

Issue: Group III Written Notice with termination (sexual harassment); Hearing
Date: 06/09/03; Decision Issued: 06/20/03; Agency: DOC; AHO: David J.
Latham, Esq.; Case No. 5738

COMMONWEALTH of VIRGINIA
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Three witnesses for Grievant
Warden
Advocate for Agency
Four witnesses for Agency

ISSUES

Did grievant's conduct warrant 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 a timely grievance from a Group III Written Notice issued for sexual harassment.³ As part of the disciplinary action, grievant was removed from employment. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 22 years. He was a captain. Grievant has one prior active disciplinary action – a Group I Written Notice for inadequate or unsatisfactory performance.⁵

The Commonwealth's policy on sexual harassment defines this term 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)."⁶

In August 2002, grievant was transferred from the night shift to day shift. On August 24, 2002, grievant's subordinates on the night shift held a "going away" party to commemorate the occasion. The party included cake and refreshments, cards, and small gifts. During the party, grievant shook the hands of male subordinates. As he opened gifts, he also shook the hands of, and embraced some of the female subordinates. The embraces were one-armed, around-the-shoulder hugs. Some of the gift-givers initiated the hugs as they gave their gift. Grievant believes that corrections officer "M" may have been among those he hugged at this party. None of the female subordinates objected to the casual embraces either during the party, or subsequent to the party.

On January 18, 2003, officer M, who is subordinate to grievant, filed a written complaint to an assistant warden alleging that grievant had sexually

³ Exhibit 1, p. 1. Written Notice, issued April 2, 2003.

⁴ Exhibit 1, p. 2. Grievance Form A, filed April 10, 2003.

⁵ Exhibit 7. Written Notice, issued August 10, 2001. NOTE: Grievant had one other disciplinary action that has previously been rescinded by a Decision of Hearing Officer.

⁶ Exhibit 2J. Department of Human Resource Management (DHRM) Policy No. 2.30, *Workplace Harassment*, May 1, 2002.

assaulted her on October 2, 2002, attempted to hug her on December 19, 2002, and requested her to enter a vacant room on January 12, 2003.⁷ The case was assigned to a special agent, who investigated the matter and concluded in mid-March 2003 that allegations of sexual harassment against grievant were founded. The Assistant Chief of the Office of Inspector General then conducted further investigation by interviewing 32 employees. Grievant was disciplined and removed from employment on April 2, 2003.

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 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.⁸

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 Human Resource Management 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

⁷ Exhibit 2A. Written statement of female corrections officer, January 18, 2003.

⁸ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

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 Policy No. 1.60* provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.⁹ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses; one example is violation of DHRM Policy 2.15 *Sexual Harassment*.¹⁰

Corrections officer M testified in a forthright manner and was not hesitant about confronting grievant. She testified directly and responsively. Grievant was calm, collected, and equally direct in denying the allegations against him. Thus, the *demeanors* of both accuser and accused were equally credible. As there were no witnesses to the alleged events, it is necessary to evaluate the internal consistency of officer M's testimony, and the overall credibility of her allegations.

October 2, 2002

Officer M has not provided a sufficiently satisfactory reason for waiting more than three months before reporting the alleged October 2, 2002 incident. Of the three allegations, this was the most serious since she characterized it as a "near rape."¹¹ Grievant met with the warden on October 10, 2002 regarding a serious matter involving another captain. She was unafraid to take her complaint regarding one captain directly to the warden, yet didn't bother to even mention that she had been "nearly raped" eight days earlier by grievant (also a captain).

Officer M contends that on October 2, 2002, grievant entered the support control room, and immediately grabbed both her upper arms restricting her movement. She testified that he attempted to kiss her, that she resisted him and turned her head away to the side, and that he then kissed her putting his tongue in her mouth.¹² If grievant was using both hands to hold and restrain officer M, who was resisting and turning her head away, it is difficult to imagine how grievant would have been physically able to place his lips on hers, much less tongue-kiss her. Officer M was unable to provide a reasonable explanation of how this could have been accomplished. In her written complaint, and in her testimony, officer M maintained that grievant grabbed both of her upper arms and

⁹ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁰ Exhibit 8. DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

NOTE: DHRM Policy 2.15 was superseded by Policy 2.30 effective May 1, 2002.

¹¹ Exhibit 3I. Letter to Attorney General, February 8, 2003.

¹² In her written complaint of January 18, 2003, officer M stated that grievant only "attempted to place his tongue in my mouth." However, during her interview with the investigator, officer M contended that grievant had actually put his tongue in her mouth.

restrained her. She then states that, “He *placed* my face close to his placing his lips on mine...” If grievant was using both of his hands to hold officer M’s upper arms and restrain her, it would not have been possible for him to *place her face* close to his.

