

Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: 10/25/10; Decision Date: 11/01/10; Agency: VDEM; AHO: William S. Davidson, Esq.; Case No. 9434; Outcome: Full Relief. Fee Addendum issued 11/18/10.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9434

Hearing Date: October 26, 2010
Decision Issued: November 1, 2010

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on July 8, 2010 for:

A sexual harassment complaint was made on June 21, 2010, to the Agency Human Resource Director naming you as the alleged harasser. The complaint stated you approached the complainant from behind, placed your hand on the complainant's shoulder close to her neck; you were so close the complainant could feel your genitals pressed against her buttock. The Human Resource Director determined that a fact-finding investigation was necessary. You were placed on Pre-Disciplinary Leave with pay for up to 5 days until a full and fair investigation could be conducted.

DHRM Policy Number 2.30, "Workplace Harassment" defines workplace harassment as including unwelcomed physical conduct of a sexual nature by one employee towards another. An employee who engages in such conduct is subject to disciplinary action, up to and including termination, under DHRM Policy 1.60, "Standards of Conduct."

The Human Resource Director interviewed the complainant and the alleged harasser to gather relevant information. The statements from the parties and factors relevant to the credibility of the parties' statements support the conclusion that the complaint is valid.

Accordingly, you are being issued a Group III Written Notice for Violation of DHRM Policy Number 2.30, "Workplace Harassment" and terminated from your employment with this Agency,¹

Pursuant to the Group III Written Notice, the Grievant was terminated on July 8, 2010.² On July 30, 2010, the Grievant timely filed a grievance to challenge the Agency's actions.³ On September 28, 2010, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On October 26, 2010, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative

¹ Agency Exhibit 1, Tab 10

² Agency Exhibit 1, Tab 10

³ Agency Exhibit 1, Tab 12

Counsel for Agency
Grievant
Counsel for Grievant
Witnesses

ISSUE

1. Did the Grievant sexually harass a co-worker as defined in DHRM Policy Number 2.30?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in Tatum v. VA Dept of Agriculture & Consumer Servs., 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.

⁵ In other words, there must be more than a possibility or a mere speculation.⁶

⁴ Ross Laboratories v. Barbour, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ Humphries v. N.N.S.B., Etc., Co., 183 Va. 466, 32 S.E. 2d 689 (1945)

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 Agency provided the Hearing Officer with a notebook containing thirteen (13) tabbed sections. Counsel for Grievant objected to the block of language contained in Agency Exhibit 6, and without objection from Counsel for Agency, that language was excluded. That notebook, with the aforementioned exclusion, was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing sixteen (16) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1. During the course of the hearing, handwritten notes of the Human Resource Director for the Department of Emergency Management were introduced and accepted as Grievant Exhibit 2.

After a full day of testimony, this case became a case that rises and falls on the credibility of the alleged victim, the Human Resources Director and the Grievant. The complainant in this matter, on June 21, 2010, approached the Human Resource Director for the Agency (hereinafter "Director") and made an allegation of sexual abuse by the Grievant. She testified before the Hearing Officer that at approximately 8:30 a.m. on the morning of June 16, 2010, she was in the break room following her normal morning routine. She testified that the Grievant entered the break room and, by way of introduction, stated that, "you look exceptionally good today." She responded to him with the rhetorical question, "Are you saying I do not look good every day?" Thereafter, she testified that the Grievant moved around a table which shown in Agency Exhibit 1.⁷ For purposes of reference, the Hearing Officer established that the sink, shown in this Exhibit, was on the north side of the Exhibit and the soda machines were on the south side of the Exhibit. This witness testified that the Grievant proceeded from the south side and moved around the western end of the tables to the area between the tables and the sink where she was located. She testified that he approached her from the rear and placed his right hand on her left shoulder and she felt his genitals on her buttocks. She testified that she wondered how she was going to extract herself from this situation and she turned toward the Grievant so that they were now face to face. She testified that another employee came into the break room at this point and that the two of them made direct eye contact. She testified that the Grievant then moved on and any contact between the two (2) of them ceased.

The complainant testified that she returned to her office, called her mother and discussed what had just taken place. Her mother told her to inform her supervisor that she was sick and that she would need to go home because she was sick. This witness left the Agency Wednesday morning and did not return until the following Monday, June 21, 2010. On the morning of June 21, 2010, she filed her complaint.

