

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 03/17/09; Decision Issued: 06/01/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9035; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9035

Hearing Date: March 17, 2009
Decision Issued: June 1, 2009

PROCEDURAL HISTORY

On September 15, 2008, Grievant was issued a Group I Written Notice of disciplinary action for demonstrating verbal conduct that denigrated or showed hostility on the basis of gender.

On September 18, 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 February 17, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 17, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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 Virginia Department of Transportation employs Grievant as a Construction Project Manager at one of its Facilities. The purpose of his position is:

Provide leadership for a construction program. Managing the activities of Construction Inspection/Maintenance Schedules. Assist Area Construction Engineer and Residency Management in interpreting contract requirements Monitoring progress on project and schedules. Keep Area Construction Engineer and Residency managers advised of construction matters and manpower needs for proper staffing. Resolves construction conflicts at the field level. Compiles information to resolve work orders and claims. Prepares correspondence and reports relative to construction projects in meeting the organizational objective.¹

Grievant received an overall rating of Contributor on his most recent performance evaluation.

The Senior Inspector reports to Grievant. Grievant talked about his sex life in front of the Senior Inspector and other employees. Grievant talked about all of his affairs. He sometimes instigated the conversation about his sex life. He has been discussing his sex life with others for several years. Grievant's discussions about his

¹ Agency Exhibit 9.

sex life were sometimes unwelcomed by the Senior Inspector. She would “get tired of hearing about it.”

One day, the Senior Inspector was holding her timesheets and leaning over the desk of the Office Service Specialist. Grievant said “I know I have seen that ass before but don’t recognize it.” The Senior Inspector was offended by Grievant’s comment about her.

On one occasion, Grievant was going to lunch with the Area Construction Engineer. They went to a restaurant on a nearby college campus. He made a comment about a young female student and continued to stare directly at her to the point of being noticeable. The Area Construction Engineer did not feel comfortable being around Grievant. He was concerned that people at the local college might think he was driving on campus in a VDOT truck to look at young women.

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

“The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual’s race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation or disability.” State policy 2.30 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

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

comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

Grievant created a hostile work environment for the Senior Inspector by discussing with her and others in the workplace his sexual behavior. Grievant's comment about the Senior Inspector's rear end was inappropriate and offensive. Grievant's behavior in front of the Area Construction Engineer was inappropriate. Grievant made unwelcome and repeated comments of a sexual nature which created an offensive place for employees to work. As measured by a subjective and objective standard, Grievant's behavior created a hostile work environment.

Violation of 2.30, *Workplace Harassment*, may, depending on the nature of the offense, constitute a Group I, II, or III offense. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant disputes the Agency's presentation of the facts. He did not testify at the hearing and, thus, there is no sworn testimony upon which the Hearing Officer can rely to counter the Agency's assertion of the facts.

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..."³ 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.

Grievant asserted that discussions of a sexual nature were commonplace in the office where he worked. Although there is some evidence of inappropriate comments made by other staff, Grievant was a supervisor and was responsible for setting the tone of discussion among his subordinates. Grievant's example may have justified other employees holding lower positions in the Agency to make inappropriate comments. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant contends he was denied due process because he was not granted a second interview with the Civil Rights Investigator. This assertion is without merit. Whatever information Grievant could have presented to the Civil Rights Investigator, he

³ *Va. Code § 2.2-3005.*

could have presented to the Hearing Officer during the hearing. To the extent the Agency's process was defective, it was cured by the opportunity for a hearing.

DECISION

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

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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.