

Issues: Group II Written Notice (workplace harassment) and Termination (due to accumulation); Hearing Date: 11/17/09; Decision Issued: 11/18/09; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9221; Outcome: Full Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9221**

Hearing Date: November 17, 2009  
Decision Issued: November 18, 2009

**PROCEDURAL HISTORY**

On August 19, 2009, Grievant was issued a Group II Written Notice of disciplinary action for violation of DHRM Policy 2.30 Workplace Harassment. Based on the accumulation of disciplinary action, Grievant was removed from employment effective August 19, 2009.

On August 31, 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 October 26, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 17, 2009, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 Behavioral Health and Developmental Services employed Grievant as a Tradesman II at one of its Facilities. He began working for the Agency on August 10, 2006. Grievant had prior active disciplinary action. On February 10, 2009, he received a Group II Written Notice with a three workday suspension for workplace harassment.

Grievant liked to joke with his co-workers. Grievant worked with Mr. W at the Facility. Grievant knew that Mr. W was from the Philadelphia area and was an avid Philadelphia Eagles football fan. After serving a prison term for dog fighting, an NFL quarterback signed with the Philadelphia Eagles.<sup>1</sup> In the morning of August 14, 2009, Grievant was removing some equipment from the carpenter's shop to begin the day. He observed Mr. W arriving at work and exiting his vehicle. Grievant grabbed a piece of paper and wrote:

S. Philly  
On Line Betting  
"Dog Fight"

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<sup>1</sup> Prior to the incident, Grievant had worn on several occasions a shirt saying that his dog hated the NFL player.

Grievant held up the sign, smiled and looked at Mr. W as Mr. W walked past Grievant. Mr. W saw the sign, smiled, laughed, and told Grievant he should get another life. Mr. W recognized that Grievant believed Grievant was being humorous.

Mr. W later complained to the Agency that Grievant's behavior had offended him. Grievant later apologized to Mr. W once Grievant learned Mr. W was offended.

During the hearing, Mr. W testified that Grievant's action was "no joke" to him. He believed Grievant had a "sick sense of humor". Mr. W said he was offended because Grievant was saying the Philadelphia Eagles were getting a dog fighter when actually the team was getting a football player. When Mr. W was asked if he said something to the effect of "this was the white man keeping the black man down?", Mr. W denied making the statement and said, "Why would I say a white man keeping a black man down? That had nothing to do with it!"

### **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 acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

DHRM Policy 2.30 defines workplace harassment 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.

In order to uphold the issuance of a Group II Written Notice for failure to follow DHRM Policy 2.30, the Agency must show that Grievant's behavior was on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. The Agency has not presented any credible evidence to show that Grievant's behavior was based upon these factors. There is no basis for the Hearing Officer to conclude that Grievant's acted contrary to DHRM Policy 2.30. The disciplinary action taken against Grievant must be reversed.

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<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.

The evidence showed that Grievant's actions were based on his desire to make fun of Mr. W's preference for and identification with the Philadelphia area and his support of the Philadelphia Eagles football team. Grievant's objective was to engage in a humorous exchange with a coworker. When measured by an objective and subjective standard there is no reason to believe that Grievant's actions were a pretext to discrimination or harassment of Mr. W. Although the Agency found Grievant's behavior distasteful, that behavior was not contrary to DHRM Policy 2.30.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to his former position, or if occupied, to an objectively similar position. Grievant is awarded full **back pay**, from which interim earnings (including unemployment compensation) must be deducted. Grievant's full **benefits** and **seniority** are restored.

## 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>3</sup>

[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

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<sup>3</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.