

Issue: Group III Written Notice with 10-day suspension, demotion and transfer (sexual harassment); Hearing Date: 04/01/03; Decision Issued: 04/02/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5669



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5669**

Hearing Date: April 1, 2003  
Decision Issued: April 2, 2003

**PROCEDURAL HISTORY**

On December 6, 2002, Grievant was issued a Group III Written Notice of disciplinary action with demotion, ten day suspension, and transfer for:

*Violation of Policy 2.15, Sexual Harassment – On November 22, 2002, you grabbed [Officer B's] arm and attempted to pull her in the restroom with you. You will receive a demotion to Corrections Officer and be transferred to [another Institution]*

On January 6, 2003, 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 March 5, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 1, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Attorney  
Agency Party Designee

Agency Advocate  
Officer B  
Probation and Parole Officer  
Assistant Warden  
Lieutenant  
Human Resource Officer  
Two Corrections Officers  
Sergeant

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension, demotion, and transfer 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 Corrections employs Grievant as a Corrections Officer Senior. He was formerly a Corrections Sergeant but was demoted as part of the disciplinary action taken against him. Grievant has worked for the Agency for approximately 12 years. On June 10, 2002, he received a Group II Written Notice for failure to follow the Agency's inmate count procedures.<sup>1</sup>

On November 22, 2002, Grievant was in the control booth of Housing Unit One watching the floor officers conduct inmate count. Officer B was also in the control booth. It was the first or second time Officer B had worked with Grievant. At approximately 1:40 a.m., Grievant complained that his stomach was hurting and he went up stairs directly above the lower control booth. There is a small single person restroom on the second floor that is available to correctional employees working in the area of the control booth. Grievant called down to Officer B and asked her to bring some toilet tissue to him. Initially, Officer B said "no." Grievant called Officer B again

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<sup>1</sup> Agency Exhibit 9.

and said there was toilet tissue in a locker next to the bathroom. Officer B walked upstairs and looked in the lockers, but no tissue was there. Grievant walked out of the restroom and said, "Since you are up here, come here". Grievant then grabbed Officer B's right arm by placing his left hand above Officer B's elbow and his right hand on her forearm. Grievant tried to pull Officer B towards the restroom but she resisted. When Officer B told Grievant he was hurting her arm, he let her go and she left the area.

## 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." Department of Corrections Procedure Manual "(DOCMP)" § 5-10.15. 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." DOCMP § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCMP § 5-10.17.

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. DHRM Policy 2.30<sup>2</sup> defines sexual harassment as:

Any unwelcome 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.

The Agency contends Grievant engaged in sexual harassment by creating a hostile environment. Grievant engaged in improper conduct, but there was no evidence

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<sup>2</sup> The Written Notice refers to DHRM Policy 2.15. DHRM Policy 2.30 superceded DHRM Policy 2.15 effective May 1, 2002.

that his conduct constituted sexual harassment.<sup>3</sup> Grievant grabbed Officer B's arm and attempted to pull her into the restroom. He did not make a sexual advance. He did not request sexual favors. He did not engage in conduct of a sexual nature. When Officer B was asked why she believed Grievant tried to pull her into the restroom, she said she did not know. The Agency has made an assumption that because Grievant was trying to pull Officer B into the restroom, he was planning some encounter of a sexual nature. An assumption or suspicion of what may have happened is not a sufficient basis for the Hearing Officer to conclude that Grievant's behavior was of a sexual nature. It is equally likely Grievant's behavior was motivated by horseplay or some other motive. In any event, Grievant's motive was not established and remains a mystery.<sup>4</sup>

Since the Agency has failed to establish that Grievant engaged in sexual harassment, the question becomes what level of discipline is appropriate. Disruptive behavior is a Group I offense.<sup>5</sup> Engaging in physical violence or fighting is a Group III offense.<sup>6</sup> Grievant's behavior was more than disruptive, given the degree of struggle displayed by Officer B and Grievant's supervisory position. As a supervisor, Grievant should have known not to grab the arm of a subordinate and try to pull her. Grievant's behavior was not an act of physical violence or fighting since there was no evidence that Grievant intended to hurt Officer B. In light of these considerations, Grievant's behavior rises to the level of a Group II offense. The Group III Written Notice issued to Grievant must be reduced to a Group II Written Notice.<sup>7</sup>

