Issue: Group II Written Notices (violation of sexual harassment policy, engaging in acts inappropriate for work site, interfering with an investigation, creating offensive work environment [10-day suspension and demotion]; and failure to supervise employees, violation of employee's right to use annual leave); Hearing Date: March 21-22,2002; Decision Date: March 28, 2002; Agency: Department of Correctional Education; AHO: David J. Latham, Esquire; Case Number: 5406; **Judicial Review: Appealed to the Circuit Court in the County of Buchanan on 04/26/02; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5406

Hearing Date: March 21 & 22, 2002
Decision Issued: March 28, 2002

APPEARANCES

Grievant
Two Attorneys for Grievant
Four witnesses for Grievant
Observer for Grievant
Attorney for Agency
Eight witnesses for Agency

ISSUES

Was the grievant's conduct on November 20, 2001 subject to disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed timely appeals from two Group II Written Notices issued on December 17, 2001.[1] One written notice cited grievant for violation of the sexual harassment policy, engaging in acts inappropriate for the work site, interfering with an investigation, and creating an offensive work environment. Grievant was suspended for ten days, demoted and given a pay reduction of five percent.[2] The second written notice cited grievant for failure to supervise his employees, and violation of an employee's right to use accrued annual leave. During the hearing, the agency stipulated that it has withdrawn the latter charge, i.e., the grievant is no longer charged with violating an employee's right to use accrued annual leave. This second written notice reaffirmed the demotion and pay reduction of five percent, and suspended grievant for 10 additional days.[3] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Department of Correctional Education (DCE) (Hereinafter referred to as "agency") has employed the grievant as a principal for 11 years. Grievant has the reputation of being a good principal and a good leader. His supervisor affirms that the grievant has accomplished DCE's mission and stated that he has the highest regard for grievant as an administrator and leader.

The investigation that ultimately resulted in disciplinary actions against grievant stemmed from an October 15, 2001 memorandum that the librarian gave to grievant, with a copy to the deputy superintendent. An issue arose regarding whether inmates were permitted to visit the DCE library for the purpose of conducting research in departmental and institutional operating procedures. Even though DCE is non-grievable,[4] an inmate filed a grievance regarding access to the DCE library. The assistant warden of operations (AWO) asked the librarian to respond to the charge in the grievance. In her memorandum, the librarian asked grievant to provide her with a written directive on how to proceed with the matter. In addition, the librarian stated that she felt the AWO had singled her out and had harassed her.

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[1] Exhibits 1 & 2. *Grievance Forms A*, filed January 11, 2002.

[2] Exhibit 11. *Written Notices*, issued December 17, 2001.

[3] During the second resolution step of the grievance process, the agency voided the 10-day suspension from December 17-31, 2001 and reinstated grievant's pay for this period. See Exhibit 1, page 6 of the second-step response.

During the hearing, grievant contended that his pay had been reduced by ten percent because each written notice specified a pay reduction of five percent. The agency maintained that grievant's pay had been reduced only five percent. At the hearing officer's request, the agency reviewed grievant's salary records subsequent to the hearing and has now confirmed that grievant's pay was reduced by only five percent.

[4] Exhibit 31. Departmental Operating Procedure 866, *Inmate Grievance Procedure*, issued November 30, 1998, provides that policies, procedures and decisions of DCE are not grievable by inmates.

The deputy superintendent referred the memorandum to the Director of Internal Affairs who subsequently investigated the matter. The Director contacted the librarian and requested that she send him a detailed e-mail describing her problems with the AWO. The librarian transmitted her e-mail on November 1, 2001. The Director then went to the facility on November 14, 2001 to conduct interviews.

Violation of Sexual Harassment policy; Acts inappropriate for worksite

The Commonwealth's Sexual Harassment policy addresses management responsibility to investigate and respond to allegations stating, in pertinent part:

a. Managers and/or supervisors who allow sexual harassment to continue or fail to take appropriate corrective action upon becoming aware, may be considered a party to the offense, even though they may not have engaged in such behavior.
b. Managers and/or supervisors who fail to respond appropriately to allegations of sexual harassment may be subject to corrective action, including demotion or discharge.[5]

Over a period of time, the librarian perceived that the assistant warden of operations (AWO) took more than a passing interest in her. The AWO is older than the librarian; the librarian is blonde, wealthy, socially prominent and dresses attractively. Five inmates had complained about her for various reasons. She often complained about various library-related issues and sometimes refused to follow instructions. She alleges that the AWO came to her office occasionally and acted overly friendly.

On one occasion he came to her office to check the height of her skirt.[6] She also believed that the AWO was inappropriately using the library's security camera to observe her. On some occasions, the librarian had made snide remarks about the AWO in the lunchroom. Grievant had heard some of these remarks but considered them only conversational gossip. The librarian did tell grievant on some occasions that she felt the AWO was harassing her; grievant told her he would take care of it. She never filed a grievance, complaint, incident report or in any other way formally complained to grievant, to the AWO, or to anyone else that the AWO was sexually harassing her. There have never been any complaints filed by anyone against the AWO.

The incident that precipitated the allegation of sexual harassment occurred sometime between February 2001 and July 2001.[7] The librarian was called into the principal's office, where the AWO was present. The AWO said "Look at her, I bet you have to spank her everyday." Grievant laughed and said,

[5] Exhibit 4. Section V.A.2, DHRM Policy 2.15, Sexual Harassment, September 16, 1993.
[6] DOC has a directive that limits the height of skirts in order to avoid overstimulation of inmates.
[7] Exhibit 7. E-mail to internal affairs director from librarian, November 1, 2001

"No, I probably should, but I don't." The AWO said, "Well, I know I would." The AWO denies this exchange but two DCE employees outside the open office door heard part or all of the exchange. Grievant initially denied the exchange but now says he does not recall the incident. In October 2001, when grievant learned that the librarian felt she had been sexually harassed, he immediately went to the warden and asked that the AWP not have any further contact with DCE employees. The warden agreed to the request. On November 15, 2001, the warden formally notified the principal that the warden would thereafter act as liaison to DCE.[8]

DOC conducted its own investigation into this matter. It determined that most of the librarian's allegations against the AWO could not be verified. The report concluded that the only "founded" allegation was that the "spanking" conversation did occur. The AWO was not disciplined for this incident but was given written counseling.[9]

Interference with an investigation; Creating a hostile work environment

When grievant learned that an investigator from Richmond was going to look into the sexual harassment allegations, he met with the faculty and advised them to cooperate and answer questions but not to volunteer anything. He said they should keep their comments to a minimum. Some employees interpreted grievant's remarks defensively and became somewhat apprehensive about the upcoming investigation. Some staff felt that grievant was, in effect, telling them that they shouldn't cooperate with Richmond. While the investigator was at the facility, grievant called the warden's secretary in an effort to learn whom the investigator had talked to and what was being asked.

Failure to supervise employees

A Memorandum of Agreement (MOA) exists between the Department of Corrections (DOC) and the Department of Correctional Education (DCE).[10] The MOA clarifies the responsibilities of each agency with regard to inmates housed at DOC facilities. DOC programs focus on public safety and treatment of offenders while DCE programs focus on education. Because DOC is responsible for the safety of inmates, staff and visitors at the facility, DCE necessarily defers to DOC on matters involving security. The DOC warden had appointed one of his assistant wardens to "supervise" DCE. However, this is not supervision in the traditional sense; DCE employees are supervised on a day-to-day basis by the principal who reports to a superintendent at DCE. The role of the assistant warden is more akin to a liaison to oversee what occurred within DCE areas and assure that DOC security precautions are enforced for the safety of all

[8] Exhibit 7. Memorandum to grievant from warden, November 15, 2001.
[9] Exhibit 34. Letter to AWO from warden, March 20, 2002.
[10] Exhibit 12. *Memorandum of Agreement*, signed April 18, 2001. This MOA amended and superseded a similar MOA signed May 16, 1997.

employees. The MOA provides that any issues that arise between DOC and DCE are to be resolved between the warden and the principal.

Prior to February 2001, the assistant warden of operations (AWO) was "supervising" DCE. However, his wife is a teacher working for DCE at the same facility. Because of this potential conflict of interest, and for other operational reasons, the warden reassigned the assistant warden to other responsibilities. Effective February 1, 2001, the warden named a different assistant warden to be AWO and placed DCE under his "supervision." The AWO does not direct DCE employees in how to perform their teaching duties, does not write performance evaluations for DCE employees, cannot hire and fire teachers, and does not determine salary increases – typical indicia of supervision.

A major issue that illustrates the alleged supervision problem involves the DOC requirement that it be informed of leave taken by DCE employees. DOC's position is that it is responsible for assuring security in all areas in which DCE employees are working. If, for example, the library is closed for a day because the librarian is on leave, DOC needs to know so that the correctional officer normally assigned to the library can be reassigned elsewhere. To facilitate the coordination process, the warden developed a form on which DCE employees are to report class cancellations and library closings along with the reason for closing.[11] The reason for closing could be "annual leave" or "sick leave" or some similar general reason.

Some DCE employees took umbrage at this request arguing that DOC had no right to know the reasons for their absence. When questioned about this requirement during a staff meeting, grievant told his staff that DOC could have the information requested on the form. The librarian felt that DOC wanted to know the detailed reason for sick leave. She and others believed that grievant was not supporting them and was caving in to unreasonable DOC demands.

When questioned during the investigation, grievant said that if the warden asked for DCE leave information, he would give it to him because it's a public record.[12] On one occasion grievant responded to a grievance filed by an inmate against the DCE library. Grievant knew that DCE is non-grievable but responded to the grievance "to help out."

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

[11] Exhibit 30.

[12] Employee personnel records, including leave activity reporting forms, are confidential employee information that is not available to the public.

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.[13]

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 Training[14] 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 II offenses include acts and behavior which are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[15] Examples of a Group II offense include failure to perform assigned work or otherwise comply with established written policy, and violation of Policy 2.15, Sexual Harassment.

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[13] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective July 1, 2001.
[14] Now known as the Department of Human Resource Management (DHRM).
[15] Exhibit 3. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Violation of Sexual Harassment policy; Acts inappropriate for work site

The evidence demonstrates that the AWO was taking an inappropriate interest in the librarian. While the AWO denies sexually harassing her, it is apparent that she was annoyed by his attention to her. She made this clear to him and to others, including grievant. However, the AWO never made any overt advances to the librarian; instead he pushed the envelope by talking her to more frequently than other employees. He also utilized his role as liaison and security overseer as the reason for most of his interactions with her.

Although grievant knew that the librarian was annoyed by the AWO, he was not aware that she felt she was being sexually harassed. It is possible that someone else might possibly have detected an undercurrent of sexual innuendo. However, because the librarian never filed any type of complaint, and never even verbally complained about sexual harassment, the grievant did not know that she felt sexually harassed. Moreover, other employees who testified that they were aware that the AWO was annoying the librarian never bothered to report it; some just teased the librarian about it.

The grievant initially denied the "spanking" exchange because he had no recollection of it. He later acknowledged that it was possible that such an exchange might have occurred but that he would have taken no notice because he does not consider the comments to have any sexual connotation. His interpretation of the comment is that the AWO was referring to the history of problems with the librarian and that he was using the "spanking" term in a disciplinary sense. After observing the testimony and demeanor of both the AWO and the grievant, the hearing officer concludes that the AWO might have intended the remark as a double entendre. However, it is far more likely than not that grievant interpreted the remark only as a joking reference to the need for discipline.

Grievant has never been disciplined for sexual harassment. In fact his record is virtually unblemished and he has enjoyed a good reputation until this disciplinary action. The evidence in this case supports a conclusion that grievant did not sexually harass anyone. He did not consider the "spanking" comment to be anything other than a reference to discipline. Most significantly, the librarian testified that she considered the "spanking" comment to be sexual innuendo only because the AWO said it. She testified that if any one else had made this remark, she would not have considered it sexually-oriented. Moreover, this conversation occurred many months prior to the investigation; the librarian never complained to anyone that she felt sexually harassed by it. Finally, when grievant became aware that the librarian perceived this comment to have some sexual innuendo, he immediately took appropriate action pursuant to Section V.A.2.b of the Sexual Harassment policy by requesting the warden to remove the AWO from any further contact with DCE employees.

Since the librarian had never told grievant that she felt sexually harassed prior to this incident, the grievant could not reasonably have been expected to know that she felt sexually harassed, especially when she admitted that she considered the remark sexual only because the AWO said it. It is easy to conclude, in hindsight, that perhaps the grievant could have been sufficiently aware of the situation to inquire of the librarian whether she felt sexually harassed.[16] However, while such Monday-morning quarterbacking is easy, it is not an appropriate basis for taking disciplinary action on this issue in the circumstances presented in this case. .

Interference with an investigation

As the person in charge of DCE at the facility, grievant knew, or reasonably should have known, that his direction to the DCE staff to limit their comments to the investigator would carry weight. There is no evidence as to whether grievant's directions adversely affected the investigation. On the other hand, there is evidence that grievant's statements did make some of his staff more apprehensive about the upcoming investigation. While grievant did not tell staff to conceal any evidence, his statements may well have inhibited some people from being as forthright as they might otherwise have been. It was not appropriate for a management employee to make such statements in the face of an upcoming investigation. If grievant had nothing to fear from the investigation, he should either have said nothing to staff, or he should have told them to feel comfortable discussing whatever they wanted to.

Creating a hostile or offensive work environment

The preponderance of evidence leads to three conclusions. First, the AWO did single out and harass the librarian. Much of the harassment was disguised as dealing with various security concerns. While security concerns are important, the AWO used these opportunities to let the librarian know that he was available and interested in her. Although the AWO made no overt advances, the librarian felt that the AWO's interest in her was more than just business. However, she clearly was not interested in the AWO. She was annoyed by the AWO's attention, felt harassed and attempted to discourage him.

Second, the librarian did complain to both coworkers and grievant about the repeated harassment. Grievant told her on more than one occasion that he "would take care of it." He promised to talk with the AWO but never did so. It is apparent from grievant's statements to the agency investigator that he was very interested in cooperating 100% with DOC. His responses to both the investigator and to DCE staff indicate that grievant was willing to give DOC virtually anything

[16] However, a manager who proactively attempts to ferret out a possible sexual harassment complaint may find himself being castigated by his superior for generating a complaint that didn't exist.

it wanted. Therefore, it is not surprising that grievant would be reluctant to rock the boat by complaining to the DOC liaison (AWO) that his behavior with respect to the librarian was harassing and inappropriate. Rather, it appears that grievant hoped that the problem either would go away or at least remain contained within the institution.

Third, grievant's knowledge of the harassment may be inferred from his response to the librarian's whistle-blowing memorandum to the deputy superintendent. Immediately upon reading the portion of her memorandum about the AWO, grievant said to the librarian, "But I told you that I would take of this."[17] Accordingly, it is concluded that grievant knew that the AWO had been harassing the librarian over a significant period of time. The grievant's failure to directly address this harassment resulted in the creation of a hostile or offensive work environment for the librarian.

Failure to supervise employees

While commending grievant for his cooperation with DOC, the agency alleges that grievant surrendered his leadership responsibilities by allowing the appearance that DOC was supervising DCE. The agency acknowledges that there is no evidence that grievant intended to violate policies or harm faculty and staff relationships. Accordingly, during the second resolution step of the grievance process, the agency voided the 10-day suspension and reinstated his pay for this period.[18] However, removal of the suspension was intended only as recognition that grievant did not intend to violate policies or harm relationships.

Nonetheless, the fact remains that grievant's actions, or more accurately knowing inaction, did violate policies and adversely affected faculty and staff relationships. The grievant may have had good intentions in cooperating 100% with DOC. However, the net effect of his cooperation was widely perceived as caving in to DOC. Moreover, grievant's staff told him that he was going too far in his cooperation. Notwithstanding knowledge of his staff's perceptions, grievant reinforced his actions by telling his staff that he would give DOC whatever it wanted. This only confirmed to others that grievant appeared to be giving DOC a free hand in overruling DCE whenever a difference of opinion occurred.

Further, allowing DOC to assume that it had a free hand reinforced DOC's assumption that it did have the upper hand. This is borne out by the AWO's demand to the librarian that an inmate be allowed access to the DCE library despite the fact that the inmate was on restriction for having been caught masturbating in the DCE library.[19] Thus, by failing to resist DOC encroachment in DCE matters, grievant effectively failed to provide the leadership and supervision his employees deserved.

[17] Exhibit 7. Memorandum from librarian to Director of Internal Affairs, November 1, 2001.
[18] Exhibit 1. Second resolution step response to Grievance # 1, February 7, 2002.
[19] Exhibit 7. *Ibid*.

In summary, it is concluded that grievant did not violate the sexual harassment policy either by failing to take corrective action or by engaging in acts inappropriate for the work site. However, grievant did: 1) interfere with the investigation into the harassment allegation, 2) create or contribute to a hostile or offensive work environment, and 3) failed to effectively supervise his employees by allowing another agency to exert undue influence over his employees.

The Standards of Conduct includes examples of offenses characterized as Group I, II or III offenses. The three offenses in this case are not among the examples listed. When an offense is not specifically listed, one must look to the definition for each of the three levels of offense. In addition, the grievant's influential position as principal and highest-ranking DCE person at the facility must be considered in weighing the seriousness of the offenses. Certainly the offenses are more serious than mere unsatisfactory attendance or inadequate work performance (Group I offenses). All three offenses constitute behavior more severe in nature than Group I offenses and are such that an accumulation of two such offenses should warrant removal from employment – the definition of a Group II offense. Accordingly, the two Group II Written Notices must be affirmed.

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.[20]

Here, the grievant has 11 years of service, which has been unblemished and has earned the unqualified praise of his supervisor. The agency had considered these mitigating circumstances when it implemented discipline by suspending and demoting grievant rather than discharging him. It also removed the 10-day suspension from December 17 through December 31, 2001 because it deleted one of the allegations on the written notice. In view of the fact that the agency has not proven the sexual harassment charge on the other written notice, it is held that the 10-day suspension from December 3 through December 13, 2001 should also be removed.

[20] Exhibit 4. Section VII.C.1, DHRM *Standards of Conduct Policy No: 1.60*, effective September 16, 1993.

DECISION

The decision of the agency is hereby modified.

The two Group II Written Notices issued on December 17, 2001 are AFFIRMED. However, the Written Notices shall be revised to include only those offenses determined by this decision to be proven. Specifically, the allegations of violation of the sexual harassment policy, engaging in appropriate acts, and violation of an employee's leave rights shall be deleted from the Written Notices.

Further, the periods of suspension shall be removed from both Written Notices. The agency shall restore to grievant any pay withheld during the period of suspension from December 3-13, 2001.

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.

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David J. Latham, Esq.
Hearing Officer