Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 02/29/12; Decision Issued: 03/08/12; Agency: DOC; AHO: William S. Davidson, Esq.; Case No. 9756; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Admin Review request received 03/23/12; EDR Ruling No. 2012-3310 issued 05/18/12; Outcome: AHO's decision affirmed: Administrative Review: DHRM Admin Review request received 03/23/12; DHRM Ruling issued 06/08/12; Outcome: Remanded to AHO; Remand Decision issued 06/15/12; Outcome: Original decision affirmed; Administrative Review: EDR Admin Review request on Remand Decision received 06/28/12; EDR Ruling No. 2012-3382 issued 07/11/12; Outcome: AHO's decision affirmed; Administrative Review: DHRM Admin Review request on Remand Decision received 06/28/12; DHRM Ruling issued 09/14/12; Outcome: Remanded to modification; Second Remand Decision issued 09/20/12; Outcome: Modified in accordance with DHRM ruling.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9756

Hearing Date: February 29, 2012
Decision Issued: March 8, 2012

PROCEDURAL HISTORY

The Grievant was issued a Group III Written Notice on September 19, 2011, for:

> On August 9, 2011, Officer A reported to Major B that she had been sexually harassed by [Grievant] while on transportation duties with [Grievant]. Officer A reported that [Grievant] made inappropriate comments toward her and touched her inappropriately. [Grievant] was interviewed by Special Agent C on August 19, 2011. [Grievant] provided an initial statement to Special Agent C denying all claims made by Officer A. However, [Grievant] provided a second statement which supported some of the claims made by Officer A. Among such admissions, [Grievant] advised Officer A that she "could have been a stripper." Based upon [Grievant's] conduct, he is being issued a Group III Written Notice for violation of DHRM Policy 2.30 *Workplace Harassment* with termination. [1]

Pursuant to the Group III Written Notice, the Grievant was terminated on September 19, 2011. [2] On October 17, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On January 9, 2012, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer.

Counsel for the Grievant made a Motion for Production in this matter on January 18, 2012. The Hearing Officer ruled on that Motion on January 19, 2012, and subsequently, the Agency appealed the Hearing Officer's Ruling to the Director of EDR. The Director issued a Compliance Ruling of Director on February 7, 2012. Scheduling for the hearing was delayed until the issue of the production of documents could be resolved.

APPEARANCES

Advocate for the Agency
Counsel for Grievant
Grievant
Witnesses

ISSUE

[1] Agency Exhibit 1, Tab 1, Page 1
[2] Agency Exhibit 1, Tab 1, Page 1
[3] Agency Exhibit 1, Tab 1, Page 2

Did the Grievant violate DHRM Policy 2.30, Workplace Harassment?

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]

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 six (6) tabbed sections. Tabs 1 through 4 and Tab 6, were accepted without objection as Agency Exhibit 1. There was an objection to the documents proffered for Tab 5, prior to commencement of the hearing. The Hearing Officer did not allow those documents and stated that he would hold his ruling in abeyance until such time as they were used during the hearing. During the course of the

[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)

hearing, these documents were presented to a witness and, at that time, Grievant's counsel withdrew her objection and the documents were introduced and placed at Tab 5 of Agency Exhibit 1.

The Grievant provided the Hearing Officer with no documentary evidence, however, the Grievant proffered documents that were placed, without objection, in Agency Exhibit 1, Tab 1 and are numbered pages 6 through 14.

DHRM Policy 2.30(A)(1), provides in part as follows:

> The Commonwealth strictly forbids harassment of any employee...on the basis of an individual's...sex... [7]

DHRM Policy 2.30(C)(1), provides in part as follows:

> Any employee who engages in conduct determined to be harassment... shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct. [8]

In its glossary, Policy 2.30 defines Sexual Harassment in part as follows:

> **Any unwelcome sexual** advance, request for sexual favors, or **verbal,** written or physical **conduct of a sexual nature by...co-workers**... (Emphasis added)
>
> Hostile Environment - A form of sexual harassment **when a victim is subjected to unwelcome and severe...sexual comments, innuendoes,** touching or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work. [9] (Emphasis added)

Finally, the glossary for Policy 2.30 also defines Workplace Harassment in part as follows:

> **Any unwelcome verbal**, written or physical conduct **that either denigrates or shows hostility or aversion towards a person on the basis of...sex.**..that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment... [10] (Emphasis added)