Officer M wrote in her complaint that grievant entered the support control room at 1745 hours and “immediately” grabbed her. This is inconsistent with the undisputed control room logbook, which shows that officer M entered the room at 1742 hours and that no one else entered the room until 2123 hours.¹³ It is also inconsistent with the logbook entry showing that the officer being relieved by officer M left the control room at 1802 hours. The agency investigator credibly testified that room entries by higher-ranking officers are not always recorded in the logbook, even though procedure requires that such entries be made. It is curious, however, that both of the two corrections officers failed to record his entry. However, even if grievant had entered the control room at 1745 hours, the other corrections officer made no mention that officer M was attacked by grievant. Most significantly, the other corrections officer was not called to testify about what he had seen, or to affirm the accuracy of the logbook entries. When a party fails to call a witness who may have corroborative testimony, it must be presumed that the testimony of the witness would not have been favorable to that party.

Officer M stated that grievant remained in the control room for 30 minutes and left at 1815 hours.¹⁴ Under questioning, she was unable to provide any explanation of what grievant did during that half-hour after she purportedly fought off his attack. She claims that she sat down and turned her back to him. Grievant had no explanation of why, if she had just been sexually attacked, she calmly sat down with her back to her attacker and ignored his presence for half an hour. She failed to record his departure from the room in the logbook.

Officer M’s written complaint states categorically that grievant was in the control room for 30 minutes from 1745 to 1815 hours. Yet she also adamantly maintains that grievant entered the room after the other corrections officer left (which the logbook documents as 1802 hours). When cross-examined about this obvious inconsistency, officer M was unable to provide a satisfactory explanation. Given all of the inconsistencies discussed above, officer M’s version of this alleged incident is less than credible.

December 19, 2002

Officer M alleges that at 1830 hours on December 19, 2002, she was alone in the break room purchasing a snack from a vending machine and that grievant walked up behind her and attempted to grab her. She rebuffed him and the incident ended. Grievant denies that this incident happened. No one else

¹³ Exhibit 2H. Support Control Room logbook, October 2, 2002.

¹⁴ Exhibit 2A. Grievant’s complaint to Assistant Warden, January 18, 2003.

witnessed this incident. There is no corroborative evidence to support either grievant or his accuser. Therefore, this alleged incident is not probative.

January 12, 2003

On January 12, 2003, Officer M was assigned to work in the medical unit. Two inmates and two nurses were in the unit until 1200 hours when the two nurses left to administer medication to inmates in another building. Grievant entered the medical unit at 1205 hours, and Officer M recorded the entry in the logbook. Officer M contends that grievant told her to go into a vacant examining room but that she refused. Grievant then directed her to relieve another corrections officer on hall control duty; officer M complied with the request. Grievant agrees that he entered the medical unit and instructed officer M to relieve the hall control officer but denies ordering officer M to enter a vacant examining room. There were no witnesses to this incident and there is no corroborative evidence. With only an allegation, the agency has not proven that grievant did anything inappropriate during this encounter.

Officer M's credibility

Officer M asked to be moved to day shift after grievant was transferred to day shift. She first told the warden that grievant and a female lieutenant had requested that she be assigned to day shift. The warden denied the request. officer M later made another request for transfer, contending that she wanted to be placed on day shift to accommodate her personal family situation.¹⁵ When the special agent investigating the allegations asked officer M about her transfer to day shift, she denied ever asking to be transferred. Grievant denied ever telling officer M that he wanted her on day shift. The lieutenant testified very credibly that she never told officer M that she wanted her to transfer to the day shift.

Officer M asserts that she did not report her allegations until months and days afterwards because there are no female management employees above the level of captain. However, she had no hesitation about speaking with the warden about her dispute with another captain in the facility. Further, grievant could have spoken to females in human resources or in the agency's central office if she felt it necessary to report the matter to someone of the same gender.

Officer M's credibility is significantly tainted by her denial of having any knowledge of a prior disciplinary action against grievant. She avers that she did not know about the discipline, about a complaint filed with the Equal Employment Opportunity Commission (EEOC), or about a financial settlement made with the female accuser in that case. However, officer M's correspondence makes multiple references that strongly suggest she had knowledge of part or all of the entire matter. For example, she states, "After some investigation on my own, ... I found that there have been numerous grievances lodged against the persons

¹⁵ Officer M was transferred to day shift on November 30, 2002.

outlined in my complaint. ... These men have been the subject of numerous allegation (sic) of sexual misconduct in the work place... It has come to my attention that I am not the only person that has been emotionally and physically affected..."¹⁶ While it is not surprising that officer M had knowledge of the prior events, her *denial* of such knowledge is very curious. It suggests that officer M has her own agenda, which she feels will be better served by pretending ignorance of the previous events.

Further, Officer M repeatedly denied receiving any help or advice in writing her correspondence. However, when asked during the hearing to define a term (anthropological insight) used in her letter she was totally unable to explain its meaning. Grievant has a high school education obtained through a GED equivalency examination. Some of the words, phrases, and concepts expressed in her correspondence do not appear consistent with this level of education.

