

Issue: Group II Written Notice (workplace harassment); Hearing Date: 02/26/14;  
Decision Issued: 03/24/14; Agency: VDOT; AHO: Sondra K. Alan, Esq.; Case  
No. 10238; Outcome: Full Relief.

DECISION OF HEARING OFFICER  
IN RE: CASE NO. 10238  
HEARING DATE: 2/26/2014  
DECISION ISSUED: 3/24/2014

PROCEDURAL HISTORY

A complaint was made against Grievant on May 29, 2013 regarding sexual harassment. Grievant was notified of the filing on June 3, 2013. Grievant was given a letter summarizing the investigation on August 14, 2013.<sup>1</sup> Grievant was notified of a due process hearing on September 18, 2013 and Grievant responded on September 23, 2013.<sup>2</sup> Grievant was issued a Group II Written Notice on September 23, 2013 for causing subtle sexual harassment by inappropriate comments of sexual nature.<sup>3</sup> A third (3<sup>rd</sup>) step resolution was dated October 29, 2013 upholding the Written Notice<sup>4</sup> and a timely request for a hearing was granted.

A Hearing Officer was appointed on December 9, 2013, a pre-hearing conference was scheduled on December 18, 2013. Grievant then requested an additional conference call on January 9, 2014 to reschedule the Hearing that had been scheduled for January 28, 2014 and requested change to February 13, 2014. Due to inclement weather the February 13, 2014 the scheduled Hearing was rescheduled again for February 26, 2014 at the Agency office.

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<sup>1</sup> Agency Exhibit 9

<sup>2</sup> Agency Exhibit 6

<sup>3</sup> Agency Exhibit 3

<sup>4</sup> Agency Exhibit 6

## APPEARANCES

Agency Advocate

Agency Representative as Witness

2 Agency Witnesses

Grievant as Witness

5 Grievant Witnesses

## ISSUES

1. Did Grievant exhibit actionable sexual harassing behavior towards complainant and others as defined by Agency Policy?<sup>5</sup>
2. Was Grievant's right to confront his accuser abridged?
3. Was a Group II Disciplinary action warranted?
4. Was the complaint filed as retaliation to previous complaints made against Grievant that were unfounded?

## BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (GPM) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §5.8.

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<sup>5</sup> Agency Exhibit 2, Policy 2.30 page 4 "Hostile Environment"

## APPLICABLE POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq, the Rules for Conducting Grievances effective July 1, 2012 and the Grievance Procedure Manual (GPM) effective July 1, 2012.<sup>6</sup>

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “includes acts of minor misconduct that require formal disciplinary action.” Group II offenses “include acts of misconduct of a more serious and/or repeat nature that requires formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.” More than one (1) active Group II offense may be combined to warrant termination

and

Workplace Harassment Policy 2.30, page 4<sup>7</sup>

Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employee (third party).

- **Quid pro quo** – A form of sexual harassment when a manager/supervisor or a person in authority gives or withholds a work-related benefit in exchange for sexual favors. Typically, the harasser requires sexual favors from the victim, either rewarding or punishing the victim in some way.
- **Hostile environment** – A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual

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<sup>6</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standard of Conduct for State Employees

<sup>7</sup> Agency Exhibit 2 Policy 2.30 page 4 “Hostile Environment”

comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

### FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

According to testimony, an anonymous Agency employee, after attending a sexual harassment training program, determined he/she had been sexually harassed. The person who believed themselves harassed then reported this to another Agency employee who later brought it up at a staff meeting with the employee's superior. The superior reported the allegation for an investigation.<sup>8</sup> The name of the complainant, nature of the incident(s), or number of incident(s) were never revealed to Grievant nor revealed at the hearing.

The matter was investigated. However, it appears the investigator did not request information about a specific incident or incidences nor reveal the name of the person who had made the complaint. Instead, the investigation was commenced by the investigator questioning all the employees in Grievant's Pod (11 persons) regarding general sexual harassment issues as related to Grievant. The investigator claimed she asked neutral questions but evidence would be the questions already presumed there was an issue of sexual harassment within the work Pod. According to one of Grievant's witnesses the questions were suggestive and "awkward".<sup>9</sup>

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<sup>8</sup> Agency witness testimony

<sup>9</sup> Grievant witness testimony

The investigator's report was admitted as evidence.<sup>10</sup> Testimony of three (3) Agency witnesses as to how they interpreted and used the report was given. The Agency's witnesses also confirmed that classes on hostile workplace policy were regularly given. No person, neither the complainant nor those interviewed, gave *ore tenus*, evidence at this hearing of their encounters with sexual harassment.