The Hearing Officer heard from seven (7) witnesses in this matter. The two (2) primary witnesses were the alleged victim in this matter and the Grievant, whom she accused as being the person who sexually harassed her. Both of these witnesses were corrections officers for the Agency. On or about July 28, 2011, they drove from their place of employment to MCV hospital to relieve a similar team of corrections officers who were guarding an inmate. The alleged incident of harassment took place at MCV Hospital. The Hearing Officer was not impressed

[7] Agency Exhibit 1, Tab 4, Page 2
[8] Agency Exhibit 1, Tab 4, Page 3
[9] Agency Exhibit 1, Tab 4, Page 4
[10] Agency Exhibit 1, Tab 4, Page 4

with the testimony of either the Grievant or the accuser. Both of them were evasive and, at many times, were unbelievable. The oral and documentary evidence presented to the Hearing Officer provide many different versions of what allegedly occurred on or about July 28, 2011.

On August 8, 2011, a Major at the Agency, sent a Memorandum to the Human Resource officer regarding this incident. In that Memorandum, he states in part as follows:

> ...Officer A reports that while on a medical transportation run to MCV, [Grievant] repeatedly rubbed and touched her face, hair, arms and legs. Officer A reports that she told [Grievant] several times to stop and even threaten[ed] to hit him, if the touching did not cease, but he continued to touch her. Officer A reports that this was not [Grievant's] first time touching her; in the past she reports that he grabbed her between the legs... [11]

On August 8, 2011, the alleged victim provided a written report regarding the alleged incident that took place on or about on July 28, 2011. In that report, she stated in part as follows:

> ...While at the hospital [Grievant] was touching me inappropriate like on my legs, arm, face and rubbing my hair. Each time he touch[ed] me I told him to stop before I knock the hell out of you. It seems like that whole night we was talking he turn[ed] everything into sex. Like when I was eating a banana he said "Oh we know what you do." I responded "why is you weird [sic] about what I do." Also he said something to me about taking my clothes off for money. He also mentioned about riding some dick... [12]

On August 26, 2011, Officer A was interviewed by Special Agent C and this Agent's Investigative Interview states in part as follows:

> ...I stood up to stretch and [Grievant] began rubbing my right thigh. I told [Grievant] to stop that before I knock[ed] the hell out of him. A little while later, [Grievant] began rubbing my right shoulder and again I told him to stop. I also told him again that I would knock the hell out of him. My face had broken out and [Grievant] reached up and began rubbing my face where I had been itching it. I told him you think I'm playing with you, but I'm not I will knock the hell out of you....He began stroking my hair. I told him to stop and again stated I would knock the hell out of him... [13]

Further, during the interview of August 26, 2011, Officer A's responses to Special Agent C's questions were as follows:

> ...[Special Agent C] - In your Internal Incident Report you stated that you were eating a banana in the Emergency Room, MCV and [Grievant] indicated "Oh we know what you do?" What did you feel he was implying?

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[11] Agency Exhibit 1, Tab 2(A), Page 1
[12] Agency Exhibit 1, Tab 2(B), Page 1
[13] Agency Exhibit 1, Tab 2(B), Pages 7 and 8

[Officer A] - Performing oral sex on a male.

[Officer A] - ...but then he asked me how I would like to take my clothes off for money. **There was never any mention about being a stripper.**

[Special Agent C] - In your Internal Incident Report you related that [Grievant] made a comment to you about riding some dick? What was this about?

[Officer A] - **[Grievant] never used the word "dick"** but he stated I bet you could ride the heck out of something. I inferred that he was talking about dick.

[Special Agent C] - Has [Grievant] ever touched your vagina?

[Officer A] - ...[Grievant] reached inside my car and grabbed my vagina. I asked [Grievant] what the hell was he doing? He did not say anything, but he removed his hand.

[Special Agent C] - Did you ever indicate to [Grievant] that you felt uncomfortable around him?