Finally, during the hearing, Officer M contended that she was positive about the date of the October 2, 2002 incident because she maintained a personal journal in which she recorded the event. However, this journal was not brought to the hearing or proffered as evidence by the agency. Such a journal would have provided evidence that might have been corroborative of officer M's allegations. The failure to provide this critical evidence suggests that the journal either does not exist or does not contain any probative evidence.

Follow-up investigation

In the follow-up investigation conducted on March 18, 2003, a typed questionnaire was given to 32 employees. The form requested yes/no answers and provided space for comments. The questionnaire explored whether the respondents had witnessed any "physical contact" between officer M and grievant, and between officer M and another captain that officer M alleges sexually harassed her. The questionnaire specifically defines "physical contact" to be, "Any unwanted or inappropriate contact between two individuals, such as hugging and kissing at work."¹⁷ None of the 32 respondents stated that they had ever witnessed this type of "physical contact."

The agency suggests that the results of this survey cast doubt on grievant's assertion that he lightly embraced some female subordinates at the August 24, 2002 party. However, the survey cannot be interpreted in this way because of the questionnaire's definition of "physical contact." If respondents witnessed handshakes or light thank-you embraces, they apparently did not consider such contact to be "unwanted or inappropriate," and therefore answered the questions in the negative. If the questionnaire had first asked about unwelcome or inappropriate contact, and then asked a separate question about whether there had been any physical contact (including welcome contact), the

¹⁶ Exhibit 2I. Letter to Attorney General from grievant, January 22, 2003.

¹⁷ Exhibit 3L. Investigative Interview questionnaire, March 18, 2003.

results would be more useful and perhaps probative. This point was illustrated by the testimony of one female corrections officer who testified on grievant's behalf. Although her questionnaire states that she did not see any physical contact at grievant's going-away party, she acknowledged under questioning that grievant did shake some hands and may have embraced some female officers, but that no one indicated that his conduct was unwelcome. Therefore, the questionnaires do not provide corroborative evidence for either party.

Conclusion

From the testimony of two key agency witnesses, it is concluded that the agency's rationale for discipline was, in large part, grievant's forthright acknowledgement that he hugged female officers during his going-away party. The agency recognized that the allegations made by corrections officer M are uncorroborated, and that there are no witnesses to any of the alleged incidents. Thus, this case largely becomes a credibility determination between grievant and his accuser. Accordingly, the agency seized upon grievant's acknowledgement of apparently welcome contact with other employees in August 2002 and took this acknowledgement to be a *mea culpa* statement. This convoluted reasoning cannot withstand the scrutiny of a logical, deductive approach. Grievant has been disciplined for three specific charges alleged to have occurred between October 2, 2002 and January 12, 2003. The case must rise or fall on whether that conduct occurred as charged – not on an event that occurred months earlier, and especially not on an event in which there was no unwelcome conduct.

This case is a classic "He said, she said" standoff. Grievant denies the allegations of his lone accuser. Corroborative evidence exists for only one of the three alleged incidents – and that documentary evidence supports grievant's denial of wrongdoing. The agency has offered no evidence that would undermine grievant's credibility. On the other hand, the credibility of the agency's star witness is significantly tainted by inconsistencies in her stories, her inability to explain key aspects of her testimony, her lie about why she wanted a transfer to day shift, her very curious denial of knowledge about grievant's prior disciplinary action, and her failure to disclose what she claims is a document that might have provided corroboration of her allegation. Given these factors, the agency has not demonstrated, by a preponderance of evidence, that grievant sexually harassed a female subordinate.

Polygraph evidence

The agency submitted both a polygraph examination report¹⁸ and a departmental investigative report that includes a reference to the analysis of the polygraph test results.¹⁹ A third reference to the polygraph test result is contained in the warden's notes prepared after grievant's pre-disciplinary

¹⁸ Rejected Exhibit 2E.

¹⁹ Exhibit 2, p. 5. Report of Investigation, undated.

meeting.²⁰ The Code of Virginia specifically prohibits the agency from engaging in these actions:

The analysis of any polygraph test charts produced during any polygraph examination administered to a party or witness **shall not** be submitted, referenced, referred to, offered or presented in any manner in any proceeding conducted pursuant to Chapter 10.01 (§ 2.2-1000 et seq.) of Title 2.2 ...²¹ (Emphasis added)

Because the report should not have been proffered, and the references to such report should have been redacted from the investigative report and warden's notes, the hearing officer may not consider the results of the polygraph examination in making a decision in this case. Moreover, the hearing officer may draw an inference regarding the agency's motive for attempting to enter such evidence into the record.

DECISION

The decision of the agency is hereby reversed.

The Group III Written Notice issued on April 2, 2003 for sexual harassment and grievant's removal from employment are **RESCINDED**. Grievant is reinstated to his position with full back pay less any interim earnings.

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

²⁰ Exhibit 1, p. 7. Warden's notes, March 31, 2003.

²¹ Va. Code § 40.1-51.4:4. Prohibition of use of polygraphs in certain employment situations.

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.²² 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.²³

[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]

David J. Latham, Esq.
Hearing Officer

²² An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.