

Issue: Group III Written Notice with 30-day suspension (sexual harassment);
Hearing Date: February 6, 2002; Decision Date: February 12, 2002; Agency:
Department of Mental Health, Mental Retardation and Substance Abuse
Services; AHO: David J. Latham, Esquire; Case No.: 5371



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5371

Hearing Date: February 6, 2002
Decision Issued: February 12, 2002

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Representative for Agency
Attorney for Agency
Legal Advocate Assistant
Eight witnesses for Agency

ISSUES

Did the grievant's actions on and before October 15, 2001 warrant disciplinary action under the Commonwealth of Virginia Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on November 19, 2001 because he had sexually harassed a female employee. The grievant was suspended for a period of 30 days and was demoted to the position of housekeeping worker. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Mental Health, Mental Retardation and Substance Abuse Services (Hereinafter referred to as "agency") has employed the grievant for 19 years. He was a housekeeping lead worker prior to this disciplinary action. The clients at this facility are mentally retarded, physically handicapped, mentally ill or some combination of these conditions.

Grievant has received formal training on sexual harassment, most recently on September 1, 1999,¹ November 3, 1999,² and on March 28, 2001.³ The training material states that sexual harassment includes verbal behavior such as offensive sexually graphic jokes and language, threats, comments about a person's body, or suggestions of a sexual nature. The agency's policy provides that such sexual harassment shall be subject to corrective action, which may include discharge from state service.⁴ Grievant understood that the agency has a zero tolerance policy towards sexual harassment. He also acknowledged that supervisors are expected to set an example for subordinates, and are held to a higher standard.

On October 12, 2001, at the end of the work shift, grievant and two other employees were exiting the building where they work. They were in the area between two locked doors waiting for the outside door to be opened by security personnel. Grievant and another male employee were standing behind a female employee. The other male employee grabbed the buttock of the female employee; the female turned around and hit both males. The female then left the premises and went home for the weekend. On Monday, October 15, 2001 she filed a written report of the incident, adding that both males had been verbally sexually harassing her for some time.⁵

An investigation was begun and several employees were interviewed. The other male employee admitted that he had grabbed the female employee's buttock. When the female was interviewed, she maintained that grievant had been making comments of a sexual nature to her for three years. These included comments about her nipples and buttocks and, about wanting to suck

¹ Exhibit 22. Inservice Training Attendance Roster and attachments, September 1, 1999.

² Exhibit 26. Inservice Training Attendance Roster and attachments, November 3, 1999.

³ Exhibit 25. Minutes of Month Supervisor's Meeting, March 28, 2001.

⁴ Exhibit 22, p.6. *Ibid.*

⁵ Exhibit 1. Written statement from female employee, October 15, 2001.

her lips. He made statements such as, "You ought to be with me," "I know you want me," and "Come on, I know you want to kiss me." He also talked about taking Viagra and said, "I'm still as good as I ever was," and "Come on to my house, I took my Viagra." The female employee is a strong-willed, independent person who did not report the matter for a long time because she, "wanted to handle it on my own." However, sometime during 2000, she reported the comments to her supervisor, a lieutenant, who counseled the grievant. After the counseling, grievant did not make sexual comments to the female employee for about two months. He then resumed making the same type of comments to her.

At least four other employees have heard grievant make some of these comments to the female employee.⁶ The female employee does not flirt or lead men on at work. On some occasions, she had told grievant to stop his comments; in other situations, she made her displeasure obvious by responding to grievant with a curse or by giving him "the bird." One female employee had warned grievant to stop talking about taking Viagra and its effect on him because he would eventually get into trouble. About two years ago, several female employees who worked for grievant were discharged from employment for unsatisfactory performance. Some of these women complained that grievant had sexually harassed them. Although the allegations were determined to be unfounded, the director of housekeeping had a lengthy discussion with grievant and counseled him to limit his conversations with female employees to greetings and work related issues. Grievant indicated his understanding and said that he would act appropriately in the future.

The agency issued grievant a Group III Written Notice on November 19, 2001.⁷ Because of the grievant's long state service, and because of his otherwise satisfactory job performance, it was decided not to discharge grievant but to suspend him for 30 days and demote him from his supervisory position to housekeeping worker with a five percent reduction in salary.

Grievant completed an application for employment in 1982. He listed only one conviction of a law violation – unlawful cutting in 1970.⁸ He did not include several other convictions including destruction of private property in 1970, grand larceny in 1971 (sentenced to three years in the penitentiary), assaulting a police officer in 1974 and tampering with a gas meter in 1979.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes

⁶ Exhibit 5. Investigation Report, November 9, 2001.

⁷ Exhibit 11. Written Notice, issued November 19, 2001.

⁸ Exhibit 27. Application for Employment

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 § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

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 § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁹

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training¹⁰ 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 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. One example of a Group III offense is violation of Policy 2.15, Sexual Harassment.¹¹

By a preponderance of the evidence, the agency has demonstrated that grievant made comments over a prolonged period of time, primarily to one particular female employee. The statements attributed to him by the female

⁹ § 5.8 Department of Employment Dispute Resolution *Grievance Procedure Manual*

¹⁰ Now known as the Department of Human Resource Management (DHRM).

¹¹ Exhibit 24. Section V.B.3.o, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

employee, and corroborated in part by other employees, are squarely within the definition of sexual harassment because they included comments about the employee's body parts and comments of a sexually suggestive nature. Grievant refers to the comments he made as "trash talking." He acknowledges participating in such talk, especially in the outdoor break area where both men and women were present.¹² Therefore, the agency had no alternative but to take disciplinary action.

During cross-examination, grievant denied making any of the specific comments attributed to him by other employees. However, he admitted to "trash talking," and he acknowledged that he stopped making inappropriate comments to the female employee for two months after his supervisor verbally counseled him. His testimony is therefore internally inconsistent. Moreover, the hearing officer must conclude that grievant's denials are less than credible, given his lack of candor about his past criminal record. During cross-examination, grievant was given ample opportunity to admit any convictions other than the one on his job application form. He denied having any other convictions - until the agency representative refreshed his memory from a criminal record sheet.

The Standards of Conduct policy provides for the consideration of mitigating circumstances in the implementation of disciplinary actions and states, in pertinent part:

While the disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as:

- a. conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or
- b. an employee's long service or otherwise satisfactory work performance.¹³

The grievant has been employed by the agency for 19 years. His work performance has always been rated satisfactory or better. Given these circumstances, it was entirely appropriate for the agency to reduce the discipline from discharge (the normal discipline for a Group III offense) to suspension and demotion. A supervisor is expected to set the example for subordinates. Grievant utterly failed to set an appropriate example despite verbal warnings from a subordinate, verbal counseling from his own supervisor and verbal counseling from the Director of Housekeeping. Since grievant failed to heed these warnings, the agency had no alternative but to remove grievant from a supervisory position. Failure to do so would be to condone grievant's behavior – an option no employer could elect in such circumstances. Therefore, the

¹² Exhibit 8. Memorandum from grievant to facility director, November 14, 2001.

¹³ Exhibit 24. Section VII.C.1, DHRM Policy No. 1.60, Standards of Conduct, September 16, 1993.

suspension, demotion and reduction in salary were reasonable and appropriate alternatives to discharging grievant from employment.

Grievant suggests that his offense should warrant no more than a Group I Written Notice. If grievant had not been a supervisor, and if he had made only an isolated comment or two, a lower level of disciplinary action might be appropriate. However, the record in this case reflects a pervasive and long-standing pattern of offensive and unwelcome comments being made by a male supervisor to a female employee. Accordingly, the discipline must be commensurate with the seriousness of the offense.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice, suspension, demotion and salary reduction issued to the grievant on November 19, 2001 are AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the 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