[Officer A] - No, but I did tell him that I was not attracted to him and I did not find him interesting. [14] (Emphasis added)

In his Report of Investigation, dated September 1, 2011, Special Agent C, stated in part as follows:

During their time at MCV Hospital, Richmond Virginia, [Grievant] touched [Officer A] on her face, shoulder, leg and hair without permission. [15]

On August 19, 2011, Special Agent C questioned the Grievant regarding these matters. The Grievant provided answers to questions indicating that he denied each and every allegation which Officer A had made. [16] Later that same day, the Grievant corrected his prior statement and, in answer to the question: "Did you make a comment to [Officer A] about taking her clothes off for money?" - The Grievant replied, "I did make a comment to her that she could have been a stripper." [17]

At the hearing, Officer A testified that the Grievant "put his hands between my legs." She further stated, "I was eating a banana and he said, 'We know what you do;' and [Grievant] caressed my shoulder, my arms, and my hair." This witness further testified that the Grievant

[14] Agency Exhibit 1, Tab 2(B), Pages 7 and 8
[15] Agency Exhibit 1, Tab 2, Page 2
[16] Agency Exhibit 1, Tab 2(C), Pages 6 and 7
[17] Agency Exhibit 1, Tab 2(C), Page 8

also "**told me about riding some dick.**" Officer A, in her response to a question from Special Agent C, stated that the Grievant never used the word "dick."

Under cross-examination, Officer A testified that she did not specify in her earlier statement that the Grievant touched her on her vagina during the evening they were at the hospital. Officer A denied ever touching the Grievant's biceps. Officer A confirmed that her cell phone was used that evening to look at pictures of tattoos.

The Grievant testified that there was a substantial amount of lint on Officer A's uniform. He testified that he moved towards her as if he was going to remove the lint and she saw him and said for him to stop and to not touch her. He testified that he did in fact stop and did not touch her. The Grievant acknowledges touching the tattoo on Officer A's arm but says that was with her permission. The Grievant denied touching Officer A's face and hair. He denied making any comment about "riding some dick." However, the Grievant did affirmatively state that he did tell Officer A that she could be a stripper. Curiously, the Grievant testified that he made that statement in order to shock her so that she would stop using her personal cell phone as he knew that was a violation of state policy.

The Agency called as a witness another corrections officer who testified that some time in March of 2011, the Grievant had touched her in the buttocks. This witness also confirmed that she and the Grievant had a one night stand. The Hearing Officer finds that alleged event is not helpful in his Decision in this matter and he also finds that this witness' credibility was seriously eroded by her demeanor during her testimony.

The Hearing Officer heard from Special Agent C. This witness acknowledged that it had been some time since he had prepared this Report. The Hearing Officer, even with this information, found his testimony to be wholly unhelpful as he seemed to not have a sincere grasp of what was in his own Report. **This witness did confirm however, that Officer A told him that the Grievant had simply touched her legs. She did not talk about the Grievant touching her vagina on or about July 28, 2011.**

Next the witness heard from the Human Resource Officer at the Agency. Her testimony was that the "stripper" statement would be verbal harassment under Policy 2.30. This witness also testified regarding the alleged event that took place off of Agency property and that is not against state policy. Officer A, in her response to a question from Special Agent C, stated that there was no mention about being a stripper.

Finally, the Hearing Officer heard from the Warden of this Agency. This witness testified that, because the Grievant admitted to the "**stripper**" statement, he concluded everything else that the Grievant denied was a lie and, conversely, everything that Officer A stated was true. The Warden testified that, before hearing Officer A's testimony at the hearing, all he knew was that Officer A had alleged that the Grievant had touched her on the legs. The hearing was the first time the Warden had heard anything about her vagina being touched. The Warden further testified that because of a prior Group I offense, that the Grievant must have committed the offenses alleged in this matter. The prior Group I offense was more than ten (10) years ago.

The Warden acknowledged that Operating Procedure 135.1 (VI)(C)(2)(a) states as follows:

> An employee should be immediately advised of the reason for his or her removal from the workplace. As soon as possible after an employee's removal from the work area for reasons stated above, management must provide the employee with written notification of the intended corrective action and a summary or description of the evidence of the offense for which corrective action is being contemplated, and when applicable, that an administrative investigation of the employee's conduct is underway. [18]

When asked several times if the Warden had complied with that Policy, he effectively did not answer the questions. The Hearing Officer finds that the Agency did not comply with that Policy. However, that issue was not raised prior to the hearing and the Hearing Officer affirmatively finds that the Grievant was completely familiar with the charge for which he was removed and was adequately represented by counsel regarding that charge.

The problem with the testimony by the Grievant is that her written statements and declarations prior to this hearing state that there was no mention of "stripper" and that the Grievant never used the word "dick." Her testimony before the Hearing Officer contradicts both. The Grievant admits the "stripper" comment, but denies all else. His denials were carefully crafted and were simply not believable. The Warden seems to have relied on the "stripper" statement to construct the totality of his justification for termination.

While Officer A denied the "stripper" statement was made, the Hearing Officer will believe the Grievant when he conceded he made that statement, inasmuch as it is an admission against his own interest.

That statement, standing alone, is sufficient to violate Policy 2.30. The Hearing Officer finds that termination is a possible, even if harsh, result of a violation of this policy.

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..." [19] 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.

[18] Agency Exhibit 1, Tab 6, Page 12
[19] Va. Code § 2.2-3005

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter and that the Group III Written Notice with termination was appropriate.

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
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.[20] 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.[21]

[20]An 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

[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]

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William S. Davidson
Hearing Officer

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).

[21] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department of Corrections

June 8, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9756. For the reasons stated below, the Department of Human Resource Management (DHRM) remands this decision to the hearing officer. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer stated the following:

The Grievant was issued a Group III Written Notice on September 19, 2011, for:

> On August 9, 2011, Officer A reported to Major B that she had been sexually harassed by [Grievant] while on transportation duties with [Grievant]. Officer A reported that [Grievant] made inappropriate comments toward her and touched her inappropriately. [Grievant] was interviewed by Special Agent C on August 19, 2011. [Grievant] provided an initial statement to Special Agent C denying all claims made by Officer A. However, [Grievant] provided a second statement which supported some of the claims made by Officer A. Among such admissions, [Grievant] advised Officer A that she "could have been a stripper." Based upon [Grievant's] conduct, he is being issued a Group III Written Notice for violation of DHRM Policy 2.30 *Workplace Harassment* with termination.

Pursuant to the Group III Written Notice, the Grievant was terminated on September 19, 2011. On October 17, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. On January 9, 2012, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer.

****

The hearing officer identified the following as the relevant ISSUE:

Did the Grievant violate DHRM Policy 2.30, Workplace Harassment?

****

The FINDINGS OF FACT, as per the hearing officer, in this case are as follows:

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 six (6) tabbed sections. Tabs 1 through 4 and Tab 6 were accepted without objection as Agency Exhibit 1. There was an objection to the documents proffered for Tab 5, prior to commencement of the hearing. The Hearing Officer did not allow those documents and stated that he would hold his ruling in abeyance until such time as they were used during the hearing. During the course of the hearing, these documents were presented to a witness and, at that time, Grievant's counsel withdrew her objection and the documents were introduced and placed at Tab 5 of Agency Exhibit 1.

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Any unwelcome sexual advance, request for sexual favors, or **verbal,** written or physical **conduct of a sexual nature by ... co-workers ...** (Emphasis added)

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Finally, the glossary for Policy 2.30 also defines Workplace Harassment in part as follows:

Any unwelcome verbal, written or physical conduct **that either denigrates or shows hostility or aversion towards a person on the basis** of...sex ... that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment... (Emphasis added)

The Hearing Officer heard from seven (7) witnesses in this matter. The two (2) primary witnesses were the alleged victim in this matter and the Grievant, whom she accused as being the person who sexually harassed her. Both of these witnesses were corrections officers for the Agency. On or about July 28, 2011, they drove from their place of employment to MCV hospital to relieve a similar team of corrections officers who were guarding an inmate. The alleged incident of

harassment took place at MCV Hospital. The Hearing Officer was not impressed with the testimony of either the Grievant or the accuser. Both of them were evasive and, at many times, were unbelievable. The oral and documentary evidence presented to the Hearing Officer provide many different versions of what allegedly occurred on or about July 28, 2011.

On August 8, 2011, a Major at the Agency, sent a Memorandum to the Human Resource officer regarding this incident. In that Memorandum, he states in part as follows:

... Officer A reports that while on a medical transportation run to MCV, [Grievant] repeatedly rubbed and touched her face, hair, arms and legs. Officer A reports that she told [Grievant] several times to stop and even threaten [ed] to hit him, if the touching did not cease, but he continued to touch her. Officer A reports that this was not [Grievant's] first time touching her; in the past she reports that he grabbed her between the legs…

On August 8, 2011, the alleged victim provided a written report regarding the alleged incident that took place on or about on July 28, 2011. In that report, she stated in part as follows:

… While at the hospital [Grievant] was touching me inappropriate like on my legs, arm, face and rubbing my hair. Each time he touch[ed] me I told him to stop before I knock the hell out of you. It seems like that whole night we was talking he turn [ed] everything into sex. Like when I was eating a banana he said "Oh we know what you do." I responded "why is you weird [sic] about what I do." Also he said something to me about taking my clothes off for money. He also mentioned about riding some dick ...

