Issues: Two Group II Written Notices (workplace harassment), Demotion, Transfer and Pay Reduction; Hearing Date: 02/10/10; Decision Issued: 02/16/10; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9255; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 03/03/10; Reconsideration Decision issued 03/04/10; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 03/03/10; EDR Ruling #2010-2568 issued 05/03/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 03/03/10; DHRM Ruling issued 03/09/10; Outcome: Declined to review.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9255

Hearing Date: February 10, 2010
Decision Issued: February 16, 2010

PROCEDURAL HISTORY

On November 12, 2009, Grievant was issued a Group II Written Notice of disciplinary action for workplace harassment. On November 12, 2009, Grievant was issued a second Group II Written Notice of disciplinary action for workplace harassment. He was demoted and transferred with a disciplinary pay reduction.

On November 18, 2009, Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 12, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 10, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 Commonwealth University employed Grievant as an Enforcement and Safety Supervisor prior to his demotion to an Enforcement Safety Officer. The purpose of his position as a supervisor was:

> To handle inquiries and complaints related to enforcement of parking regulations and security concerns.
> To coordinate enforcement/security of special events.
> To exchange information, ideas, and to adapt procedures as required.

Grievant supervised Ms. P over a period of several years. On occasion, grievant would brush up against Ms. P without the necessity or permission to do so. Grievant made comments about the attractiveness of her lips and rear end. On several occasions while at work, he attempted to kiss her. Each time she said "no" but he continued to attempt to kiss her. He would tell her how beautiful he thought she was. On one occasion, Grievant kissed Ms. P without her consent. She said "don't do this to me". Grievant told Ms. P that she could come and sleep at his place. She told Grievant she did not want to go to his place. Ms. P was offended by Grievant's behavior.

Grievant supervised Ms. W. When she was pregnant, Grievant said that she no longer had to used condoms because she was pregnant.[1] Grievant told her that after

[1] Ms. W took pregnancy leave in February 2009 and returned to work July 2009.

she had her baby he would help "work her stomach off" which she interpreted to mean reducing her weight by having sex with him. On one evening, Grievant told Ms. W that he was tired and he wanted to go home to "get a nut". Ms. W understood Grievant to be referring to having an orgasm. Ms. W was offended by Grievant's behavior.

Grievant supervised Ms. Wo from sometime in 2007 until early in 2008. Grievant was overly flirtatious towards her. He would make comments about her body and how she looked. He asked her out for dates on more than one occasion. She told him she would never go out with them. Grievant asked her to his house and she said it would never happen. Grievant would "look her up and down". Ms. Wo was offended by Grievant's behavior.

CONCLUSIONS OF POLICY

"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.
>
> - **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."[2]

The Agency has a policy entitled "University Guidelines on prohibition of Sexual Harassment". This policy states, in part:

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[2] DHRM Policy 2.30.

> Verbal sexual harassment may include, but is not limited to: (1) sexual innuendo, comments and sexual remarks about clothing, body, or sexual activity; (2) humor and jokes about sex that denigrate women or men in general; (3) sexual propositions, invitations, or other pressure for sex; (4) implied or overt threats of a sexual nature; and, (5) making gestures of a sexual nature.[3]
>
> "[F]ailure … to comply with written policy" is a Group II offense.[4]

Grievant engaged in workplace harassment of Ms. P contrary to State and Agency policy. Ms. P did not welcome Grievant's behavior and routinely informed him of her objections. Grievant made several comments of a sexual nature about Ms. P's body. Grievant inappropriately brushed against Ms. P and kissed her. Based on both an objective and subjective standard, Grievant's behavior was workplace harassment. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to comply with DHRM Policy 2.30 as well as the Agency's policy with respect to Ms. P.

Grievant denies making inappropriate comments to Ms. P. Ms. P's testimony was credible. In addition, she only reported the matter to the Manager after his insistence that she do so. Her conversation with the Manager was emotional and credible to the Manager. Ms. P also reported her concerns to another female coworker as Grievant continued his inappropriate behavior.

