

Issue: Group II Written Notice (workplace harassment); Hearing Date: 05/18/09;  
Decision Issued: 05/19/09; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.;  
Case No. 9058; Outcome: Partial Relief; **Administrative Review: AHO  
Reconsideration Request received 06/01/09; Reconsideration Decision issued  
06/03/09; Outcome: Original decision affirmed; Administrative Review: EDR  
Ruling Request received 06/01/09; EDR Ruling #2009-2331 issued 06/22/09;  
Outcome: AHO's decision affirmed; Judicial Review: Filed in  
Williamsburg/James City County Circuit Court on 07/02/09; Final Order issued  
08/19/09; Outcome: AHO's decision affirmed.**



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9058**

Hearing Date: May 18, 2009

Decision Issued: May 19, 2009

**PROCEDURAL HISTORY**

On January 8, 2009, Grievant was issued a Group II Written Notice of disciplinary action for workplace harassment.

On January 21, 2009, 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 she requested a hearing. On April 16, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 18, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
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 Department of Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Food Services Tech I at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On the first day that Grievant met Mr. M, Grievant told him she had a daughter, she was blessed, and she had not had sex in 15 years. On other days, Grievant would get in front of Mr. M, look at him and turned her head and then laugh at him. When Mr. M would talk to female coworkers, Grievant would sometimes approach the group place her hands on her hips and position her body as if to ask, "Who do you think you are, talking to him?" Other staff mentioned to Mr. M that Grievant liked him. On one occasion, Grievant and Mr. M were called into a supervisor's office. The supervisor asked Mr. M if he wanted Grievant's body. Mr. M said "no". The supervisor asked Grievant if she wanted Mr. M's body. Grievance said "yes". On one occasion when Mr. M and two other women were walking away from Grievant, Grievant turned so that her rear end was facing them and pointed to her rear end.

Grievant engaged in inappropriate behavior for several months. She did not engage in similar behavior towards other staff. Mr. M repeatedly complained to his supervisors about Grievant's behavior. Mr. M was told to avoid Grievant as much as possible. He attempted to do so.

On October 28, 2008, Grievant falsely reported to the Agency that Mr. M had made sexually suggestive remarks to her. The Agency began an investigation. The investigator concluded Grievant's allegations were false and that Grievant exhibited unusual social behaviors, and had fixations on Mr. M. that were annoying and strange to Mr. M and others.

On December 22, 2008, the Supervisor gave Grievant a written reprimand stating:

On December 12, 2008, [the Investigator] completed her investigation of your Sexual Harassment allegation against [Mr. M]. She found that your claim could not be validated. You should know that reporting a false claim is a very serious matter. An employee could lose his/her job if such a claim was validated.

The findings of the investigation indicated that you have an unusual behavior towards and a "fixation" for [Mr. M] that he does not share with regard to you. You have openly expressed a physical attraction to [Mr. M] and he does not reciprocate in that attraction. This is harassment and you are to stop this behavior immediately. Your supervisor and I will regularly monitor your behavior towards [Mr. M] and hold you accountable for continued harassment.

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If you continue your inappropriate behavior additional progressive disciplinary action will be taken. This action may include discipline under the Standards of Conduct, Group I, II, III depending on the nature of the offense. This may even lead to dismissal from state employment.

Please follow the above directions to assure proper behavior so that no further disciplinary action is necessary.<sup>1</sup>

On January 6, 2009, Grievant approached Mr. M. She laughed, raised her hands in the air, and danced for a little while so that Mr. M could watch her.

### **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."<sup>2</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include

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<sup>1</sup> Agency Exhibit 2.

<sup>2</sup> 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.”

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.”<sup>3</sup>

Grievant created a hostile work environment for Mr. M. She subjected him to unwelcomed behavior. Grievant was attracted to Mr. M and “fixated” on him. She devoted extra time and attention towards Mr. M with the objective of having him respond to her favorably. Grievant’s behavior was repeated and lasted over several months. By an objective and subjective standard, Grievant’s behavior was unwelcome repeated sexual conduct that created an intimidating or offensive place for Mr. M to work. He repeatedly complained to his supervisors about Grievant.

Grievant argued that on January 6, 2009, she was rejoicing. If the Hearing Officer assumes for the sake of argument that Grievant’s assertion is true, the outcome of this case does not change. Grievant clearly selected Mr. M to be the person who she rejoiced in front of. She could have rejoiced away from Mr. M but instead she walked directly to Mr. M and rejoiced in front of him. This is consistent with Grievant having a fixation on Mr. M and her behavior was another attempt to gain Mr. M’s attention even after she had been advised to leave him alone.