On August 26, 2011, Officer A was interviewed by Special Agent C and this Agent's Investigative Interview states in part as follows:

… I stood up to stretch and [Grievant] began rubbing my right thigh. I told [Grievant] to stop that before I knock[ed] the hell out of him. A little while later, [Grievant] began rubbing my right shoulder and again I told him to stop. I also told him again that I would knock the hell out of him. My face had broken out and [Grievant] reached up and began rubbing my face where I had been itching it. I told him you think I'm playing with you, but I'm not I will knock the hell out of you ... He began stroking my hair. I told him to stop and again stated I would knock the hell out of him...

Further, during the interview of August 26, 2011, Officer A's responses to Special Agent C's questions were as follows:

... [Special Agent C] - In your Internal Incident Report you stated that you were eating a banana in the Emergency Room, MCV and [Grievant] indicated "Oh we know what you do?" What did you feel he was implying?

[Officer A] - Performing oral sex on a male.

[Officer A] - ... but then he asked me how I would like to take my clothes off for money. There was never any mention about being a stripper.

[Special Agent C] - In your Internal Incident Report you related that [Grievant] made a comment to you about riding some dick? What was this about?

[Officer A] - [Grievant] never used the word "dick" but he stated I bet you could ride the heck out of something. I inferred that he was talking about dick.

[Special Agent C] - Has [Grievant] ever touched your vagina?

[Officer A] - ... [Grievant] reached inside my car and grabbed my vagina. I asked [Grievant] what the hell was he doing? He did not say anything, but he removed his hand.

[Special Agent C] - Did you ever indicate to [Grievant] that you felt uncomfortable around him?

[Officer A] - No, but I did tell him that I was not attracted to him and I did not find him interesting. (Emphasis added)

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At the hearing, Officer A testified that the Grievant "put his hands between my legs." She further stated, "I was eating a banana and he said, 'We know what you do;' and [Grievant] caressed my shoulder, my arms, and my hair." This witness further testified that the Grievant also "told me about riding some dick." Officer A, in her response to a question from Special Agent C, stated that the Grievant never used the word "dick."

Under cross-examination, Officer A testified that she did not specify in her earlier statement that the Grievant touched her on her vagina during the evening they were at the hospital. Officer A denied ever touching the Grievant's biceps. Officer A confirmed that her cell phone was used that evening to look at pictures of tattoos.

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The Hearing Officer heard from Special Agent C. This witness acknowledged that it had been some time since he had prepared this Report. The Hearing Officer, even with this information, found his testimony to be wholly unhelpful as he seemed to not have a sincere grasp of what was in his own Report. **This witness did confirm however, that Officer A told him that the Grievant had simply touched her legs. She did not talk about the Grievant touching her vagina on or about July 28, 2011.**

Next the witness heard from the Human Resource Officer at the Agency. Her testimony was that the "stripper" statement would be verbal harassment under Policy 2.30. This witness also testified regarding the alleged event that took place off of Agency property and that is not against state policy. Officer A, in her response to a question from Special Agent C, stated that there was no mention about being a stripper.

Finally, the Hearing Officer heard from the Warden of this Agency. This witness testified that, because the Grievant admitted to the "**stripper"** statement, he concluded everything else that the Grievant denied was a lie and, conversely, everything that Officer A stated was true. The Warden testified that, before hearing Officer A's testimony at the hearing, all he knew was that Officer A had alleged that the Grievant had touched her on the legs. The hearing was the first time the Warden had heard anything about her vagina being touched. The Warden further testified that because of a prior Group I offense, that the Grievant must have committed the offenses alleged in this matter. The prior Group I offense was more than ten (10) years ago.

The Warden acknowledged that Operating Procedure 135.1 (VI)(C)(2)(a) states as follows:

> An employee should be immediately advised of the reason for his or her removal from the workplace. As soon as possible after an employee's removal from the work area for reasons stated above, management must provide the employee with written notification of the intended corrective action and a summary or description of the evidence of the offense for which corrective action is being contemplated, and when applicable, that an administrative investigation of the employee's conduct is underway.

When asked several times if the Warden had complied with that Policy, he effectively did not answer the questions. The Hearing Officer finds that the Agency did not comply with that Policy. However, that issue was not raised prior to the hearing and the Hearing Officer affirmatively finds that the Grievant was completely familiar with the charge for which he was removed and was adequately represented by counsel regarding that charge.

