

Issue: Group III Written Notice with Termination (workplace harassment); Hearing  
Date: 11/29/12; Decision Issued: 12/19/12; Agency: DOC; AHO: John R.  
Hooe, III, Esq.; Case No. 9903; Outcome: No Relief – Agency Upheld.

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

**DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER**

**In the matter of: Case Nos. 9903**

Hearing Date: November 29, 2012  
Decision Issued: December 19, 2012

**PRELIMINARY MATTERS**

During the telephone pre-hearing conference conducted on August 21, 2012 between the Grievant, the Agency Representative and the Hearing Officer it was agreed that the hearing in this matter would be conducted on September 17, 2012. However, the Hearing Officer received by email a letter from [attorney] dated September 6, 2012 advising that he would be representing the Grievant in the grievance hearing.

As agreed by the Grievant's attorney and the Agency's representative, the hearing was rescheduled to conducted on Wednesday, October 31, 2012. With a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called to be provided to the Hearing Officer and to the other party no later than October 23, 2012 at 5:00 p.m. However, for good cause shown and as agreed by the parties, the hearing was rescheduled to be conducted on Thursday, November 29, 2012 commencing at 10:00 a.m. on the grounds of the [location]. As of October 30, 2012 the parties had exchanged copies of exhibits and list of witnesses, both of which were also provided to the Hearing Officer.

**APPEARANCES**

Grievant  
Representative for Grievant  
Representative for Agency  
Agency Advocate  
One Witness for Agency

## **ISSUES**

1. Did the Grievant inappropriately speak to and touch a female officer?
2. If so, did the Grievant's actions violate Operating Policy 101.2 Equal Employment Opportunity/Workplace Harassment?
3. If so, did the Grievant's actions constitute a Group III Offense?
4. Were mitigating factors considered? If not, why?

## **EXHIBITS**

The Agency Exhibits admitted into evidence are contained in a single notebook with the following contents:

- Tab 1 - The Written Notice to Grievant issued on July 18, 2012
- Tab 2 - Report of Investigation by [], Master Special Agent together with attached exhibits A-1, A-2, A-3, A-4, A-5, B-1, B-2, B-3, B-4, B-5, B-6, B-7, C-1, D-1, E-1, E-2, FG-1, G-2 and G-3
- Tab 3 - Employee work profile (8 pages)
- Tab 4 - Operating Procedure No. 101.2 (6 pages)
- Tab 5 - Operating Procedure No. 135.1 (16 pages)
- Tab 6 - New Orientation Checklist dated October 6, 2008; memorandum signed October 7, 2008 and Orientation Sign-off sheets signed October 23, 2008

The Grievant's Exhibits entered into evidence were not contained in a notebook but contained the following contents:

- Tab 1 - Written Notice dated July 18, 2012
- Tab 2 - Verizon Wireless bills (12 sheets)
- Tab 3 - Transaction sheets for Account No. XXXX1814 (2 sheets)

## **FINDINGS OF FACT**

The Grievant filed a timely appeal from a Group III Written Notice issued on July 18, 2012 for violation of Operating Policy 101.2 Equal Employment Opportunity/Workplace Harassment. The disciplinary action also resulted in termination of employment effective July

18, 2012.

The Agency's Exhibit 4 included Operating Procedure 101.2 which addresses the issue of workplace harassment. The Operating Procedure defines workplace harassment as follows:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment... Workplace harassment on the basis of age, color, disability, gender (including sexual harassment, pregnancy, and marital status)... is illegal. A procedure provides at (vii).C. that any employee who engages in conduct determined to be harassment...will be subject to corrective action under Operating Procedure 135.1. Standards of Conduct, which may include discharge from employment.

Agency Exhibit 5 included Operating Procedure 135.1 Standards of Conduct. According to the Operating Procedure, Workplace Harassment can be considered a Group I, Group II or Group III Offense "depending on the nature of the violation." It is provided at V.D. Third Group Offenses (Group III) that "these offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal."

[], Master Special Agent [(MSA)], investigated the complaint which resulted in the Grievant's termination from employment. [MSA] testified that the matter set out in the Report of Investigation (Tab 2 of the Agency Exhibits) correctly sets out the results of his investigation. In the report it is stated that a co-worker of the Grievant alleged that she first became acquainted with the Grievant in April, 2011 as a co-worker and developed a social relationship with the Grievant thereafter which continued through May, 2012. The co-worker alleged that during the first week of June she was working in the control room when she let the Grievant into the control room where he hugged her. She reported that she backed away from the Grievant, opened the door to the control room and the Grievant left. The co-worker further reported that on June 24, 2012, she was assigned to a control room post in the same area where the Grievant was assigned to the floor post. She stated to the investigator that the Grievant made her uncomfortable and that she was not happy that they were to work together. She reported that the Grievant made a comment that he was happy that they were working together and that he leered at her communicating with his eyes that he was looking at her body. She reported that the Grievant wrote an acronym "TUTTB" on a folded used count sheet and that he stated that it stood for "tie you to the bedpost." She stated that later he asked if she was wearing thongs and a few minutes later suggested that they get a hotel room together on July 2<sup>nd</sup>. She further reported that later that same day she passed through a doorway where the Grievant was holding the door open. The Grievant placed his hand on her right buttocks. She said she gave him a serious look to let him know she didn't like it but did not say anything to him at that time. Later that same day the co-worker was interviewed in the shift commander's office regarding what had occurred at which time she wrote a statement.

The report of investigation further indicates that the Grievant initially denied touching

the co-worker's buttocks and claimed that the acronym meant "troll under the twelfth bridge". However, the Grievant later admitted that the acronym meant "tie you to the bedpost" and subsequently admitted that he did intentionally touch the co-worker on the buttocks as she left the control room. The Grievant admitted that his initial statements provided during the investigation were false.

During the hearing, the Grievant testified as to the details of his social relationship with the co-worker. He asserted that the nature of his social relationship (which included at least one shopping trip together, lunching together a few times and getting moonshine from her in December, 2011) combined with the facts that he has had no prior discipline and that this is the first time he had touched her on her buttocks, should result in less severe discipline.

[MSA] testified that mitigation was not considered due to the Grievant not telling the truth during his initial statements.

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et. seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.....

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The

Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct to provide appropriate corrective action.

The Virginia Department of Corrections sets out its Standards Of Conduct Operating Procedure 135.1 (Agency Exhibit 5). The Written Notice issued on July 18, 2012 designates the type of offense as Group III.

There is no question that the Grievant intentionally touched the co-worker's buttocks. It is also undisputed that he initially lied to the investigator.

### **DECISION**

The Hearing Officer finds that the Agency proved by a preponderance of the evidence that the Grievant is guilty of workplace harassment and that the nature of the harassment warrants a Group III Written Notice which normally results in termination of employment. The evidence also indicated that mitigation was not considered (i.e. prior good work record) due to the Grievant lying to the investigator.

The Agency action of Group III Written Notice with termination of employment is upheld.

### **APPEAL RIGHTS**

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. "Received by" means delivered to, not merely post-marked or placed in the hands of a delivery service.

**Requesting Administrative Review:**

1. **A challenge that the hearing decision is inconsistent** with state or agency policy is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director's authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.
2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, as well as a request to present newly discovered evidence, is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance. EDR's authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

**Final Hearing Decision.** A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of 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:** Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

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John R. Hooe, III  
Hearing Officer