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<sup>3</sup> DHRM Policy 2.30.

Grievant argued that, “I have been persecuted by [the Supervisor] and [Mr. M] because of my faith in the Lord Jesus Christ.” No credible evidence was presented to support this allegation. The Agency took disciplinary action against Grievant because of her offensive behavior towards Mr. M and not because anyone was persecuting Grievant.

During the hearing, the Agency argued Grievant should receive a Group II Written Notice. During the grievance Step Process, the Second Step Respondent reduced the discipline to a Group I Written Notice when he stated, “I am willing to reduce the Group II Standards of Conduct to a Group I, however, you need to be aware that any future incidents of this type will not be tolerated and could result in your involuntary removal from employment.” The Second Step Respondent did not condition his statement on Grievant ending her grievance at the Second Step. The Third Step Respondent confirmed the Second Step Respondent’s statement when he said, “[Grievant] provided no additional evidence as to why the Group I should be reduced or overturned.” (Emphasis added). For the purpose of clarity, the Hearing Officer will reduce the Group II Written Notice to a Group I Written Notice to align the outcome of this decision with the statements made by Step Respondents.

*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...”<sup>4</sup> 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 further 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 is **reduced** to a Group I Written Notice.

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<sup>4</sup> *Va. Code § 2.2-3005.*

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>5</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

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





**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 9058-R**

Reconsideration Decision Issued: June 3, 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.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant restates the arguments and evidence presented at the hearing. 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.

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Carl Wilson Schmidt, Esq.  
Hearing Officer

**VIRGINIA:**

**IN THE CIRCUIT COURT OF CITY OF WILLIAMSBURG/JAMES CITY COUNTY**

**Grievant/Appellant,**

**v.**

**Case No.:**

**Agency/Appellee.**

**FINAL ORDER**

This matter came before the Court on August 13, 2009, at or about 8:00 a.m., as an appeal of a decision of a hearing officer under the Grievance Procedure for State Employees pursuant to Virginia Code § 2.2-3006(B). At the hearing, the Grievant/Appellant, appeared *pro se* and the Agency/Appellee, was represented by undersigned counsel.

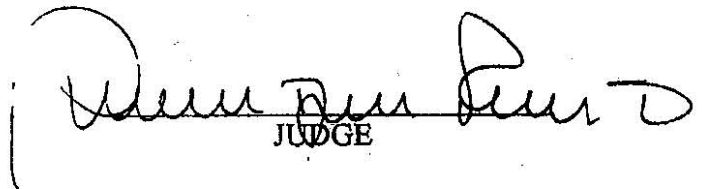
Having reviewed the record and considered the arguments of the parties and/or counsel, the Court finds that the Grievant/Appellant has failed to reference, cite and/or otherwise identify any statute (and/or other legislation), judicial precedent and/or accepted legal principle in support of her claim that the decision of the hearing officer was "contradictory to law" – as required by Virginia Code § 2.2-3006(B) for the reversal of that decision.

Accordingly, it is hereby ADJUDGED, ORDERED and DECREED that this appeal is DISMISSED and that the decision of the hearing officer in Grievance Case No. 9058 (issued May 19, 2009) is AFFIRMED.

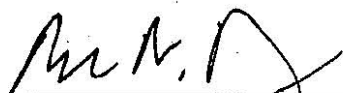
Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the endorsement of the Grievant/Appellant is hereby dispensed with. *STP*

The Clerk is hereby directed to send a certified copy of this Final Order to all counsel of record and *pro se* parties upon entry hereof.

Entered this 19<sup>th</sup> day of August, 2009

  
JUDGE

I ASK FOR THIS:

  
Ronald N. Regnery (VSB #37453)  
Senior Assistant Attorney General  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
(804) 786-5632  
(804) 372-2087 (facsimile)  
Counsel for Agency/Appellee

I CERTIFY THAT THE DOCUMENT TO WHICH THIS AUTHENTICATION IS AFFIXED IS A TRUE COPY OF A RECORD IN THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY, VA AND I AM CUSTODIAN OF THAT RECORD.  
BETSY B. WOOLRIDGE, CLERK

BY: Natalie C. Cradic D.C.

Seen: