

Issues: Group III Written Notice with termination (sexual harassment and falsification of application); Hearing Date: 12/19/02; Decision Date: 02/28/03; Agency: VCU; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5596



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5596**

Hearing Date: December 19, 2002  
Decision Issued: February 28, 2003

**PROCEDURAL HISTORY**

On September 16, 2002, Grievant was issued a Group III Written Notice of disciplinary action for:

*Violated the University's sexual harassment guidelines and the University policy regarding falsification of application.*

On October 4, 2002, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 5, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 19, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Counsel  
Assistant Director

Fiscal Tech  
Husband  
Director  
Equipment Specialist  
Equipment and Application Specialist  
Program Support Tech  
Fiscal Tech Senior  
Sergeant  
Painting Supervisor  
Mail Service  
Network Analyst  
Head of Building Services  
Library Practitioner  
Director, Administrative Services  
Director, Academic User Services  
Head, Library Administrative Services

### **ISSUE**

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

### **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:

Virginia Commonwealth University employed Grievant as a Facilities Coordinator from 1996 until his removal September 16, 2002. No evidence of any prior disciplinary action against Grievant was presented.

The Fiscal Tech began working for the University in May 2000. She had known Grievant since that time. She worked in the building where Grievant worked.

In June 2001, the Fiscal Tech began counseling sessions with a professional counselor to address issues relating to the Fiscal Tech's inability to "stand up" to her family members. The Fiscal Tech felt that she was unable to deny requests of some of her family members and the result was that they "walked all over her."

In early September 2001, Grievant and the Fiscal Tech were alone and entering an elevator. Grievant grabbed the Fiscal Tech's bottom and then kissed her lips. The Fiscal Tech was overwhelmed and surprised. She did not react to Grievant and did not tell anyone of Grievant's behavior.

In the Fall of 2001, Grievant and the Fiscal Tech were on the loading dock waiting for a chair to be delivered. Grievant asked the Fiscal Tech to come into his office. He closed the door, unzipped his pants, and exposed his penis to the Fiscal Tech. Grievant asked the Fiscal Tech to touch his penis and she said "no". She told Grievant she was a happily married woman. She waited until Grievant covered himself and zipped up his pants. She left Grievant's office. Shortly thereafter, Grievant went to the Fiscal Tech's office and asked her how he measured up, referring to the size of his penis. She responded that she had only been married to one person and did not know. She did not report the incident immediately to anyone other than her husband. She asked her husband to let her handle the problem.

In June 2002, the Fiscal Tech's supervisor asked her to go with Grievant to a storage room to move some boxes after it appeared that someone may have broken into the storage room. The Fiscal Tech was apprehensive about being alone with Grievant but did not refuse to follow her supervisor's instruction because she did not want to tell the supervisor why she was concerned about Grievant. Once they were inside the storage room, Grievant asked the Fiscal Tech to take off her shirt and clothes. She refused. Grievant stepped back and pulled out his penis and started fondling it. The Fiscal Tech heard voices outside the room so she did not leave immediately. She feared the people outside the storage room would think something improper was going on between Grievant and the Fiscal Tech inside the storage room, so she waited until the people left before leaving. The incident lasted about 90 seconds. After leaving the storage room, the Fiscal Tech went to join some of her friends for a previously scheduled lunch. The Fiscal Tech was noticeably upset. Her friends asked her what was upsetting her and she avoided their questions. Later in the day, a co-worker who observed her at the lunch continued to question the Fiscal Tech regarding what was upsetting her. The Fiscal Tech finally explained what had happened to her in the storage room. The Fiscal Tech also later told her husband what Grievant had done in the storage room.

On July 10, 2002, the Fiscal Tech reported her concerns about Grievant to University Managers. She also indicated she wanted to try to handle the matter herself. She confronted Grievant and told him his behavior made her feel uncomfortable. Grievant asked her what made her feel uncomfortable and she explained. Grievant said he would not continue his prior behavior towards her. On July 22, 2002, Grievant apologized to the Fiscal Tech and she replied "Thank you."

The Fiscal Tech did not report Grievant's behavior as it happened because she perceived him as having power and that she feared he could adversely affect her employment. The Fiscal Tech believed that Grievant had power because he was the building manager and could come and go as he pleased. He also had a special parking place thereby suggesting to her that he had additional power.