⁷ Agency Exhibit 1, Tab 6

The Director interviewed the complainant on June 21, 2010 and that interview started at approximately 8:45 a.m. The typed rendition of the meeting notes for that interview are contained at Agency Exhibit 1, Pages 1 and 2. As an answer to the Director's first question, the complainant stated that the Grievant said to her when he entered the break room that morning, "You look good today."⁸ The word, "exceptional," was not included in the typed rendition of that interview. Upon cross-examination, the complainant was adamant that the Director misquoted her.

The complainant's mother testified and upon cross-examination, stated that her daughter knew that there was a significant difference between someone saying that you "look good" and someone saying you "look exceptionally good." The complainant's mother testified that her daughter does not embellish facts.

In answer to another question asked to the complainant by the Director, the complainant stated that she and the Grievant did not have any relationship outside of work and that they had gone to lunch one (1) time about a month before this incident.⁹ In her testimony, the complainant stated that the Grievant had asked her numerous times to go to lunch and had also asked her to go to a pub. For whatever reason, comments regarding the pub and the numerous requests for lunch were not included in the Director's notes. The Hearing Officer does not know whether the complainant failed to mention this fact, whether the Director failed to record this fact or whether this is an embellishment of the facts.

The complainant testified that all of this took place in front of the sink which is shown in Agency Exhibit 1, Tab 6. At no time in this initial interview did the complainant testify that the Grievant had an erection. She stated to the Director that she "could feel his male genitals pressed against my backside."¹⁰

The Director requested that the complainant reduce to writing her complaint. The complainant did this and produced a three (3) paragraph statement which is dated June 23, 2010 and is found at Agency Exhibit 1, Tab 4. In that statement, the complainant states in part as follows:

As he was talking I realized that he was so close that I could feel his genitals on my buttock, I politely backed away turned and faced him. I backed away A's office assistant walked into the break room. Buy [sic] this time she looked at me like (what is this?) Dead into my eyes no words were spoken but she was (judging by the look on her face), she was thinking just as I was thinking. (*What in the world is going on with this?*)

A's office assistant started to walk out of the break room but with hesitation she decided to proceed cautiously to the soda machine. I took this opportunity to move so I would be standing in front of the break room

⁸ Agency Exhibit 1, Tab 1, Page 1

⁹ Agency Exhibit 1, Tab 1, Page 1

¹⁰ Agency Exhibit 1, Tab 1, Page 1

table to politely remove myself from this very uncomfortable situation. I felt so relieved that she did not leave me alone.¹¹

During the afternoon of June 21, 2010, the Director interviewed the fellow employee who came into the break room while this alleged incident was occurring. In part, the interview notes were as follows:

HR Director: “Do you recall being in the break room any time the prior week, and specifically on Wednesday, June 16, 2010? The complainant stated that you walked into the break room and looked at her (dead into the eyes) as if to say what is this? She said you did not say anything. Do you remember this?”

Ms. B: “No, but I seldom go into the break room. It is possible that a man and woman could have been in there and I wasn’t paying them any attention. I remember going in there to get something out of the vending machine. I didn’t think I had enough change and I stepped out and then found some in my pocket and went back in to the machine.”

HR Director: “Do you recall what day that was?”

Ms. B: “No, I am sorry, I don’t. If anything had looked strange I would have reported it since I am very sensitive about workplace sexual harassment. I had this happen to me in the workplace and I know what she is going through. I am sorry I couldn’t help.”¹²

It is clear that the complainant and this witness have entirely different recollections regarding what happened that morning regarding the alleged incident. It is instructive to the Hearing Officer that the complainant did not produce her written statement until Tuesday, June 23, 2010. She had approximately six (6) days to consider her statement and to attempt to produce a statement that was as factual as she possibly could. There is significant difference between these two (2) statements.

On June 28, 2010, at 9:00 a.m., the Director and the Director of Training and Exercise interviewed the Grievant. This is the first time that the Grievant was made aware that a charge had been lodged against him. The Director produced a three (3) page set of typed meeting notes from this interview. At first, the Director testified that these notes were exact quotations of what the Grievant said. Indeed, in the Exhibit itself, she shows all exchanges to be exact quotations. Upon questioning by counsel for Grievant, it became obvious that these questions and answers were merely summations. Originally, the Director testified that the typed notes were compiled soon after the original interview. Upon cross-examination, it appears that the typed notes may not have been produced for at least two (2) and perhaps two-and-a-half (2 ½) months after the original interview.

The Director had been requested by both the Grievant and by Grievant’s counsel to produce all documents that she and the Agency had in their possession regarding this interview.