The problem with the testimony by the Grievant is that her written

statements and declarations prior to this hearing state that there was no mention of "stripper" and that the Grievant never used the word "dick." Her testimony before the Hearing Officer contradicts both. The Grievant admits the "stripper" comment, but denies all else. His denials were carefully crafted and were simply not believable. The Warden seems to have relied on the "stripper" statement to construct the totality of his justification for termination.

While Officer A denied the "stripper" statement was made, the Hearing Officer will believe the Grievant when he conceded he made that statement, inasmuch as it is an admission against his own interest.

That statement, standing alone, is sufficient to violate Policy 2.30. The Hearing Officer finds that termination is a possible, even if harsh, result of a violation of this policy.

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 ..." 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.

The DECISION of the hearing officer is as follows:

For reasons stated herein, the Hearing Officer finds that the Agency has bourne its burden of proof in this matter and that the Group III Written Notice with termination was appropriate.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, the hearing officer questioned the credibility of the testimony of the victim and the testimony of the grievant in that at different times, their very own testimonies contradicted themselves. However, he determined that the grievant, through his own admission, made the "stripper" statement. Thus, the hearing officer concluded "That statement, standing alone, is sufficient to violate Policy 2.30. The Hearing Officer finds that termination is a possible, even if harsh, result of a violation of this policy."

For the following reasons, the Department of Human Resource Management does not agree with the hearing officer's decision. The sexual harassment component of Policy 2.30 comports with the definition of sexual harassment under Title VII of the Civil Rights Act of 1964, as amended (Title VII). According to that definition, Sexual Harassment is:

> 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). These actions may be described as either:
>
> * 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, or:
>
> * Hostile environment – A form of sexual harassment when a victim is subjected 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. (Emphasis added)

As such, this Department adheres to the guidance promulgated by the U.S. Equal Employment Opportunity Commission which enforces Title VII and federal court rulings regarding sexual harassment. Under Title VII, the appropriate standard to sustain a claim of sexually offensive and hostile work environment is a determination of whether the alleged sexually offensive act or statement is sufficiently egregious and pervasive. In the instant case, the probative determination is whether the singular incident involving use of the word "stripper" is sufficiently egregious and pervasive to sustain a findings of sexual harassment; and, if so, whether a Group III Written Notice with termination is the appropriate level of disciplinary action with respect to progressive discipline as embodied in the Standards of Conduct Policy (Policy 1.60).

Therefore, we are remanding this decision to the hearing officer and directing that he revise his decision to be in compliance with policy and law.

_____

Ernest G. Spratley

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
In re:

Case No: 9756

Hearing Date: February 29, 2012
Decision Issued: March 8, 2012
DHRM Reconsideration Request Rec'd: June 11, 2012
Response to Reconsideration: June 15, 2012

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Department of Employee Dispute Resolution ("EDR"). A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. A request to the Hearing Officer to Reconsider his Decision must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request. [22]

OPINION

The Grievant, requested of DHRM a Review of the Hearing Officer's Decision, which was issued on March 8, 2012. On June 8, 2012, DHRM in a Policy Ruling of the Department of Human Resource Management ("PR of DHRM") directed the Hearing Officer as follows:

> For the following reasons, the Department of Human Resource Management does not agree with the hearing officer's decision. The sexual harassment component of Policy 2.30 comports with the definition of sexual harassment under Title VII of the Civil Rights Act of 1964, as amended (Title VII). According to that definition, Sexual Harassment is:
>
> 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). These actions may be described as...

[22] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

> ...Hostile environment - A form of sexual harassment when a victim is subjected 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. (Emphasis added)
>
> As such, this Department adheres to the guidance promulgated by the U.S. Equal Employment Opportunity Commission which enforces Title VII and federal court rulings regarding sexual harassment. Under Title VII, the appropriate standard to sustain a claim of sexually offensive and hostile work environment is a determination of whether the alleged sexually offensive act or statement is sufficiently egregious and pervasive. In the instant case, the probative determination is whether the singular incident involving use of the word "stripper" is sufficiently egregious and pervasive to sustain a findings [sic] of sexual harassment; and, if so, whether a Group III Written Notice with termination is the appropriate level of disciplinary action with respect to progressive discipline as embodied in the Standards of Conduct Policy (Policy 1.60). [23]

In this matter, the Grievant admitted that he told a fellow employee that, "she could be a stripper." The issue before the Hearing Officer is whether or not that rises to the level of sexual harassment under Title VII of the Civil Rights Act of 1964, as amended (Title VII). The Hearing Officer must determine if that statement qualifies as a hostile environment statement. It was clear that the statement was unwelcome. DHRM, in quoting the definition of Hostile Environment, emphasized the words, severe or pervasive. In its instructions to the Hearing Officer, DHRM used the words egregious and pervasive.

