Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: 11/18/02; Decision Date: 01/15/03; Agency: Dept. of Conservation & Recreation; AHO: Carl Wilson Schmidt, Esquire; Case No. 5576; **Administrative Review: EDR Ruling Request received 01/27/03; EDR Ruling Date: 02/20/03 [Ruling #2003-021]; Outcome: HO neither abused his discretion nor exceed his authority in deciding this case; Administrative Review: DHRM Ruling Request received 01/27/03; DHRM Ruling Date: 02/17/03; Outcome: HO's decision comports with provisions of DHRM Policy 1.60 and 2.30. No reason to interfere with decision.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5576

Hearing Date: November 18, 2002
Decision Issued: January 15, 2003

PROCEDURAL HISTORY

On September 23, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

> *[Grievant] sexually harassed [Maintenance Ranger] from 4/7/02 through 9/18/02. The harassment was persistent, pervasive, and unwelcome.*

On September 26, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 31, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 18, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
State Trooper

Maintenance Ranger
Wife
Co-worker

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for sexual harassment.

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. 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 Conservation and Recreation employed Grievant as a Chief Ranger until his removal. He and his family lived in a house owned by the Commonwealth and located at one of the Agency's parks. He was a sworn law enforcement officer and began working for the Agency full time on February 1, 1994. From 1994 through 2001, Grievant's performance met or exceeded the Agency's expectations.

In April 2001, the Maintenance Ranger[1] was not employed by the Agency but volunteered to provide labor at one of the Agency's parks. She and several other volunteers worked under Grievant's direction to improve the park where Grievant worked. On April 7, 2002, the Maintenance Ranger again volunteered to provide labor at the park were Grievant worked. She and several other volunteers worked on one of the park's paths. Grievant was wearing his uniform, badge, pepper spray, and gun.

At some point during the day, Grievant instructed the Maintenance Ranger to go with him to another area of the park to get straw to cover freshly planted grass seed. While they were alone, Grievant told the Maintenance Ranger about his college experiences and that he has asked to be transferred to another park. He told her he

[1] The victim will be referred to as the Maintenance Ranger throughout this decision even though some of the events occurred prior to her becoming employed by the Agency.

was married and discussed some of the problems he and his wife were having. Grievant asked the Maintenance Ranger if she was married and she told him she was not married. She also told him, she was not dating anyone at the time. Later, Grievant asked the Maintenance Ranger if she wanted to go to the well house so he could show her how to test the well water. She agreed. Grievant was drawn to the Maintenance Ranger because he considered her to be an attractive woman.

The well house is a small building with few windows and is dark inside. Grievant showed the Maintenance Ranger how to test the water and she bent forward to look closer at some of the test equipment. When she straightened up and turned, Grievant placed his lips on her lips and grabbed her breast. She immediately backed away from Grievant and reminded Grievant he was a married man. They left the well house and while walking together, Grievant apologized and asked the Maintenance Ranger not to say anything to anybody about what happened because he could get into a lot of trouble. He also said it was his word against her word.

In the following week, the Maintenance Ranger volunteered to work at the park again. She did so because she felt Grievant would not bother her again. She believed this because he had apologized to her for his behavior the prior week and she knew he intended to transfer to another park soon.

Another manager working for the Agency invited the Maintenance Ranger to apply for a job with the Agency. She elected to do so and was hired by the Agency on May 22, 2002 as a Maintenance Ranger working at Grievant's park. She decided to work at the park because she expected Grievant to transfer soon and she felt he would not bother her anymore.

While Grievant and his family were in the process of moving their belongings out of the Chief Ranger's house located on the park to another house in another park, the Maintenance Ranger and some of her co-workers wanted to see the inside of the house. Grievant gave the women a tour of the house.[2] At one point, Grievant asked the Maintenance Ranger if she would like to see some renovations he made in another part of the house. She agreed. They went into another room and Grievant asked the Maintenance Ranger if he could have a kiss. She said "no" and went to join the other women.

On the following day, Grievant called to Grievant's employment during work hours. He asked the Maintenance Ranger if he could have her home telephone number so that he could call her. The Maintenance Ranger said "no" and then hung up the telephone.

Some time later, Grievant called the Maintenance Ranger one evening at her home telephone number. He called from his house located at the second park where

[2] Grievant contends these events occurred sometime in July whereas the Maintenance Ranger testified they occurred sometime around Memorial Day. The date on which the tour occurred is not significant.

Grievant had been transferred. The Maintenance Ranger was surprised by the call and asked Grievant how he obtained her home telephone number. Grievant had obtained it by calling directory assistance. She asked him where he was calling from and why. Grievant said he was calling her from the second park because he missed her and wanted to meet with her. She said "no" and told him he needed to behave himself because he was a married man.

