

Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 08/13/19; Decision Issued: 08/17/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11231; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11231**

Hearing Date: August 13, 2018

Decision Issued: August 17, 2018

#### **PROCEDURAL HISTORY**

On May 16, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace harassment.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 12, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On August 13, 2018, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Representative  
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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:

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On November 12, 2017, Officer S was working in the control booth. She asked to be relieved so she could go to the restroom. Grievant went to the control booth. He began making sexual comments to Officer S. Grievant said, "Damn, [Officer S] you got a fat ass. I haven't had a [race] girl in a long time." The front of Grievant's pants bulged because he had an erection. Grievant asked Officer S if she wanted to touch him. She said "no." As she left the control booth, Grievant swiped his fingers across the outside of the crotch of her pants. Officer S delayed returning to the control booth because she did not want to see Grievant. She wanted to avoid working with Grievant in the future.

Officer S told a sergeant about the incident and the sergeant told her to inform Lieutenant W. The Agency conducted an investigation. During the investigation, the Investigator believed Officer S's allegations.<sup>1</sup>

---

<sup>1</sup> The Agency presented testimony from two other women claiming Grievant made sexual comments while at work. The evidence showed that neither employee considered Grievant's comments to create a hostile work environment.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”<sup>2</sup> Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”<sup>3</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>4</sup>

DOC Operating Procedure 135.1(V)(D)(t) provides that Group III Offenses include:

Violation of DHRM Policy 2.30 Workplace Harassment (considered a Group III offense, depending upon the nature of the violation.)

DHRM Policy 2.30 governs Workplace Harassment. Workplace harassment is defined as:

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, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, 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.

Sexual Harassment is defined as:

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 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.
- Hostile environment – A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual

---

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

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

On November 12, 2017, Grievant engaged in sexual harassment of Officer S. He made unwelcomed sexual comments and touching. His behavior was severe because he touched the crotch of Officer S's pants. He created an offensive workplace for Officer S because she did not want to continue working with Grievant. 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.

Grievant argued that the disciplinary action was based on Officer S's word verses his word and that he denied the allegations. In order to resolve disputes based on conflicting employee accounts of events, the Hearing Officer determines and compares the credibility of each witness -- if each witness testifies. In this case, only Officer S testified and, thus, the Hearing Officer could not determine the credibility of Grievant's denial. Several portions of Officer S's testimony lacked credibility. However, the Hearing Officer could not conclude that all of her testimony lacked credibility. Since the Hearing Officer must consider the facts described in Officer S's testimony and does not have a basis to disregard those facts based on credible testimony from Grievant, the Hearing Officer must conclude that the Agency has met its burden of proof.

Grievant argued Officer S was biased against him because he complained that she did not return to her post promptly after he relieved her so she could go to the restroom. Grievant argued Officer S told Officer D "I am going to get [Grievant's] ass, if it's the last thing I do." Officer D testified but did not identify the date Officer S made this statement. If Officer S targeted Grievant before November 12, 2017, Officer S's statement may have shown a motive to make a false allegation. If it was after November 12, 2017, Officer S's statement may have reflected her anger with Grievant's inappropriate touching. Without knowing the date Officer S made her statement, it is unclear what weight to give Officer D's testimony.

*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 Human Resource Management ...."<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 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

---

<sup>5</sup> Va. Code § 2.2-3005.

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 request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</sup>

---

<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.

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

*/s/ Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer