

Issue: Group III Written Notice with Termination (Workplace Harassment); Hearing Date: 08/28/12; Decision Issued: 09/05/12; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9870; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

***Department of Human Resource Management***

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9870**

Hearing Date: August 28, 2012  
Decision Issued: September 5, 2012

### **PROCEDURAL HISTORY**

On May 23, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace harassment.

On June 20, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 30, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 28, 2012, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

Virginia Commonwealth University employed Grievant as an Instrument Management Technician until his removal effective May 23, 2012. He began working for the Agency in 2008. Grievant worked in an office that held an inventory of dental instruments. One of his responsibilities included handing out instruments to and retrieving instruments from dental students. Grievant was popular with many of the students he helped.

The Student was a female dental student who regularly interacted with Grievant to obtain instruments to complete her assignments.

In the Spring of 2011, the Student was told by her dental instructor to obtain a dental instrument referred to as a back action plugger. The actual name of the instrument is Back-action Condenser/Plugger. When the Student asked Grievant for the back action plugger, he did not know if he had that instrument in his inventory and he asked another employee working with him for help. She obtained the instrument and the instrument was given to the Student. During Grievant's interaction with the Student he made light of the instrument's name because "back action" is a euphuism for anal sex. Grievant asked her "do you want some back action?" The Student did not respond because she was embarrassed by Grievant's comment.

For several weeks, Grievant would make fun of the Student in front of other students when she approached him to check out instruments. Grievant would say "she

asked for some back action.” The Student told Grievant “this is not funny, you need to stop” but Grievant continued to tease her.

The Student decided to stop asking for the instrument. She also decided to begin obtaining instruments from another location on the Agency’s campus. In March 2012, the Student resumed obtaining instruments from Grievant’s location. She returned instruments out of order and Grievant began criticizing her for doing so. In March 2012, Grievant also asked the Student about her request for a “back action instrument” even though she had not requested the instrument since the prior year.

Initially, the Student did not wish to file a complaint against Grievant. She told her husband about Grievant’s behavior and he told her he intended to report Grievant to the Agency. She then decided to speak with the Agency regarding her concerns about Grievant. When the Student spoke with Agency employees, she displayed embarrassment and a reluctance to discuss her encounters with Grievant.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>1</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual’s race, sex, color, national origin, religion, age, veteran status, political affiliation or disability. Any employee who engages in conduct determined to be harassment or encourages such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Workplace Harassment is:

Any 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) affects an employee's employment opportunities or compensation.<sup>2</sup>

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, DHRM Policy 2.30, Workplace Harassment.

A Hostile Environment is:

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.<sup>3</sup>

The Agency's policy defines sexual harassment to include:

Verbal sexual harassment may include, but is not limited to: (1) sexual innuendo, comments and sexual remarks about clothing, body, or sexual activities; (2) humor and jokes about sex that denigrate women or men in general; (3) sexual propositions, invitations, or other pressure for sex; (4) implied or overt threats of a sexual nature; and, (5) making gestures of a sexual nature.<sup>4</sup>

Grievant repeatedly spoke to the Student using sexual innuendo about sexual activity. She asked her if she wanted "back action" and mentioned that she wanted "back action". Grievant used the phrase "back action" to refer to anal sex. He continued to tease the Student even after she asked him to stop and even after several months had passed even though she had only asked for the instrument on one occasion. Grievant's behavior was sufficiently repeated and severe to create a hostile educational environment for the Student. She attempted to avoid interacting with Grievant at his location. She began obtaining instruments at another location. Grievant created a hostile work environment for the Student under an objective standard of analysis. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant denied the Student's allegation. He did not testify and, thus, the credibility of his denial could not be determined.

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...."<sup>5</sup> 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

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<sup>3</sup> See, DHRM Policy 2.30, Workplace Harassment.

<sup>4</sup> Agency Exhibit 6.

<sup>5</sup> Va. Code § 2.2-3005.

the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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

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

3. 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 the Office of Employment Dispute Resolution 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:

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

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>6</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.