Egregious is defined as:

> Remarkable or extraordinary in some bad way; glaring; flagrant; notorious.

Pervasive is defined as:

> As to extend throughout; spread through every part of; permeate.

Severe is defined as:

> Harsh; unnecessarily extreme.

Stripper is defined as:

> A person or thing that strips; a woman who performs a striptease.

The Hearing Officer finds that referring to a fellow employee as a "stripper," is a severe and egregious representation or characterization of that person. The Hearing Officer notes that DHRM did not emphasize the word, "repeated," when it recited the Title VII definition of

[23] PR of DHRM, dated June 8, 2012

Hostile Environment. The Hearing Officer did not find that there was a repeated use of sexual comments.

The PR of DHRM was silent as to its definition of Workplace Harassment, and dealt only with the term, Sexual Harassment. In the original Decision of March 8, 2012, at page 3, the Hearing Officer set forth the following:

> Finally, the glossary for Policy 2.30 also defines Workplace Harassment in part as follows:
>
> **Any unwelcome verbal**, written or physical conduct **that either denigrates or shows hostility or aversion towards a person on the basis of...sex.**..that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment... (Emphasis added) [24]

The complete definition of Workplace Harassment as set forth in DHRM Policy 2.30 is as follows:

> An 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, 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. Effects an employee's employment opportunities or compensation.

The reason the Hearing Officer set forth DHRM's definition of Workplace Harassment is that he felt that was the policy that was violated in this matter. Clearly, the reference of being a "stripper," was unwelcome and clearly it is denigrating.

Denigrate is defined as to attack the reputation or to defame someone. It is difficult to imaging that referring to a co-worker as a stripper is a compliment or a term of endearment. It would certainly appear that it was made on the basis of the employee's sex. At a minimum, the employee involved in this matter felt that it created an intimidating, hostile or offensive work environment.

The Hearing Officer is in complete agreement with DHRM in that it is not likely that the single reference of the term "stripper," would violate the definition of Sexual Harassment, however, it appears to this Hearing Officer that it violates the definition of Workplace Harassment as set forth in DHRM Policy 2.30. The key difference is that in the Sexual Harassment definition, there is the use of the word "**repeated**." That word is not to be found in

[24] Decision issued March 8, 2012, case #9756

the definition of Workplace Harassment. Indeed, in Workplace Harassment, the definition starts with, "**any** unwelcome verbal..."

As the Hearing Officer stated in his original Decision, termination is a possible, even if harsh, result of a violation of this policy. The Hearing Officer is not a "super personnel officer, and, while he may deem the punishment as harsh, it is a permissible punishment for a violation of DHRM Policy 2.30.

DECISION

The Hearing Officer, having considered the PR of DHRM, and its failure to address the basis on which the Hearing Officer made his original Decision, Workplace Harassment, concludes that there is no reason to set aside his original Decision in this matter.

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. [25]

_____

William S. Davidson
Hearing Officer

[25] An 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).

September 14, 2012

[Parties]

RE: **Grievance of [Grievant] v. Department of Corrections**
Case No. 9756

Dear [Parties]:

Please be advised that, upon further consideration of the grievant's appeal of the hearing officer's reconsideration decision dated June 15, 2012, the Department of Human Resource Management issues the following determination. The basis for this revision is explained below.

In his original decision, the hearing officer upheld the disciplinary action of the agency that included dismissal from state employment. The hearing officer determined that there was a credibility question on the part of the grievant as well as on the part of the grievant and found that the grievant was guilty of one making perhaps one offensive statement ("…you could have been a stripper").

Based on the grievant's challenge to the original hearing decision, the DHRM directed that the hearing officer reconsider his decision in order to ensure that it complies with the relevant policy; that is, DHRM Policy No. 2.30, Workplace Harassment with respect to sexual harassment.

