

Issue: Group III Written Notice with Termination (Sexual Harassment and false statement);
Hearing Date: June 17, 2003; Decision Date: June 24, 2003; Agency: DOC; AHO:
John R. Hooe, III; Case Number: 5715

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS**

DECISION OF HEARING OFFICER

In the matter of Department of Corrections Case Number 5715

Hearing Date: June 17, 2003
Decision Issued: June 24, 2003

PROCEDURAL BACKGROUND

The hearing was originally scheduled for May 5, 2003. At the request of the Grievant's attorney, the hearing was rescheduled to June 17, 2003 to allow the Grievant's attorney the opportunity to review the record and interview witnesses.

APPEARANCES AND EXHIBITS

Grievant
Representative for Grievant
Representative for Agency
Assistant Warden
Five Witnesses for Agency
Ten Witnesses for Grievant (including Grievant)
Agency Exhibits 1 thru 9
Grievant Exhibits A thru D

ISSUES

A. Was the Grievant's conduct between November 2, 2002 and January 3, 2003 subject to disciplinary action as a violation of Standards of Conduct 5-10.17.B.19 as a violation of DHRM Policy 2.15 Sexual Harassment? If so, was termination the appropriate disciplinary action? If not, what was the appropriate level of disciplinary action?

B. Was the Grievant's written statement dated February 3, 2003 (Agency Exhibit 1, Tab C) a false statement and in violation of Standards of Conduct 5-10.17.B. and subject to disciplinary action? If so, was termination the appropriate level of disciplinary action? If not, what was the appropriate level of disciplinary action?

FINDINGS OF FACTS

The Grievant filed a timely appeal from a Group III Written Notice issued on March 6, 2003, which Notice provided for termination of employment effective March 6, 2003. The Notice found violation of the Sexual Harassment Policy and found that the Grievant made a false statement in violation of Management Policy. Following denial of relief at the third resolution step in the grievance process the agency had qualified the grievance for a hearing.

The Department of Corrections has employed the Grievant since January 1, 1986. At the time of termination from employment, the Grievant was a Sergeant. No evidence was introduced at the hearing that the Grievant had previously received any written notices or otherwise been disciplined since January 1, 1986.

As a Sergeant, the Grievant was responsible for supervising a female correctional officer whose complaints led to an investigation by the Office of Inspector General, Department of Corrections. Agency Exhibit 1 is a Report of Investigation dated March 3, 2003. The Exhibit includes the following material facts:

1. The complaining correction officer provided a written statement dated January 31, 2003 alleging that the Grievant had touched her on her "butt" several times but that she had spoken to the Grievant and was confident that nothing would happen again and did not wish to pursue the matter.
2. She provided a written investigative interview dated February 20, 2003 setting out specific things that the Grievant had said to her, including "look at that ass", and "boy, what I could do to you" and other similar statements. She also stated that the Grievant touched, rubbed or grabbed her "butt" on several occasions and grabbed her left breast on one occasion. In the written statement she said that the Grievant's behavior was causing her to get more and more "nervous and uncomfortable". She also stated again that since the Grievant is now on another shift she did not wish to pursue the matter any further.
3. The Grievant provided a written investigative interview dated February 20, 2003 in which he admitted telling the complaining corrections officer that she had a "nice ass" and in reference to her breasts that, "I could suck them". He asserted that any comments made were in the context of a verbal exchange with the corrections officer and that at no time did she say she was offended. He also admitted touching her twice on the behind, denied touching her on the breast and denied touching her between her legs.
4. The complaining officer testified at the hearing that when the Grievant would touch her she would usually respond with a phrase like "alright now, that's enough". She stated that on one occasion the Grievant ran his hand up the inside of her leg to her crotch. During the cross examination she stated that she did have personal conversations with

the Grievant regarding her marriage prior to Grievant's behavior of which she complains. She also stated that she did not say anything to the Grievant when he ran his hand up her leg and never confronted him because she was afraid of the consequences. She also denied ever making sexual remarks to the Grievant.