¹¹ Agency Exhibit 1, Tab 4, Page 1

¹² Agency Exhibit 2, Page 1

Previously she stated that she had complied with this request and during the course of this hearing it became obvious that she had her original handwritten notes of this meeting in her office. The Hearing Officer directed that she produce those notes and they were entered as Grievant Exhibit 2. When the Hearing Officer compares the actual handwritten notes of the Director for the meeting of June 28, 2010 to the typed meeting notes that are contained at Agency Exhibit 1, Tab 5, it is clear to the Hearing Officer that the Director did not at all purport to include everything that was contained in the interview. Indeed, it appears that a subjective intent was applied as to what was put in the typed meeting notes and what was left out.

It is also relevant to the Hearing Officer that the Director testified under oath that the meeting lasted for approximately 45 minutes. Under further questioning, she admitted that it may have lasted between 45 minutes to an hour. When the Director of Training and Exercise testified, he stated that the meeting started at 9:00 a.m., broke for a short recess at 10:00 a.m. and concluded just prior to lunch which was at 11:30 a.m. Accordingly, one (1) Agency witness to this meeting testified that it lasted for 45 minutes to 60 minutes and the other Agency witness testified that it lasted approximately 150 minutes. It is difficult for the Hearing Officer to understand the discrepancy between these two (2) witnesses. At no time during the interview does it appear that the Grievant was asked if he had an erection while he was in the break room with the complainant.

On June 29, 2010, the Director interviewed the complainant again.¹³ During this interview, the complainant stated that the incident took place in front of the towel dispenser, which is shown in Agency Exhibit 1.¹⁴ This is a different location from where she originally testified the incident took place. Further, at this interview, the Director inquired of the complainant as to whether or not it could possibly have been the Grievant's stomach or belt she felt.¹⁵ The Grievant, when he was interviewed on June 28, 2010, apparently demonstrated that, because of the size of his stomach, what he was alleged to have done would have been simply impossible. The Director inquired of the complainant during this interview if the Grievant had an erection during the alleged incident. This is the first time that the question of an erection was raised.¹⁶ The complainant answered that she simply did not know if the Grievant had an erection.

In her testimony before the Hearing Officer, the complainant testified that the Grievant was really not directly behind her but was more to her side, thereby removing his large stomach from the issue and making it possible that, if he had an erection, she could have felt something on her buttocks.

The Director in her testimony finally concluded that she found the complainant to be more believable than the Grievant. She testified that the Grievant became aggressive and defensive in his interview on June 28, 2010.¹⁷ Upon cross-examination, this witness seemed surprised that a male employee, who had for the first time learned that a sexual harassment case had been filed against him, might become aggressive and or defensive in his answers. The Hearing Officer noted that, during her cross-examination, this witness became fidgety in her chair and defensive. Her facial demeanor changed, her body language changed, the volume and

¹³ Agency Exhibit 1, Tab 7, Pages 1 and 2

¹⁴ Agency Exhibit 1, Tab 6

¹⁵ Agency Exhibit 1, Tab 7, Page 2

¹⁶ Agency Exhibit 1, Tab 7, Page 2

¹⁷ Agency Exhibit 1, Tab 5, Page 1

timbre of her voice changed and she was clearly uncomfortable when she was being questioned regarding the manner in which she conducted her investigation and the manner in which she complied with requests for documentation. It is of note that when the Director of Training and Exercise testified, he specifically testified that he did not find the Grievant to be defensive in his testimony. Upon cross-examination, the Director testified that she had in fact asked the Grievant if he had an erection when she first interviewed him on June 28, 2010 and that she had simply forgotten to put that in her notes.

The Grievant testified in this matter and consistently denied that he did any of the things that the complainant alleged. His denials were consistently found in the typed notes that were introduced as Agency Exhibit 1, Tab 5 and in the handwritten notes that were produced as Grievant Exhibit 2. This Hearing Officer finds that the inconsistencies in the complainant's testimony before the Hearing Officer and her written statement and the written notes made by the Director which were attributable to the complainant were such as to cause the complainant's testimony to be less credible than the testimony of the Grievant. The only potential neutral third witness to this matter specifically contradicted the assertions made about her and her observations in the break room. This is the only other potential witness to this matter.

The complainant had several days to regain her composure prior to her written statement regarding this third neutral witness. This witness testified before the Hearing Officer and was interviewed by the Director. In both her testimony and that interview, this third party neutral witness completely contradicted the complainant's observations. The written notes made by the Director regarding her interview with the Grievant have been discredited to the point that they are essentially meaningless in this matter. The Director testified that she was the person who first began questioning whether or not the Grievant had an erection and this question did not take place until after the Grievant had demonstrated that it would be extraordinarily difficult for what the complainant alleged that he did to actually happen, based on his physical body build. Only then did the issue of erection begin. Following the Grievant's demonstration, then the complainant changed her story before the Hearing Officer to indicate that the Grievant perhaps approached her more from the side than from the rear.

