

Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: January 8, 2002; Decision Date: January 9, 2002; Agency: Department of Corrections; AHO: David J. Latham, Esquire; Case Number: 5343

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5343

Hearing Date:	January 8, 2002
Decision Issued:	January 9, 2002

PROCEDURAL ISSUES

The grievant participated i5.3()10(t9t)J-J-1ck6 TD 30.3391 Tw[T]-6.TTTTucted on

rejected the reports pursuant to the statutory provision that prohibits the use of such reports in grievance proceedings.¹

APPEARANCES

Warden Senior
Two Legal Representatives for Agency
Three witnesses for Agency

ISSUES

Did the grievant's actions between October 1, 2000 and December 28, 2000 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 September 28, 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 since 1989; he held the rank of lieutenant at the time of discharge. In 1989, grievant received a Group III Written Notice and three-day suspension for sexual harassment.² In 1998, a letter of reprimand was issued to grievant for contributing to sexual harassment.³ Grievant has received regular training on sexual harassment at least every two years during the course of his employment.⁴

Sexual harassment includes sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment;

¹ Va. Code § 40.1-51.4:4.D provides: The analysis of any polygraph charts produced during any polygraph examination administered to a 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 ...

² Exhibit 5. Written Notice issued to grievant, November 28, 1989.

³ Exhibit 10. Letter from Human Resource Officer to grievant, March 31, 1998.

⁴ Exhibit 6. Training records for grievant.

2. submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting that individual; and/or
3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.⁵

Over a three-month period between October and December 2000, grievant repeatedly sexually harassed a female corrections officer. The grievant was assigned in the fall of 2000 to a housing unit where the female complainant was working. The harassment began with verbal comments about parts of her body such as, "You have big, pretty legs." Within a week, grievant asked the female officer for a date, suggesting they meet at a nearby bar after work. She declined, telling grievant that she was not interested in him and that it was not appropriate because he was her supervisor. Beginning in mid-November, he made it a point to accompany the female officer when she conducted inmate counts. He would accompany her more often than other officers. On one occasion in the laundry room, he brushed up against her back; she elbowed him away.

Grievant also began calling the female officer while she was working alone in the control booth and he was in his office. He would ask her such things as, "Is your pussy good?" and "Does the pussy taste good?" Grievant then became bolder and started grabbing the female officer's buttocks. He did this approximately 50 times in the course of three months. On about ten occasions he grabbed her breasts and, on three occasions, grabbed her genital area. Grievant made these physical contacts only when no one else was in the area. The female officer would strike the grievant to get him to desist but he is much taller and heavier than she is, and was not deterred from his physical advances. On one occasion she even stomped on his foot but it had no effect on his repeated groping. After these encounters, the female officer was frequently upset and crying. When another female officer asked what was wrong, she simply said that grievant was harassing her; she did not mention that the harassment was sexual.

In late December 2000, the grievant was alone on an elevator with the female officer and grabbed her breasts. That night, the female officer finally discussed what had been happening with her mother, who encouraged her to report it to authorities. The female officer reported the harassment the following day. She had not wanted to report it previously because she was afraid she would lose her job. She was also fearful, because there were no witnesses to any of the groping incidents, that she would not be believed.

The female officer has been a corrections officer for five years and has established a satisfactory performance record. She has been married before and has been involved in an "on/off" relationship with a male corrections officer for the

⁵ Exhibit 7. DHRM Policy 2.15, *Sexual Harassment*, September 16, 1993.

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, pursuant to Va. Code § 53.1-10, has promulgated its own Standards of Conduct and Performance, which is modeled very closely on the DHRM Standards of Conduct.⁹ 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 agency has easily borne the burden of proof to demonstrate that the grievant repeatedly committed the Group III offense of sexual harassment. The credible, sworn testimony of the female officer and others is sufficient to show that grievant verbally and physically sexually harassed the female officer. Grievant failed to rebut any of the testimony presented at the hearing and failed to present any testimony or evidence in his own defense.

In his written grievance, grievant argues that disciplinary action should be reversed because there was no physical evidence.¹⁰ This argument fails because the lack of physical evidence in harassment cases is the norm, not the exception. The evidence in this case consists of the direct, sworn, credible testimony of the person whom the grievant harassed. Grievant has failed to rebut this testimony. Similarly, the lack of independent witnesses is not fatal to the agency's case. When there are no witnesses, the adjudicator must consider the testimony of those testifying and make a credibility determination. Here, the testimony of the harassed employee was credible; the grievant failed to testify or rebut her testimony.

Grievant also contends that the harassed officer and a male officer, with whom she has had an "on/off" relationship, conspired to fabricate charges against the grievant. The harassed officer has credibly denied this under oath; her denial is uncontroverted by grievant. The male officer has also denied grievant's allegation.

Grievant objects to the consideration of disciplinary actions that are no longer "active" pursuant to the Standards of Conduct policy. It is correct that the general rule is that only "active" disciplinary actions are considered when evaluating mitigating or supporting circumstances. However, one exception to the general rule is that disciplinary action for the same type of offense, whether

⁹ Exhibit 8. Department of Corrections Policy Number 5-10, *Standards of Conduct*, June 1, 1999.

¹⁰ Exhibit 9. Attachment to Grievance Form A, October 15, 2001.

active or inactive, may be utilized to demonstrate a pattern of conduct that has existed over a prolonged period of time. Thus, even where past acts of sexual harassment are time-barred for purposes of a particular claim, the Supreme Court has stated that this type of showing “may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue.”¹¹ In this case, the prior disciplinary action and reprimand letter were both for sexual harassment and are therefore relevant to establishing a pattern of conduct. While this evidence is not probative in the instant case, it does demonstrate that grievant has been previously warned about such misconduct.

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.¹² When issuing the employee a Written Notice Form for a Group I offense, management should issue notice as soon as practicable.¹³ 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 also be conducted in an expeditious fashion. Here, there was a delay of more than two months in starting an investigation, a very slow investigation, and another delay of almost two months before grievant was discharged. The agency may wish to review this investigation and the delay in administering discipline 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 September 28, 2001 for sexual harassment is hereby AFFIRMED. This Written Notice shall

¹¹ See Warren v. Halstead Industries, Inc., 802 F.2d 746, 753 (4th Cir. 1986), citing Holsey v. Armour & Co., 743 F.2d 199, 207-08 (4th Cir. 1984), cert. denied, 470 U.S. 1028, 105 S. Ct. 1395, 84 L.Ed.2d 784 (1985), citing United Airlines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L. Ed.2d 571 (1977).

¹² Section 7.b, DHRM Policy No. 1.60, Standards of Conduct, effective September 16, 1993.

¹³ Section 12.c (1), *Ibid*.

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 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