Issues: Group III Written Notice (workplace harassment) and Termination; Hearing Date: 08/06/09; Decision Issued: 08/07/09; Agency: VSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9139; 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: 9139

Hearing Date: August 6, 2009
Decision Issued: August 7, 2009

PROCEDURAL HISTORY

On April 29, 2009, Grievant was issued a Group III Written Notice of disciplinary action with removal for creating a hostile work environment.

On May 28, 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 he requested a hearing. On July 8, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 6, 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:

Virginia State University employed Grievant as a Patrol Sergeant until his removal effective April 29, 2009. Grievant received favorable performance evaluations during his tenure with the Agency. Grievant had prior active disciplinary action. On March 12, 2008, Grievant received a Group I Written Notice for failing to report to work as scheduled.

Grievant supervised two female employees, Officer D and Officer S. He reported to a female employee, Captain D.

During the period March 2008 through December 2008, Grievant made numerous comments to Officer D that offended Officer D. For example, Grievant sometimes referred to female employees as "bitches" and "whores." He referred to female employees and said "She sat on my lap, my dick ain't move!" Grievant said, "Dick ain't free. I f—k for gifts." He also said, "[t]here are some stupid whores at dispatch" referring to female employees working as dispatchers. With respect to Captain D, Grievant said she could "hug his nuts" referring to his genitals. Grievant said, "Her husband ain't f—king her right." Grievant referred to female Officer B and said, "She can take her whoring ass home to her husband." In November 2008, the Agency was concerned about students having sex in cars in the parking lots. Grievant called Officer D and told her "Be sure to check the lots; they are riding dick." Officer D filed a complaint with the Agency regarding Grievant's comments on January 15, 2009.

When Captain D joined Grievant's shift sometime in 2008, Grievant made several comments to Officer S that Officer S felt were inappropriate and offensive. Grievant told Officer S that he wondered if Captain D's husband was "f—king her right." Grievant said he would "like to go up there and f—k her on her desk" referring to Captain D. Grievant said Sergeant G "can have her from the front and I will f—k her from the back."

On April 24, 2008, Grievant completed on-line training regarding "Preventing Sexual Harassment" and received a certificate. Grievant had received classroom training regarding workplace harassment prior to his on-line training.

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."[1] 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." DHRM 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.
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> - **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.

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

"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."[2]

Grievant created a hostile work environment based on gender. Officer D and Officer S were subjected to unwelcome comments by Grievant. Those comments were of a sexual nature. They were demeaning to women in general and other female employees. Grievant made pervasive repeated offensive sexual comments. Based on a subjective standard, his comments created an intimidating and offensive place for employees to work. Based on an objective reasonable person standard, Grievant's comments created an intimidating and offensive place for employees to work. Grievant engaged in workplace harassment contrary to DHRM Policy 2.30.

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. The Agency argues Grievant's behavior rises to the level of a Group III offense and that discharge was appropriate. The Agency's conclusion is supported by the evidence presented. Grievant's comments were grossly inappropriate for the workplace. Grievant was a supervisor and was held by the Agency to a higher standard than non-supervisory employees. Grievant's comment about him and another employee having sex with Captain D, apparently against her will, was egregious.

Grievant argued that he considered Officer D to be a friend and, thus, felt comfortable making sexual comments to her. Officer D denied her friendship with Grievant was anything other than a work-related friendship. No evidence was presented that would establish that the working relationship between Grievant and Officer D was of a nature that Grievant reasonably could have concluded Officer D found his comments acceptable.

Grievant argued that no one notified him that his comments were offensive. If Officer D had informed him sooner that his comments were offensive, he would have stopped making them. Nothing in policy requires a subordinate to notify a superior that his behavior is inappropriate. With respect to several of Grievant's comments, it should have been obvious to him that they could be offensive to female employees. The Agency provided Grievant with the appropriate level of training necessary to enable him to independently determine that his comments of a sexual nature would be offensive and inappropriate for the workplace.

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

[2] DHRM Policy 2.30.

[3] *Va. Code § 2.2-3005.*

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 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:

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

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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.