from the Agency's facility. If the Hearing Officer assumes for the sake of argument that the Agency should have more timely notified Grievant of the reason for his removal, it does not establish a basis for relief in this grievance. It would be harmless error by the Agency.

Grievant contends the witnesses against Grievant failed to comply with DHRM 2.30 requiring timely reporting of workplace harassment. It is not unusual for victims of sexual harassment to be reluctant to report their harassment. The witnesses' failure to timely report Grievant's workplace harassment does not undermine the Agency's case against Grievant.

Grievant contends the witnesses wrongly accused him. Grievant either did not know the women at all or knew them only on a very limited basis. They had no prior conflicts with Grievant or personal relationships with Grievant that would generate a reason for them to lie about Grievant. Grievant, on the other hand, approached complete strangers and touched them in a manner that would otherwise be reserved

witness' ability to write and ability to describe in writing events that occurred. A witness' inability to remember the precise date and time of an assault is a factor to consider but it is not a factor that would require disregard of otherwise credible testimony.

⁷ The Agency provided the report of Lt. M. It is not clear that the Agency failed to provide the documents ordered by the Hearing Officer to be disclosed.

only for people who were very familiar with one another. His perception of his interaction with the women lacks credibility.⁸

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, 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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Even if the Hearing Officer views the facts in a light favorable to Grievant, namely that he was simply being friendly and wanted to hug several of the women, hugging a stranger without that person's consent is battery. Employees have the right to be free from being hugged by co-workers whom they do not know.