

Issue: Group II Written Notice with demotion (sexual harassment); Hearing Date: 08/26/03; Decision Issued: 08/28/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5785; **Judicial Review: Appealed to the Circuit Court in Augusta County on 09/03/03; Outcome pending**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5785**

Hearing Date: August 26, 2003  
Decision Issued: August 28, 2003

**PROCEDURAL HISTORY**

On May 30, 2003, Grievant was issued a Group II Written Notice of disciplinary action with demotion for:

*Violation of DHRM Policy 2.30, Workplace Harassment. On 5-22-03 while in the shift commander's office, you made the following statement to [Sgt S]: "let me feel your butt." VaDOC procedure 5-10, Standards of Conduct & Performance directs to notify you that any subsequent written notice issued during the "active" life period, regardless of level, may result in removal.*

On June 27, 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 July 29, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 26, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant

Grievant's Counsel  
Agency Representative  
Six witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with demotion for engaging in 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 at one of its Correctional Institutions. Prior to his demotion with a ten percent salary reduction, he worked as a Corrections Sergeant. On May 7, 2001, Grievant received a Group III Written Notice for failure to follow written instructions which weakened security procedures.<sup>1</sup> On March 7, 2003, Grievant received a Group I Written Notice for inadequate or unsatisfactory job performance.<sup>2</sup>

Grievant and Sergeant S have known one another as co-workers for sixteen years. In the early part of their acquaintance, they discussed personal matters such as the ending of Sergeant S's first marriage. Grievant is affable and outgoing. He regularly engages other employees in conversation and enjoys joking with co-workers including Sergeant S.

In 2001 or 2002, Sergeant S, Grievant and two or three male co-workers were in a group talking. At one point, the topic of the conversation turned to how the size of male genitals varied by race. Someone said the genitals of individuals of Grievant's

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> Agency Exhibit 4.

race were larger than the genitals of other races. Sergeant S asked Grievant if that was true.

On May 22, 2003, Sergeant S encountered Grievant. She described her encounter as follows:

*On Thursday, May 22, 2003, [Grievant] and I, [Sergeant S] were in the Shift Commander's Office. [Ms. D] was at the file cabinet looking at the rosters in the top drawer. [Grievant] stated to me that he had something that he had wanted to ask me for a long time. I asked what it was. He said wait until she leaves and pointed to [Ms. D]. After [Ms. D] left he looked at me and said can I feel your "butt" or something to that effect. It may have been squeeze your butt or something resembling that statement. I was shocked and stated "I don't imagine, I can't believe you even asked me that!" He then said "Why can't you believe I asked you that. It's better to ask than just do it, ain't it?" I said I guess so. He also told me that why wouldn't he want to touch it? "It looks nice." He then went on to say that I just didn't understand how a man's mind works and I said, I guess I don't. A couple of times later that day [Grievant] asked "just one time" when he saw me, but since then he has made no offensive statements to me.<sup>3</sup>*

Prior to May 22, 2003, Grievant had never asked to touch Sergeant S or made any comment of a sexual nature to Sergeant S that Sergeant S found offensive.

On Monday, May 26, 2003, Grievant and Sergeant S worked together on the same shift as they had done many times in the past. Sergeant S did not act any differently towards Grievant. Grievant did not realize he had offended Sergeant S on the prior Thursday and acted as he would normally have acted towards Sergeant S. Sergeant S expressed her concerns to Grievant about problems she was having with her son. She told Grievant of her concern about her son being injured while riding his bicycle.

On Tuesday, May 27, 2003, Sergeant S went to see the Warden upon his return from vacation. Before speaking with the Warden, Sergeant S spoke with a female operations officer and asked the operations officer whether Sergeant S should pursue the matter with the Warden. After receiving an affirmative response from the operations officer, Sergeant S spoke with the Warden and expressed what Grievant said to her. Sergeant S was tearful and upset when she spoke with the Warden.

When the Warden confronted Grievant with having made inappropriate comments to Sergeant S, Grievant readily admitted making the comments and admitted his comments were inappropriate. In his written statement, Grievant states:

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<sup>3</sup> Agency Exhibit 1.