In this matter, the only issue before this Hearing Officer is who is more believable and credible. This Hearing Officer finds that the Grievant and the third party witness are more believable than the complainant and the other witnesses for the Agency. Accordingly, the Hearing Officer finds that the Agency has not borne its burden of proof in this matter.

MITIGATION

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...”¹⁸ 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant did not sexually harass a co-worker as defined in DHRM Policy Number 2.30. The Hearing Officer orders that the disciplinary action be rescinded; that the Grievant be reinstated to his former position or, if occupied, to an objectively similar position; that the Grievant be paid full back pay from the date of his termination to the date of his reinstatement; that all of the Grievant’s benefits and seniority be restored; and that the Agency pay reasonable attorney’s fees to the Grievant’s attorney for his representation of the Grievant in this matter.

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 Street, 12th Floor

¹⁸Va. Code § 2.2-3005

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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁹ 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.²⁰

[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]

William S. Davidson
Hearing Officer

¹⁹An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁰Agencies 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
FEE ADDENDUM OF HEARING OFFICER
In Re: Case No: 9434

Issued: November 18, 2010

PROCEDURAL HISTORY

A hearing was held in this matter on October 26, 2010 and a Decision was issued by the Hearing Officer on November 1, 2010. The Hearing Officer's Decision was sent to both the Agency's attorney and the Grievant's attorney by facsimile transmission on November 1, 2010.

On November 4, 2010, the attorney for the Grievant filed with the Hearing Officer a Petition for Reasonable Attorney's Fees. The attorney for the Grievant certified that on November 4, 2010, a true copy of the original of the Petition for Reasonable Attorney's Fees was mailed to the attorney for the Agency.

The attorney for the Agency, on November 10, 2010, sent a letter to the Hearing Officer indicating that on behalf of the Agency, he was not going to contest attorney's fees and stated that the Agency had no objection as to the calculation of attorney's fees and costs sought by the attorney for the Grievant.

GOVERNING LAW

Attorney's fees are dealt with at VII(D) of Rules for Conducting Grievance Hearings and at Section 7.2(e) of the Grievance Procedure Manual. Attorney's fees are only available where the Grievant has been represented by an attorney and has substantially prevailed on the merits of a Grievance challenging his discharge. For such an employee to substantially prevail, the Hearing Officer's Decision must contain an Order that the Agency reinstate the employee to his former (or an objectively similar) position. The Hearing Officer's original Decision ordered that the Grievant be reinstated to his former position or to an objectively similar position.

Section 7.2(e) of the Grievance Procedure Manual requires that counsel for the Grievant ensure that the Hearing Officer receives within fifteen (15) calendar days of the issuance of the original Decision, counsel's Petition for Reasonable Attorney's Fees. In this matter, that was done and as provided, the Petition included an Affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the Rules for Conducting Grievance Hearings. Further, a copy of this Fee Petition was provided to the Agency as is required by the Rules. The Agency did not contest the Fee Petition by providing a written Rebuttal to the Hearing Officer.

OPINION

In his Petition for Reasonable Attorney's Fees, counsel requested attorney's fees of \$2,567.60. This was arrived at by charging \$131.00 per hour for 19.6 hours. Based on the time and complexity of this matter, the Hearing Officer finds that to be a reasonable request for attorney's fees.

Accordingly, the Hearing Officer awards attorney's fees in this matter to the attorney for the Grievant in the amount of \$2,567.60.

Counsel for the Grievant asked for \$100.00 in out-of-pocket costs. Counsel for the Agency specifically stated that he had no objection to the costs which were being sought. However, the Hearing Officer is unsure as to whether or not he has the authority to award costs other than attorney's fees. To the extent that he has such authority, and inasmuch as there was no objection raised by the Agency, the Hearing Officer awards \$100.00 in costs to the attorney for the Grievant.

The attorney for the Grievant requested reimbursement for one (1) of the Grievant's witnesses. The Hearing Officer clearly does not have the authority to make such payment and, accordingly, denies that request.

APPEAL RIGHTS

Within ten (10) calendar days of the issuance of the Fee Addendum, either party may petition the EDR Director for a Decision solely addressing whether the Fee Addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once the EDR Director issues a ruling on the propriety of the Fee Addendum, and if ordered by EDR, the Hearing Officer has issued a revised Fee Addendum, the original Decision becomes final and may be appealed to the Circuit Court in accordance with Section 7.3(a) of the Grievance Procedure Manual.

William S. Davidson
Hearing Officer