The Exhibits introduced by the Agency documented that the Grievant was familiar with Agency Policies on work place harassment, sexual harassment and standards of conduct which applied to his employment.

The Grievant introduced four exhibits (Exhibits A, B, C & D) which were four Written Notices of unrelated instances of sexual harassment by other officers and the discipline imposed in those cases between the period of October 20, 1999 and August 1, 2002, each having occurred at the same facility where the Grievant was employed. In addition, the Grievant called his witnesses, four other employees of the facility, three of whom are now Sergeants and each of whom have been found in violation of the sexual harassment policy but were not terminated from employment.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, VA. Code Section 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes 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 employees' 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. 6532, 656 (1989)

Code Section 2.1-116.05(A) 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 for employment dispute which may arise between state agencies and those employees who have access to the procedure under Section 2.1-116.09.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Employee Grievance Procedure, Virginia Department of Employment Dispute Resolution Rules for Hearing IV (D)*. The following procedural due process is required before disciplinary action:

Prior to . . . any disciplinary suspension, employees must be given

1. An oral or written notice of the offense,
2. An explanation of the agency's evidence in support of the charge, and
3. A reasonable opportunity to respond.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Section 2.1-114-.5 and 53.1-10 of the Code of Virginia, the Department of Personnel and Training 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 5-10.17.B.19 of the Standards of Conduct Policy provides that violation of DHRM Policy 2.15, Sexual Harassment is considered a Group III offense (depending upon the nature of the violation). Section 5.10-17.C.2. provides that if a Group III Notice is issued, mitigating circumstances may result in an employee's demotion or transfer and a disciplinary salary action, and/or suspension as an alternative to removal. Section 5-10.13.B. provides that when mitigating circumstances exist, specified corrective action may be reduced. It further states that mitigating circumstances include those conditions related to an offense that would serve to support a reduction of corrective action in the interest of "fairness and objectivity" and they also include consideration of an employee's long service with a history of otherwise satisfactory work performance. In addition, Section 5-10.17B.2. provides that falsifying any records is a Group III offense.

In the instant case, the agency has met the burden of proof necessary to demonstrate by a preponderance of the evidence that the Grievant gave a false statement as alleged and by his words and actions violated the Standards of Conduct regarding sexual harassment. Both allegations merit a Group III Written Notice.

As to the Grievant's termination from employment, the Agency admitted that it did not consider any mitigating circumstances before terminating the Grievant as a result of the Group III offenses. However, the Agency failed to rebut the Grievant's testimony that since his employment on January 1, 1986 he has never received any written notices or been disciplined in any way for any misconduct. The Agency failed to rebut the Grievant's assertion that in other sexual harassment cases, as demonstrated by Grievant's Exhibits A, B, C and D and by four of Grievant's witnesses, that other employees in violation of sexual harassment policy had received no more than Group II Written Notices, various periods of suspension and in some instances demotions.

DECISION

The issuance of a Group III Written Notice for the alleged offenses is upheld. The termination of employment is reversed in light of the mitigating circumstances of the Grievant's long employment with a history of otherwise satisfactory work performance. Discipline is reduced to

suspension effective March 6, 2003 for a period of 30 days as provided in Section 5-10.13.B3 of DOC Procedures Manual. All pay and benefits after April 4, 2003 should be paid and restored to the Grievant.

APPEAL RIGHTS

As Section 7.1 through 7.3 of the *Grievance Procedure Manual* set forth in more detail, this hearing 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 hearing decision is subject to four types of administrative review, depending upon the nature of the alleged defect with 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 a 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 the grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing 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.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, a challenge that a hearing decision is consistent with law may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make 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 not further possibility of an administrative review, when:

1. The 10 calendar days period for filing requests for administrative review had expired and neither party has fled 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 received prior approval of the Director before filing a notice of appeal.

John R. Hooe, III
Hearing Officer