On May 22, 2003, while in the shift commander's office, I [Grievant], jokingly made a statement to [Sergeant S] let me feel your butt. I never meant it but I am sorry this happened and would never do anything to hurt [Sergeant S].<sup>4</sup>

Grievant's comments were made in a joking manner. He did not actually intend to seek Grievant's permission to touch her. Sergeant S, however, did not realize Grievant was joking and considered his comments to be a sincere request to touch her.

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

Grievant engaged in inappropriate behavior requiring disciplinary action but that behavior did not rise to the level of sexual harassment.

The Agency contends Grievant engaged in sexual harassment.<sup>5</sup> "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."<sup>6</sup> State policy 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

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<sup>4</sup> Agency Exhibit 2.

<sup>5</sup> Although the Written Notice refers to Workplace Harassment, the Agency's evidence showed it believed Grievant engaged in sexual harassment. For example, the Agency highlighted the definition of sexual harassment in Agency Exhibit 6 and based its arguments on that definition. Sexual harassment is a type of workplace harassment under DHRM Policy 2.30.

<sup>6</sup> DHRM Policy 2.30.

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 did not engage in *quid pro quo* sexual harassment because he did not give or withhold a work-related benefit in exchange for sexual favors. Grievant did not engage in hostile environment sexual harassment because his conduct was not severe. His conduct was in the form of a request to touch Sergeant S and did not involve any threat or attempt at intimidation or any actual or likely physical contact with Sergeant S. Grievant's conduct was not pervasive because it involved an isolated comment made on a single day without any evidence of a pattern of behavior or expectation that his behavior might continue.

"Inadequate or unsatisfactory job performance" is a Group I offense.<sup>7</sup> It is inappropriate for a male supervisor to ask a female supervisor if he can touch a private part of her body such as her bottom. Such request does not relate to the Agency's business and is likely to offend the woman being asked. With good reason, Sergeant S was offended by Grievant's remarks and it affected their working relationship. The Agency had to treat Grievant and Sergeant S differently because of Grievant's comment. Grievant's behavior was inadequate job performance thereby justifying reduction of the Written Notice to a Group I offense.

Since the Agency alleged sexual harassment but has only established inadequate job performance, the Hearing Officer must examine the appropriateness of the disciplinary action based on the facts presented at the hearing. The Agency contends that Grievant should not hold a supervisory position.<sup>8</sup> The Hearing Officer agrees. An experienced supervisor working within the Department of Corrections should know not to request to inappropriately touch another supervisor even when such request is intended as a joke. When a supervisor exercises such poor judgment, a sufficient question arises as to whether that person should continue as a supervisor. Grievant's demotion must be upheld.

When an employee is demoted for disciplinary reasons, an adverse salary action must follow. The minimum salary reduction is 5% but in no event may the employee's salary exceed the maximum of the pay band following a disciplinary salary action. Grievant's salary was reduced by 10% with the assumption that Grievant engaged in sexual harassment. Since the Agency has not established that Grievant engaged in

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<sup>7</sup> DOCPM § 5-10.15(B)(4).

<sup>8</sup> Disciplinary action for a Group I offense normally would not include a demotion. Because Grievant has an active Group III Written Notice and an active Group I Written Notice, there exists a sufficient basis to demote Grievant.

sexual harassment, the Hearing Officer must evaluate the appropriateness of the salary reduction in light of Grievant's failure to adequately perform his job. Consequently, the Hearing Officer will adjust that reduction to 5% so long as Grievant's salary as a Sergeant does not exceed the maximum of the pay band following the demotion.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with demotion with adverse salary action is **modified**. The Agency is ordered to modify Grievant's disciplinary action to be a Group I Written Notice with demotion to Corrections Officer Senior with a 5% pay reduction but not exceed the maximum of the Grievant's pay band following the demotion. The Agency is ordered to pay Grievant's **back pay** representing the difference between a 10% and 5% pay reduction from the effective date of demotion.

## 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>9</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>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.