On September 4, 2002, Grievant called the Maintenance Ranger again. He asked her to join him at a scheduled meeting. She asked him why he continued to call her. He said he missed her and wanted to see her. He said he wanted to kiss her neck and he wanted to kiss her inner thigh and he wanted to be inside her. He added he was as hard as a rock. The Maintenance Ranger quickly hung up. She was shaking and scared following Grievant's call. She felt Grievant was unstable and she did not know what actions he would take next. She feared him.

The Maintenance Ranger informed Agency managers that Grievant was harassing her. She did not report the details immediately because she thought he would call her again and she intended to tape his conversation. Grievant called on September 18, 2002 and the Maintenance Ranger taped the call.

Because of her several month interaction with Grievant, the Maintenance Ranger will not enter the well house by herself with another male. She is apprehensive about working alone with a male in a deserted part of the park. She began regularly using the security system at her home. She purchased a cell phone and took self-defense classes.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[3] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

The Agency contends Grievant engaged in sexual harassment because he created a hostile work environment with respect to the Maintenance Ranger. A court's analysis of sexual harassment is different, to some extent, from the analysis of a Hearing Officer in a grievance hearing. When a court attempts to determine whether sexual harassment occurred it is also attempting to determine whether an employer

[3] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

should be held liable for that harassment. Liability sometimes results from the employer's failure to stop the harassment after learning of that harassment. When a Hearing Officer attempts to determine whether sexual harassment occurred, it is because the employer has identified what it considers as sexual harassment and is attempting to take corrective action under the Standards of Conduct. Thus, a Hearing Officer can conclude that the absence of financial liability to a State Agency does not prohibit the conclusion that an employee engaged in behavior that would otherwise constitute sexual harassment.

Although the State's workplace harassment policy is patterned after Title VII law governing sexual harassment, the two are not identical.[4] It is possible for an employee to engage in sexual harassment under DHRM Policy 2.30, Workplace Harassment, but for that employee's behavior not to violate Title VII analysis.

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, natural origin, age, sex, religion, disability, marital status or pregnancy."[5] State policy[6] defines sexual harassment as:

> Any unwelcomed 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 subject to unwelcome and severe or pervasive repeated sexual

[4] For example, under Title VII analysis, a plaintiff must prove: "(1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer." See, Ocheltree v. Scollon Productions, 308 F.3d 351 (2002). In contrast, DHRM Policy 2.30 does not require the fourth element and modifies the third element to "creates an intimidating or offensive place for employees to work."

[5] DHRM Policy 2.30. DHRM Policy 2.30 superceded DHRM Policy 2.15 on May 1, 2002. A portion of Grievant's offensive behavior occurred before May 1, 2002 under the old policy. DHRM Policy 2.15 also prohibits an employee from "creating an intimidating, hostile, or offensive work environment" and is not materially different from DHRM Policy 2.30. The change in policy does not change the outcome of this case.

[6] Grievant received a copy of the Agency's sexual harassment policy, #332, which restates an employee's obligation under DHRM Policy 2.15.

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

Grievant's actions towards the Maintenance Ranger were unwelcome. She said nothing and did nothing to suggest to him that she wanted a romantic or personal relationship with him. Grievant directed his actions towards the Maintenance Ranger because he believed she was an attractive woman. Grievant's behavior was severe because he kissed the Maintenance Ranger's lips and touched her breast against her will and called her at home in September and expressed his lust for her even though she had repeatedly rejected him. Grievant's behavior was pervasive because he repeatedly indicated to the Maintenance Ranger that he wanted a romantic and sexual relationship with her despite her repeated rejection of him. Because of Grievant's sexual harassment, the Maintenance Ranger altered her work activities to avoid isolated contact with male coworkers.

"Any employee who engages in conduct determined to be harassment, or who encourages such conduct by others, shall be subject to corrective action under Policy 1.60, Standards of Conduct, which may include discharge from employment."[7] Accordingly, Grievant's removal is upheld.

Grievant contends that he cannot be held liable for sexual harassment with respect to those acts occurring prior to May 22, 2002 when the Maintenance Ranger became an employee. Although there is some federal case law[8] holding that unpaid volunteers are not susceptible to the discriminatory practices for which Title VII was designed to eliminate, this conclusion is in the context of determining employer liability. In this grievance hearing, the focus is on whether an employee engaged in behavior rising to the level of a Group III offense. When Grievant's behavior is examined as a whole, it justified the issuance of a Group III Written Notice. If the Hearing Officer considers Grievant's behavior after May 22, 2002, Grievant's actions are magnified because of the events occurring in the well house. It is the relationship between the parties that is key to determining whether sexual harassment has occurred.