Corrective action may be reduced based on mitigating circumstances.<sup>8</sup> Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2)

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<sup>3</sup> One could argue that since the Agency has failed to establish sexual harassment, the disciplinary action must be reversed. Disciplinary actions, however, are not the same as legal pleadings in Circuit Courts. In disciplinary actions, the question is whether an agency gave an employee reasonable notice of the employee's behavior to which the agency objects. In this instance, the Agency has informed Grievant of the behavior to which it objects regardless of what label it attaches to that behavior.

<sup>4</sup> Grievant has no history of any inappropriate interaction with female employees. Thus, there is no basis for the Hearing Officer to make any inferences regarding Grievant's objective.

<sup>5</sup> DOCPM § 5-10.15(B)(5).

<sup>6</sup> DOCPM § 5-10.17(B)(6).

<sup>7</sup> An employee with two active Group II Written Notices may be demoted with a pay reduction, transferred, and suspended. DOCPM § 5-10.16(C)(2).

<sup>8</sup> In previous cases, the Department of Corrections has challenged the Hearing Officer's well-established authority to mitigate disciplinary action. The Department argued the Hearing Officer's authority to mitigate interfered with what it considered its exclusive right to manage. An analysis of the Hearing Officer's authority to mitigate can be found in Division of Hearing's Case Number 5572 issued January 17, 2003. Case Number 5572 is available on the EDR website.

consideration of an employee's long service with a history of otherwise satisfactory work performance.<sup>9</sup>

When deciding the disciplinary consequences to impose on Grievant, the Agency made its decision based on the assumption that Grievant engaged in sexual harassment. Since the Hearing Officer finds that Grievant did not engage in sexual harassment, it is not fair or appropriate to sanction Grievant with the assumption that he engaged in sexual harassment. To do so would result in a penalty that is too severe. No evidence was presented by the Agency as to what consequences it would have imposed had it believed Grievant did not engage in sexual harassment. The Agency did not present this evidence for the obvious reason that it believes Grievant engaged in sexual harassment. In the absence of evidence of what the Agency would otherwise have done, the Hearing Officer must mitigate the disciplinary action within the context of the methods of discipline selected by the Agency. In this case, the Agency chose to demote with pay reduction, transfer, and suspend. Accordingly, the disciplinary action against Grievant is reduced to (1) demotion with a five percent pay reduction<sup>10</sup>, (2) transfer<sup>11</sup>, and (3) five workday suspension.

Grievant contends he did not attempt to pull Officer B into the restroom. Based on the credible testimony of Officer B, the Hearing Officer concludes the Agency has presented a preponderance of evidence that the events occurred as described by Officer B.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II with demotion to Corrections Officer Senior and a disciplinary salary reduction of five percent of his prior salary, a five workday suspension, and transfer. If reducing Grievant's former salary (as a Sergeant) by five percent leaves Grievant with salary exceeding the maximum of the pay band for a Corrections Officer Senior, then Grievant's salary must be reduced to the maximum of the pay band for a Corrections Officer Senior. The Agency is directed to provide the Grievant with **back pay** for five workdays less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). The Agency is directed to provide Grievant with **back pay** from December 18, 2003 forward to account for the revised adverse salary action as provided in this Decision.

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<sup>9</sup> DOCPM § 5-10.13(B).

<sup>10</sup> It may be necessary to adjust Grievant's salary in accordance with DOCPM § 5-10.6 stating, "In no case may an employee's salary exceed the maximum of the pay band following a disciplinary salary action."

<sup>11</sup> Grievant does not seek a reversal of his transfer to another correctional facility.

## 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.<sup>12</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>12</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

