Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: December 21, 2001; Decision Date: December 28, 2001; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5339

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5339

Hearing Date: December 21, 2001
Decision Issued: December 28, 2001

PROCEDURAL ISSUE

The agency proffered polygraph examination reports (Exhibits 2L, 2M & 2N) prepared in connection with the investigation of this matter. The hearing officer rejected the reports pursuant to the statutory provisions that prohibit the use of such reports in grievance proceedings.[1]

APPEARANCES

Grievant
Representative for Grievant
Two witnesses for Grievant

[1] Va. Code §§ 8.01-418.2 and 40.1-51.4:4.D both provide that analysis of polygraph examination administered to any party or witness shall not be submitted, referenced, referred to, offered or presented in any manner in any proceeding conducted pursuant to Chapter 10.01 (§ 2.2-1000 et seq.) of Title 2.2.

Assistant Warden
Legal Representative for Agency
Five witnesses for Agency

ISSUES

Did the grievant's actions on or about March 28, 2001 warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was the disciplinary action issued promptly?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on October 24, 2001 because he had sexually harassed a female correctional officer. The grievant was also discharged from employment on the same date. Following a denial of relief at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Corrections (hereinafter referred to as agency) has employed the grievant as a correctional officer for 16 years. Grievant has received training on sexual harassment, most recently on March 1, 1999.[2] The outline for this class categorizes sexual harassment into six levels of which level 6 is the most egregious. Level 5 includes unwanted physical touching of "unacceptable zones" that is forced on the target.

For some time, grievant had demonstrated interest in a female correctional officer but she was not interested in him. The consensus among coworkers is that grievant was infatuated with the female officer.[3] She always attempted to keep her distance from grievant. The female officer occasionally heard from coworkers that the grievant had been talking or gossiping about her. She had complained in the past to a lieutenant and a sergeant about grievant's annoying behavior. On more than one occasion, the lieutenant had spoken to both grievant and the female officer together, stressing the need to separate work and personal relationships. He advised grievant that if the female officer rejected his interest, he should simply take "no" for an answer and move on.

At approximately 9:00 p.m. on March 28, 2001, grievant was assigned to relieve the female correctional officer at a tower post. He drove a pickup truck to the base of the tower and parked it. As he walked toward the tower, the female officer exited the tower and walked toward the truck. As the two passed each other, grievant grabbed the female officer's right breast and she smacked his hand away. She entered the truck and was about to start it when grievant also attempted to enter the truck from the driver's side of the vehicle. Grievant put his

[2] Exhibit 4. In-Service Training record.
[3] See witness statements, Exhibits 2D, 2E, 2F & 2G.

left hand between her thighs and the female officer pushed him away. He then grabbed her right breast. The female officer managed to start the vehicle and drive forward. The driver's side door was still open and struck a post without causing any damage. Grievant then exited the truck and went to the tower. It was totally dark at 9:00 p.m. and there were no witnesses in the area.

The female officer did not report the incident at that time and was not scheduled to work for the next three days. When she returned to work on April 1, 2001, a female coworker told her that grievant had been boasting about having felt the female officer's genital area.[4] The female officer was dismayed at hearing what the grievant said and told the female coworker what had occurred on March 28, 2001. The lieutenant spoke with the female officer on April 8, 2001 to advise her that he was going to advise the captain about the ongoing friction between she and grievant. The female officer had not previously reported the incident because she did not want to go through the embarrassment of discussing the matter in front of administration officials. However, during the discussion with the lieutenant, she told him what had happened on March 28, 2001. The lieutenant asked her to write a description.

This case was assigned to an investigator from the agency's central office. Investigators work on more than one case at a time, many of which involve inmate complaints. Inmate complaints are given more priority than cases involving employees. An investigation was initiated on April 10, 2001. Interviews were completed by June 30, 2001. Following polygraph examinations in July and August, the grievant was again interviewed on August 6, 2001. The grievant was issued a Group III Written Notice and discharged on October 24, 2001.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 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 § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

[4] See Exhibit 2D for the actual language used by grievant when he spoke to the coworker.

> 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 § 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[5]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to §§ 2.1-114.5 and 53.1-10 of the Code of Virginia, the Department of Personnel and Training[6] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. 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 and to provide appropriate corrective action. Section V.B.3 defines Group III offenses to include acts and behavior of such a severe nature that a first occurrence normally should warrant removal.

The Department of Corrections has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct.[7] Section 5-10.17.B.20 of the DOC Standards cites the following example of a Group III offense:

> Violation of DPT Policy 2.15, Sexual Harassment (considered a Group III offense depending upon the nature of the violation).

The Commonwealth's Sexual Harassment policy defines sexual harassment to include physical conduct of a sexual nature when:

> … such conduct has the purpose of effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.[8]

Grievant argues that this is a classic "he said – she said" standoff because there were no witnesses to what occurred at the tower on the evening of March

[5] § 5.8 Grievance Procedure Manual, Department of Employment Dispute Resolution.
[6] Now known as the Department of Human Resource Management (DHRM).
[7] Exhibit 6. Department of Corrections Policy Number 5-10, *Standards of Conduct,* June 1, 1999.
[8] Exhibit 5. DHRM Policy No. 2.15, *Sexual Harassment*, effective September 16, 1993.

28, 2001. In such a case, the adjudicator must ascertain whether there was any corroborative evidence. Another female officer, who has no apparent motive to be untruthful, credibly testified that grievant bragged about touching the female officer's genital area. If grievant had not done what he is accused of, it is unlikely that he would be boasting about his actions only three days after the fact. Therefore, his admission to a third party strongly corroborates that the grievant did, in fact, sexually harass the female correctional officer. The female officer's version of what occurred has remained consistent from her first description on April 9, 2001 through her testimony at the hearing in December 2001.[9]

Grievant denied the incident of March 28, 2001. He claims, however, that he had touched the female officer on other occasions and that such touching was consensual. The female officer denied ever having allowed grievant to touch her. Grievant also contends that the female officer had been involved in a horseplay incident in February 2001 in which she grabbed the crotch of both grievant and another male correctional officer. The female officer also denied this allegation. Grievant failed to present any corroborative evidence despite his assertion that several male officers were present. Grievant further contends that the female officer was infatuated with him and that she had asked him to perform oral sex on her but that he refused. The female officer denied these allegations. Without any evidence to support the allegations, it must be concluded that grievant's accusations are merely smoke screens designed to conceal his culpability in the matter at issue herein.

Grievant also maintains that the female officer fabricated this incident because grievant had made complaints to the lieutenant about what grievant felt were deficiencies in the female officer's job performance. Although the lieutenant was aware of grievant's complaints, and of difficulties between certain inmates and the female officer, he had not viewed her performance as warranting any disciplinary action.

Grievant further attempts to deflect attention from himself by claiming that his April 25, 2001 statement to the investigator[10] is not the document he signed. Grievant maintains that the investigator told grievant to initial the statement in all four corners. However, grievant acknowledges that this statement does contain his valid initials on page one and his valid signature on page 2. He further admits that the interview was accurately recorded. Grievant has offered no logical reason as to why the investigator would ask him to initial all four corners of a document. Moreover, none of the other interview statements were initialed in such a manner. It is concluded that this is only another red herring.

[9] At the hearing, the investigator acknowledged that certain inconsistencies between some witness statements and his summary investigative report (Exhibit 2) were attributable to a less than thorough proofreading process.
[10] Exhibit 2C.

In summary, the agency has demonstrated, by a preponderance of the evidence, that grievant did sexually harass a female correctional officer. The harassment consisted of unwanted and unwelcome physical grabbing of the breasts and genital area. Such actions constitute level 5 sexual harassment and cannot be tolerated under any circumstances. The grievant knew that he could be disciplined and discharged for such conduct. Grievant has offered no circumstances that might mitigate his misconduct. Therefore, there is no basis either to reverse or to modify the agency's disciplinary action.

Prompt Issuance of Disciplinary Actions

One of the basic tenets of the Standards of Conduct is the requirement to promptly issue disciplinary action when an offense is committed. Supervisors should be aware of inadequate or unsatisfactory work performance or behavior on the part of employees and attempt to correct the performance or behavior immediately.[11] When issuing the employee a Written Notice Form for a Group I offense, management should issue notice as soon as practicable.[12] One purpose in acting promptly is to bring the offense to the employee's attention while it is still fresh in memory. A second purpose in disciplining promptly is to prevent a recurrence of the offense. Unless an extensive, detailed investigation is required, most disciplinary actions are issued within a few weeks.

It is understood that the agency has made a decision to give inmate complaints priority over employee cases. However, for the two reasons stated above, it is important that investigations of employee abuse be conducted promptly. The agency may wish to review this investigation to determine whether it might have been brought to a conclusion more expeditiously.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and discharge of the grievant on October 24, 2001 for sexual harassment is hereby AFFIRMED. This Written Notice shall be retained by the agency pursuant to Section 5-10.19.A of the DOC Standards of Conduct.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial

[11] Section 7.b, DHRM Policy No. 1.60, Standards of Conduct, effective September 16, 1993.
[12] Section 12.c (1), *Ibid*.

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 three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **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 cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 HRM, 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____
David J. Latham, Esq.
Hearing Officer