Grievant contends that portions of the Maintenance Ranger's testimony were overstated or untrue. Grievant's counsel conducted a rigorous and thorough cross examination of the Maintenance Ranger that an untruthful witness would not have survived. The Maintenance Ranger's account of events was credible and supports the Agency's disciplinary action.[9]

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[7] DHRM Policy 2.30.

[8] See Haavistola v. Community Fire Company of Rising Sun, Inc. 6 F.3d 211 (4th Cir. 1993).

[9] Grievant also argues that his behavior at the well house was not significant because the Maintenance Ranger returned to the park as an employee. Grievant's argument fails because the Maintenance Ranger began working at the park with the assumption that Grievant would be transferred soon and she would no longer have to interact with him.

Grievant contends the Agency's case fails because the offensive touching occurred before the Maintenance Ranger became an employee. Although some distinction may exist under Title VII law, DHRM Policy 2.30 does not limit sexual harassment victims to state employees. Its intent is to cover behavior involving parties other than State employees. For example, a "non-employee (third party)" could be considered to have violated the workplace harassment policy. Third parties are defined as "Individuals who are not state employees, but who have business interactions with state employees."

The Agency contends Grievant's failure to tell the truth during the investigation process forms a basis to remove him from employment. Grievant was evasive during the investigation process because he feared his wife would discover his behavior. Grievant should have been truthful at all times with Agency investigators, but his failure to do so would not in itself support a basis for removal. At best, Grievant's behavior would rise to the level of a Group II Written Notice for failure to follow supervisor's instructions. The focus of the Agency's discipline is Grievant's sexual harassment. Grievant's failure to fully answer questions merely compounds the Agency primary case for sexual harassment.

Grievant contends the Agency interrogated him contrary to policy and law. Whether the Agency improperly questioned Grievant is irrelevant to the outcome of this hearing decision. The Agency's evidence contains documents that may reflect Grievant's answers to Agency questions. Although the Hearing Officer reviewed all documents admitted into evidence, the Hearing Officer's decision is based primarily on the testimony of the witnesses including Grievant's testimony. Grievant's testimony was not materially different from his answers to the Agency's questions. Even if the Hearing Officer assumes for the sake of argument that the Agency improperly questioned Grievant, the outcome of this case would be the same based on the witness testimony presented.

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 file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.[10]

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

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Carl Wilson Schmidt, Esq.
Hearing Officer

[10] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of
Department of Conservation and Recreation
February 14, 2003

The grievant has requested an administrative review of the hearing officer's January 15, 2003, decision in Grievance No. 5576. The grievant objects to the hearing officer's decision on the basis that it is inconsistent with agency policy (DHRM Policy Number 1.60). The grievant also has requested an administrative review from the Department of Employment Dispute Resolution. The agency head, Ms. Sara Redding Wilson, has requested that I respond to your request.

FACTS

The Department of Conservation and Recreation (DCR) employed the grievant as a Chief Ranger until he was removed from employment. On September 23, 2002, DCR officials issued to him a Group III Written Notice and removed him from employment for sexually harassing another employee from 4/7/02 through 9/18/02. The harassment was deemed to be persistent, pervasive, and unwelcome. The grievant challenged the disciplinary action by filing a grievance on September 26, 2002, and the hearing officer issued a decision on January 15, 2003. In his decision, the hearing officer upheld the disciplinary action taken by DCR officials. The employee appealed the decision to the Department of Human Resource Management.

The relevant policy, the Department of Human Resource Management's Policy No.1.60, states that it is the Commonwealth's objective to promote the well being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth, but is not all-inclusive, examples of unacceptable behavior for which specific disciplinary action may be warranted. In addition, DHRM Policy No. 2.30, Workplace Harassment, provides that violators of this policy is subject to disciplinary action as spelled out in Policy No. 1.60.

In the instant case, the grievant was charged with sexually harassing a Maintenance Ranger, initially when the Maintenance Ranger was a volunteer worker and later after she was employed as a wage employee. Based on the evidence, the hearing officer concluded that
DCR officials showed, by a preponderance of the evidence, the disciplinary action taken against the grievant was warranted and appropriate under the circumstances.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the hearing officer determined that there was sufficient evidence to support the allegations the agency made against the grievant. DHRM Policy No. 2.30, Workplace Harassment, and DHRM Policy No. 1.60, Standards of Conduct, provide guidance to agencies for handling workplace harassment and for taking corrective action. This Agency has determined that the hearing officer's decision comports with the provisions of those policies and will not interfere with the decision. The grievant raised two additional issues: (1) that DCR officials violated DHRM Policy No.1.60 when investigating the allegations of sexual harassment and (2) that they violated that same policy in issuing the disciplinary action. While these issues had no impact on the outcome of the hearing officer's decision, they were reviewed by this Agency. Our review of those issues determined that, again, there is no basis to interfere with this decision.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley
Manager, Employment
Equity Services