Grievant argues that Ms. P's testimony was unreliable because she had received sexual harassment training and was aware that his supervisor had an "open door policy". Grievant argued that Ms. P's failure to timely report her claim of sexual-harassment shows that the claim is untrue.

Although it is clear that Ms. P should have more timely reported Grievant's inappropriate behavior, she failed to do so because she is from another country whose culture encourages women "deal with" abusive behavior from men. In addition, she feared that Grievant would initiate action to have her fired from her job. She reached this conclusion because of Grievant's threats to have her fired on those occasions when she arrived at work late.

Grievant engaged in workplace harassment of Ms. W contrary to State and Agency policy. Ms. W did not welcome Grievant's comments. Grievant made inappropriate comments about Ms. W's pregnancy. He suggested they have sex so that she could lose weight. He made inappropriate comments to Ms. W about his sexual behavior. Based on both a subjective and objective standard, Grievant's behavior was workplace harassment.

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[3] Agency Exhibit 7.

[4] DHRM Policy 1.60, Attachment A.

Grievant denied harassing Ms. W. He argued she filed her complaint against him in retaliation for his issuing her a written counseling. He argued she had taken courses in sexual-harassment and knew to report any inappropriate behavior by a supervisor. Her failure to do so, according to Grievant, showed her allegations were untrue.

Ms. W's testimony was credible. She did not report Grievant's behavior because she was fearful he would take disciplinary action against her and she felt it would be easier to ignore his behavior. These factors do not undermine Ms. W's credibility.

Grievant presented evidence of several female subordinates who did not observe him behave inappropriately towards them or other coworkers. Although these female employees may not have been subjected to inappropriate behavior from Grievant, this does not preclude the conclusion that Ms. P and Ms. W were subject to inappropriate behavior from Grievant. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action for failure to comply with DHRM Policy 2.30 as well as the Agency's policy with respect to Ms. W.[5]

Upon the accumulation of two active Group II Written Notices, the Agency may remove an employee. In lieu of removal, the Agency may demote, transfer, and impose a disciplinary pay reduction. Accordingly, Grievant's demotion, transfer, and disciplinary pay reduction 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…."[6] 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

[5] The Agency did not issue a Written Notice specifically with respect to Ms. Wo but rather relied upon Grievant's behavior towards her to show the persuasive nature of Grievant's behavior.

[6] *Va. Code § 2.2-3005.*

For the reasons stated herein, the Agency's issuance to the Grievant of two Group II Written Notices of disciplinary action is **upheld**. Based upon the accumulation of disciplinary action, Grievant's demotion, transfer, and disciplinary pay reduction are **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.[7]

[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

[7] 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: 9255-R

Reconsideration Decision Issued: March 4, 2010

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 does not identify any newly discovered evidence or any incorrect legal conclusion. The Agency's evidence against Grievant was overwhelming. An experienced Hearing Officer can determine the credibility of witnesses testifying by telephone just as easily as witnesses testifying in person. Grievant presented evidence from individuals who had not observed him engage in inappropriate behavior. The fact that Grievant did not engage in inappropriate behavior with every female staff member does not rebut the Agency's claim that he engaged in inappropriate behavior with some female staff. The Hearing Officer does not have contempt authority and cannot sanction a potential witness who does not appear. To the extent any of Grievant's

witnesses did not appear at the hearing, Grievant failed to proffer the extent of their testimony and seek an adverse inference against the Agency. There is this no reason to grant Grievant's request for reconsideration. Accordingly, 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

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Carl Wilson Schmidt, Esq.
Hearing Officer

March 9, 2010

RE: **Grievance of [Grievant] v. Virginia Commonwealth University**
Case No. 9255

Dear Grievant:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. The issue you raised, violation of VA Code 2.2-300, is related to violation of the grievance procedure, not a violation of a human resource management policy. This Agency has no authority to review procedural and/or compliance-related matters. The Director of the Department of Employment Dispute Resolution has the authority to review and to rule on such matters. Therefore, we must respectfully decline to honor your request.

Sincerely,

Ernest G. Spratley