Before working for Virginia Commonwealth University, Grievant worked at the State Corporation Commission. He was removed from employment through layoff because the SCC was outsourcing the function Grievant performed for that agency. When Grievant applied for employment at VCU, he was hired pursuant to a preferred hiring status. Grievant provided a friend of his with a copy of a State Application Grievant completed several years earlier when he applied for employment with another agency. Grievant's friend typed the new application to be submitted to VCU. Grievant signed the application but did not closely scrutinize the application.

The VCU application asks:

Have you ever been convicted of a law violation(s), including moving traffic violations but excluding offenses committed before your eighteenth birthday which were finally adjudicated in a Juvenile Court or under a youth offender law?

An "X" was typed in the "No" box. Grievant is currently 44 years old. When he was 19 years old, he was convicted of simple assault. When he was 26 years old he was convicted of a charge relating to marijuana.

## **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).<sup>1</sup> 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).

### Sexual Harassment

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color,

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

natural origin, age, sex, religion, disability, marital status or pregnancy.” State policy 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 comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

Grievant’s behavior towards the Fiscal Tech was unwelcomed and resulted, in part, from her being female. Grievant’s actions were severe and pervasive sexual behavior. He created an intimidating and offensive place for the Fiscal Tech to work. Grievant’s actions rise to the level of creating a hostile work environment contrary to State Policy.

“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.”<sup>2</sup> Accordingly, Grievant’s removal is upheld.

The outcome of this case rests with the credibility of the Fiscal Tech. Grievant contends that she should not be believed because if the events she contends happened actually happened, then they are so outrageous that a reasonable person would have reported those actions immediately. Many months passed before the Fiscal Tech complained to Agency managers.

The Hearing Officer finds that the Fiscal Tech’s delay in reporting Grievant’s actions does not adversely affect her credibility. The Fiscal Tech was receiving counseling because she often refused to stand up for herself and tell others she would not accept their behavior. The Fiscal Tech testified that she felt somewhat responsible for Grievant’s behavior because she laughed at some of his sexually oriented jokes when she knew she should not have done so. She felt she had no right to complain about Grievant’s behavior since she had condoned his telling of inappropriate jokes.

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<sup>2</sup> DHRM Policy 2.30.

The Fiscal Tech's failure to timely report Grievant's actions is consistent with her tendency not to stand up to those who treat her inappropriately.<sup>3</sup>

The University contends Grievant also created a hostile work environment for two other female employees. It is not necessary for the Hearing Officer to address the merits of those allegations since the University has offered sufficient evidence of sexual harassment by Grievant with respect to the Fiscal Tech.

### **Falsification of State Application**

"Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. DHRM § 1.60(V)(B)(3)(b). DHRM § 2.10 states:

Before an applicant is eligible for employment with the Commonwealth, several records must be reviewed or verified. This information is considered part of the application process and, as with information contained on the application form, if it is later discovered that an applicant falsified any information related to his or her employment, the employee may be terminated.

"Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b) or DHRM § 2.10, but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6<sup>th</sup> Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. \*\*\*

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Once an application for employment is submitted to a State agency, it becomes a record of that agency. If Grievant intended to falsify the application for employment, then he would have engaged in behavior rising to the level of a Group III offense.

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<sup>3</sup> The Fiscal Tech also testified that she had had problems with low self-esteem and did not complain to University Managers because she did not think anyone would believe her. She felt Grievant would be more credible because of his higher stature and power within the organization.

The question to be answered is whether Grievant intended to provide false information on his VCU application for employment at the time<sup>4</sup> he signed the application. The fact that an application may contain errors is not, in it itself, sufficient to establish a falsification of a State document.

The Hearing Officer finds that the University has not met its burden of proof regarding this issue. Grievant did not complete the contents of the VCU application. No evidence was presented suggesting he reviewed the application before he signed it. He considered the application a ministerial duty pursuant to his preferred hiring status. He had completed several extensive background checks in prior years without detection of any criminal record. Because of the length of time that had passed, the criminal convictions were not fresh in Grievant's mind in 1996.

Although the Hearing Officer finds that Grievant has not falsified a State document, his actions regarding sexual harassment are sufficient to support the Group III Written Notice with removal.

## **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

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<sup>4</sup> The University charged Grievant with falsification of his application for employment with the University. It did not charge him with falsification of earlier applications made to other agencies. The University offered evidence of prior applications. Those applications were excluded by the Hearing Officer because the University did not timely exchange those documents with Grievant prior to the hearing as required by the Prehearing Order and Grievant could demonstrate prejudice in the presentation of his case because the documents were not timely exchanged.



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.<sup>5</sup>

[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

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.