The investigator's interviews did not afford any factual claim of complainant to be confirmed or denied by those interviewed.<sup>11</sup> The investigator concluded from the interviews that four of those interviewed believed Grievant may have at some time acted in a way that could be construed as sexually tainted. Only two actual examples were given. 1) Grievant taking a photograph of another employee's "behind", yet that employee whose photo was taken was not asked the circumstances surrounding that event or if it was offensive to that employee. The employee testified on Grievant's behalf that she was not offended 2) The matter of the use of a Pepsi product rather than a Coke product when the employee's son worked for Pepsi and a comment made about "cheating", yet the employee to whom that comment was made was not asked the circumstances surrounding that event or if that comment was offensive. The employee testified on Grievant's behalf that she was not offended.

From these interviews, the investigator concluded unrevealed, specific action(s) happening to an undisclosed person had, in fact, taken place as well as possible harassing statements made to others in the work group. The investigator termed the events "subtle".<sup>12</sup> The Written Notice also described the offense behavior as "subtle".<sup>13</sup>

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<sup>10</sup> Agency Exhibit 10

<sup>11</sup> Grievant witness testimony

<sup>12</sup> Agency Exhibit 4

<sup>13</sup> Agency Exhibit 3

Five witnesses produced by Grievant all stated Grievant had never been sexually inappropriate to their knowledge in the workplace. One of the five witnesses took exception to the manner in which she was interviewed. She stated she believed the questions were “weird”, nonfactual and easily could lead to misinterpretation.

Two witnesses also suggested the investigation, not any sexual harassment, was what was unsettling to the work group.

Grievant was never given any specific examples of the complaint against him, was never given the name of the accuser and was expected to respond in his defense based on the letter of June 9, 2013. Grievant did not even received the complete investigative report until after his grievance was filed for hearing. Grievant never was made aware of his accuser or the events alleged by the complainant.

#### OPINION

The Agency’s decisions should be upheld by the Hearing Officer unless the evidence proves otherwise. The Hearing Officer is not to act as Super Human Resource Officer. In this case, the Hearing Officer believes there are several errors in the issuance of a Group II discipline.<sup>14</sup>

Administrative hearing or not, an accused has a constitutional right to confront his accuser unless a rare relevant exception is confirmed.<sup>15</sup> Agency never put on any evidence as to why the Grievant’s accuser should have been protected. Agency actually had no complaining witnesses that confirmed Agency’s claim. EDR Ruling # 2012-3288 states in part, “Such determinations are more suited for a hearing officer who will have

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<sup>14</sup> Virginia Code 2.2 – 3005.1

<sup>15</sup> See Coy vs. Iowa, 487 US 1012 (1988) for discussion of 6<sup>th</sup> amendment rights

the benefit of the witnesses being placed under oath to testify in person.” (emphasis added)<sup>16</sup>

It misses the point that Agency believes it met its due process duty by scheduling a meeting with Grievant prior to the Written Notice being issued. It’s not the meeting in name that is important. It is the content of the meeting that satisfies due process. In this case, the Grievant had almost no evidence from which he could make a valid defense.

While the Hearing Officer appreciates the testimony of the Agency’s witness that claims of sexual harassment need to be taken seriously or it could fall back on him, not all claims reach a level of being actionable. Discretion must be used when processing a sexual harassment claim. The relationship of the accuser and the accused, circumstances regarding the timing of the claim made, the severity of the claim, and the impact of the action on the workplace are a few considerations. Instructive examples may be seen by reviewing previous hearing outcomes. Two examples of claims which did not rise to a Group II action may be reviewed at Hearing # 5785 and Hearing # 8652.<sup>17</sup>

Finally, Grievant’s behavior needs to be such that he violated a stated policy. Agency established his actions fell under Policy 2.30 page 4 “Hostile Environment”. Even if the Agency’s evidence in its investigative report were taken as competent evidence, the policy requires unwarranted and (emphasis added) severe behavior or pervasive behavior. Agency’s evidence was Grievant’s actions were “subtle”. Agency made no claim that Grievant’s actions were pervasive. Further, the only *ore tenus* evidence given on the subject of “an intimidating or offensive place for employees to

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<sup>16</sup> EDR website [www.dhrm.virginia.gov/employmentdisputeresolution](http://www.dhrm.virginia.gov/employmentdisputeresolution)

<sup>17</sup> EDR website [www.dhrm.virginia.gov/employmentdisputeresolution](http://www.dhrm.virginia.gov/employmentdisputeresolution)



work” was put on by Grievant whose witnesses all stated the opposite. They stated they were, for the most part, a happy, cohesive group.

#### MITIGATION

Grievant claims the action filed against him was retaliatory because of a previous claim made by the same complainant that was not upheld. However, having never been given the name of his accuser, Grievant is unable to prove the second complaint was made by the same person and therefore unable to substantiate his claim of retaliation.

#### DECISION

For the reason stated above, disciplinary action with a Group II discipline is **rescinded**.

#### 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 believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the Hearing Officer. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>18</sup>

Agencies must request and receive prior approval from EDR before filing a notice of appeal.

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Sondra K. Alan, Hearing Officer

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<sup>18</sup> See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.