In his Reconsideration Decision dated June 15, 2012, the hearing officer wrote the following:

> The Hearing Officer is in complete agreement with DHRM in that it is not likely that the single reference of the term "stripper," would violate the definition of Sexual Harassment; however, it appears to this Hearing Officer that it violates the definition of Workplace Harassment as set forth in DHRM Policy2.30. The key difference is that in the Sexual Harassment definition, there is the use of the word "**repeated**." That word is not found in the definition of Workplace Harassment. Indeed, in Workplace Harassment, the definition starts with, "**any** unwelcome verbal…"
>
> As the Hearing Officer stated in his original Decision, termination is a possible, even if harsh, result of a violation of this policy. The Hearing Officer is not a

"super personnel officer," and, while he may deem the punishment as harsh, it is a permissible punishment for a violation of DHRM Policy 2.30.

The hearing officer did not modify his original decision.

The DHRM has determined that the conclusion reached by the hearing officer does not comport with DHRM Policy 2.30, Workplace Harassment, and DHRM Policy 1.60, Standards of Conduct. While violation of Policy 2.30 permits an agency to take disciplinary action under the provisions of Policy 1.60 based on the severity of the violation, the punishment in the instant case is overly harsh in relationship to the findings as enumerated by the hearing officer. Based on our review of this case, we feel that the violation should be treated and punished at no greater than that of a level II offense. Therefore, we are returning this case to the hearing officer and directing that he revise his decision to conform to the relevant policies.

Sincerely,

Ernest G. Spratley,
Assistant Director,
Office of Equal Employment Services

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
In re:

Case No: 9756

Hearing Date:	February 29, 2012
Decision Issued:	March 8, 2012
DHRM Reconsideration Request Received:	June 11, 2012
Response to Reconsideration:	June 15, 2012
Second DHRM Reconsideration Request Received:	September 14, 2012
Response to Reconsideration:	September 20, 2012

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Department of Employee Dispute Resolution ("EDR"). A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. A request to the Hearing Officer to Reconsider his Decision must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request. [26]

OPINION

In its letter of June 24, 2012, DHRM stated as follows:

> Please be advised that, based on the hearing officer's further clarification in his Reconsideration Decision dated June 15, 2012, this Department has no reason to interfere with the application of the original hearing decision.[27]

In that Ruling, DHRM was acknowledging that DHRM Policy 2.30, Workplace Harassment, defined workplace harassment as follows:

> **Any unwelcome verbal**, written or physical conduct **that either denigrates or shows hostility or aversion towards a person on the**

[26] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[27] DHRM latter dated June 24, 2012

basis of...sex...that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment... [28] (Emphasis added)

In its letter of September 14, 2012, DHRM seems to acknowledge that it continues to support its letter of June 24, 2012, but now contends that a single incident of workplace harassment does not rise to the level of a Group III offense. DHRM, in its Ruling of September 14, 2012, states in part, as follows:

> Based on our review of this case, we feel that the violation should be treated and punished at no greater than that of a level II offense. Therefore, we are returning this case to the hearing officer and **directing** that he revise his decision to conform to the relevant policies. [29] (Emphasis added)

Accordingly, as directed, the Hearing Officer finds that the Grievant is guilty of a Group II offense. Standards of Conduct Policy 1.60 indicates that a Group II offense may result in a suspension of up to ten (10) work days. The Hearing Officer rules that the Grievant should have been suspended for one (1) work day. Accordingly, the Hearing Officer orders that the Grievant be reinstated to his position, provided it has not been previously filled. If it has been previously filled, or it no longer exists, the Hearing Officer orders that the Grievant be reinstated to an equivalent position. Further, the Hearing Officer orders back pay be awarded to the Grievant for the entirety of the time that he has been unemployed, save for the one (1) day of suspension. The Hearing Officer orders that all back benefits, including seniority, be restored to the Grievant. All back pay shall be offset by any interim earnings that the Grievant has received.

Pursuant to the directive from DHRM, the Grievant has substantially prevailed in this matter and is entitled to recover reasonable attorney's fees. Counsel for the Grievant shall have fifteen (15) days from the date of the issuance of this Decision to petition for reasonable attorney's fees.

DECISION

The Hearing Officer, having considered the Letter Ruling of DHRM, concludes that there is sufficient reason to set aside his original Decision in this matter.

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.

[28] DHRM Policy 2.30, Workplace Harassment
[29] DHRM letter dated September 14, 2012

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. [30]

_____

William S. Davidson
Hearing Officer

[30] An 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).