

Issue: Group III Written Notice with 10-day suspension and transfer (sexual harassment); Hearing Date: 04/22/03; Decision Issued: 04/25/03; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5688



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5688

Hearing Date: April 22, 2003  
Decision Issued: April 25, 2003

PROCEDURAL ISSUE

Grievant filed two grievances on December 26, 2002, both of which arose out of the same material facts (a written notice issued for alleged sexual harassment). The agency requested that both grievances be consolidated for a single hearing, to which the grievant agreed. The Director of the Department of Employment Dispute Resolution (EDR) reviewed the matter and ruled that the two grievances would be consolidated into one hearing.<sup>1</sup>

APPEARANCES

Grievant  
Warden  
Representative for Agency  
Four witnesses for Agency

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<sup>1</sup> Compliance Ruling of Director Number 2003-029, February 8, 2003.

## 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 two timely grievances from a Group III Written Notice issued for sexual harassment.<sup>2</sup> As part of the disciplinary action, grievant was suspended for 10 days, and was transferred to a different corrections facility. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>3</sup> The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 17 years. He is a corrections officer senior. He has received multiple training sessions on the topic of sexual harassment.<sup>4</sup>

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).<sup>5</sup> The agency has a similar policy that is worded differently but has the same general meaning.<sup>6</sup>

At 11:10 a.m. on Saturday, September 28, 2002, a female corrections officer walked through the visitation room on her way to a perimeter tower. When she entered the room, grievant was the only person present and the following conversation took place:

Grievant: "Oh, you came in here to see me!"  
Grievant approaches: "Give me a hug!"  
Female officer: "No, you'd better get away from me."  
(Female officer held out her left arm with open palm  
upraised to emphasize that she was not interested)  
Grievant: "Oh it's like that?"  
Female officer: "Yeah, it's like that – move."  
Grievant: "Give me a big fat juicy kiss." (getting closer)  
"Oh you got on some perfume. Smelling all sweet."  
Female officer: "Go on, you better leave me alone."

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<sup>2</sup> Exhibit 1. Written Notice, issued December 20, 2002.

<sup>3</sup> Exhibit 2. Grievance Form A, filed December 26, 2002.

<sup>4</sup> Exhibit 8. Grievant's training record.

<sup>5</sup> Exhibit 7. Department of Human Resource Management (DHRM) Policy No. 2.30, *Workplace Harassment*, May 1, 2002.

<sup>6</sup> Exhibit 6. DOC Procedure Number 5-2, *Equal Employment Opportunity*, June 15, 2002.

(Attempting to open door to leave)

Grievant: "Oh, you're scared. You don't have to be scared."

After the female officer left, she promptly reported the incident to the watch commander. She was visibly angered and shaken when she spoke with the watch commander. The watch commander said he would speak to grievant. On the following Monday, the female officer filed a written incident report with the Chief of Security.

The assistant warden of operations investigated the incident and recommended to the warden that grievant be disciplined.<sup>7</sup> The warden reached a similar conclusion but recognized that the essence of the case pitted the credibility of the female officer against grievant's credibility. For this reason, and another discussed in the Opinion section, he decided to interview the female officer again and learned that four other female officers had previously experienced unwelcome conduct from grievant. Two of the four were willing to write incident reports about their experiences. One female described a similar incident in the fall of 2001 in which grievant had held her arm and pulled her close to him. She reported this incident to the watch commander who said he would take care of it. The other female officer reported that grievant had made repeated comments about wanting to taste her lipstick. She did not report the incidents because she felt she could handle the matter by avoiding situations where she would be alone with grievant.

### 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

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<sup>7</sup> Exhibit 5. Investigation report to warden, October 9, 2002. NOTE: Although this report is dated October 9, 2002, the warden received it on October 30, 2002.

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.<sup>8</sup>

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 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.<sup>9</sup> 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*.<sup>10</sup>

All three female officers referred to in the Findings of Fact testified during the hearing. All testified clearly, calmly, and credibly. Their oral testimony was consistent with their written statements. None of the three had previously been involved in any adverse interactions with grievant and none harbored any ill will towards grievant. One stated that she still likes grievant but did not appreciate his attempt to hold her close to him. Grievant denied the allegations made by all three female officers. He suggests that all three are friends and infers that they conspired against him. However, he failed to offer any credible reason that any of the three would have to fabricate the incidents.

Grievant cited the case of another female officer who had complained of sexual harassment by a white male officer. Grievant contended that no corrective action was taken against the male officer, and that this is evidence of discrimination against him. However, the warden testified that appropriate

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<sup>8</sup> § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

<sup>9</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>10</sup> Exhibit 9. DOC Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

corrective action was taken. Such corrective action is supposed to be confidential and it is therefore not surprising that grievant would not have been aware of the outcome of that incident. Grievant had no basis to allege racial discrimination other than this situation.

Grievant alleges that the female complainant in this incident socializes with the assistant warden of operations. Grievant did not question either of these people during the hearing because he had only heard rumors concerning the alleged socialization. In any case, the warden conducted his own separate investigation after the assistant warden had completed his investigation. The warden independently reached the same conclusion.

Grievant complains that the incident was “not proven beyond a shadow of a doubt.” The legal standard of proof in a grievance hearing is not beyond a reasonable doubt, but rather a preponderance of evidence. In order to prevail, it is necessary that a party prove that it was more likely than not that their version of the event is correct. In this case, the agency has met that burden of proof. The sworn, credible testimony of three witnesses outweighs grievant’s denial. Grievant’s behavior cannot be tolerated. The agency has seen fit to give grievant one more chance to continue his employment rather than discharge him at this time. The agency’s discipline is reasonable under the circumstances presented in this case.

Grievant objects to being transferred from a facility that is only 37 miles from his residence to a facility that is 126 miles from his home. There are three other facilities closer than the one to which grievant was transferred. However, there were no vacancies at the other facilities. The regional director made the decision regarding the transfer location based on available vacancies and other operational considerations. The decision on where to transfer an employee is an internal management decision made by each agency. Section 2.2-3004.B of the Code of Virginia states, in pertinent part, “Management reserves the exclusive right to manage the affairs and operations of state government.”

### DECISION

The decision of the agency is hereby affirmed.

The Group III Written Notice issued on December 6, 2002 for sexual harassment, and his transfer to another facility are UPHELD. The disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

### 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.<sup>11</sup> 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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David J. Latham, Esq.  
Hearing Officer

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<sup>11</sup> 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).

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