Issues: Group II Written Notice (failure to report incident of alleged sexual harassment) and Group III Written Notice with termination (sexual harassment); Hearing Date: June 19, 2003; Decision Issued: June 24, 2003; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 5739

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5739

Hearing Date: June 19, 2003
Decision Issued: June 24, 2003

PROCEDURAL ISSUE

The earliest date on which all participants were available for this hearing resulted in the hearing being conducted on the 29th day following appointment.[1]

APPEARANCES

Grievant
Attorney for Grievant
Eleven witnesses for Grievant
Warden
Advocate for Agency
Three witnesses for Agency

[1] § 5.1 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

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 two disciplinary actions – a Group II Written Notice for failing to report an incident of alleged sexual harassment, and a Group III Written Notice issued for sexual harassment.[2] As part of the Group III 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.[3]

The Department of Corrections (DOC) (Hereinafter referred to as "agency") has employed grievant for 10 years. He was a captain.[4] Grievant's performance has consistently exceeded expectations. He has an unblemished record.

Sexual harassment allegations

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)."[5]

On January 18, 2003, corrections officer "M" filed a written complaint to an assistant warden alleging that grievant attempted to kiss her at 0430 hours on May 19, 2002, and abused his authority by serving a disciplinary action on her on September 17, 2002. The case was promptly referred to a special agent, who investigated and concluded in mid-March 2003 that the allegation of sexual harassment against grievant was founded. After the special agent interviewed officer M, he advised her that, in his judgement, her case was weak and probably would not be sufficient to support criminal charges. Officer M was upset and wrote a complaint letter to the Attorney General with copies to the agency director, the Inspector General, the Governor, a Congressman, two attorneys, the U.S. Department of Criminal Justice, and others.[6] The Assistant Chief of the Office of Inspector General then ordered a follow-up investigation in which 32

[2] Exhibit 1, pp. 1 & 2. Written Notices, issued April 3, 2003.
[3] Exhibit 1, p. 3. Grievance Form A, filed April 25, 2003.
[4] Exhibit 4. Grievant's Employee Work Profile, 2001-2002.
[5] Exhibit 2, p. 17. Department of Human Resource Management (DHRM) Policy No. 2.30, *Workplace Harassment*, May 1, 2002.
[6] Exhibit 2I, p. 4, 5 & 6. Grievant's letter to Attorney General, February 8, 2003.

employees were interviewed. Grievant was disciplined and removed from employment on April 3, 2003.

In September 2002, the warden learned that 15 corrections officers, including officer M, had been making personal long distance calls on prison telephones. He directed that disciplinary actions be taken against the offenders. Grievant and a lieutenant were directed to serve a disciplinary action on officer M. When grievant and the lieutenant met with her, officer M became upset and blamed grievant for issuing the discipline. Grievant explained that they were merely serving the discipline that had been issued at the direction of the warden. Despite this explanation, officer M continued to be upset. In her complaint of January 18, 2003, officer M argues that grievant issued the disciplinary action to intimidate and discredit her.[7]

Failure to take appropriate action

Officer M told grievant in December 2002 that someone had sexually harassed her, but she did not disclose the name of the alleged perpetrator. Nonetheless, grievant believed he knew who the person was and made a casual, off-hand remark to an assistant warden. The assistant warden did not ask grievant any questions about the matter because the remark was so casual. A few weeks later, officer M told grievant that the employee was a specific captain. However, she specifically requested grievant not to report the matter because she was in the process of writing a complaint to give to the warden, and because she was fearful that the other captain might retaliate against her. In early-January 2003, grievant reported this to the assistant warden. The assistant warden told him to report the matter to another assistant warden and/or the chief of security. Grievant did report the matter to the other assistant warden, who told grievant to have officer M put her complaint in writing. Grievant acknowledged that he should have reported the incident promptly.

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

[7] Officer M was subsequently able to demonstrate to the warden's satisfaction that she had not been working on the day she was alleged to have made unauthorized telephone calls, and her disciplinary action was rescinded.

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 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 forthrightly, 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 sexual harassment, it is

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[8] § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.
[9] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[10] Exhibit 6. 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.

necessary to evaluate the internal consistency of officer M's testimony, and the overall credibility of her allegations.

May 19, 2002

Officer M has failed to offer a satisfactory explanation for waiting eight months before reporting the alleged May 19, 2002 incident. She met with the warden on October 10, 2002 to complain about grievant's serving her with a disciplinary action but failed to say anything about the alleged kissing incident. It is not logical that grievant would not have utilized this opportunity to complain about sexual harassment if it had really occurred.

Officer M worked the night shift (5:45 p.m. to 6:15 a.m.) on May 18-19, 2002. She alleges that at 0430 hours on May 19, 2002, grievant entered the support control booth and "quickly attempted to kiss me."[11] As the officer staffing the support control booth, officer M was required to make entries in the logbook to document the entry and exit of any visitors, especially supervisors. On that date, Officer M made entries in the logbook when officers entered and exited the booth at 2123, 2145, 2150, 0009, 0515, and 0546 hours. At 0432 hours, she noted that, "Conditions appear normal." The support control logbook reflects that grievant did not enter the booth at any time during this shift.[12] Thus, the logbook that officer M wrote contradicts her own testimony.

In fact, on May 19, 2002 grievant worked the dayshift from 5:45 a.m. to 6:15 p.m. All employees must enter the prison through the administration building by passing through master control. A logbook is maintained in master control documenting the entry of all supervisors. That logbook documents that grievant entered the administration building at 0636 hours.[13] Another officer assigned to the front building entry maintains a logbook in which the entry of all supervisors are recorded. That logbook reflects that grievant entered the administration building at 0641 hours on May 19, 2002, and entered the support building at 0643 hours.[14] Thus, the support control logbook entries made by officer M and two other independently maintained logbooks in the front entry area and in master control corroborate that grievant was not at the facility prior to 0636 hours on May 19, 2002. Testimony from the both the master control officer and the front entry officer further corroborated that grievant called in on May 19, 2002 to say he would be late, and that he did arrive late, as documented.

As a captain, grievant has significant management responsibilities and therefore has made it a practice to report for work each day at about 0430

[11] Exhibit 2A, p. 2. Grievant's written complaint, January 18, 2003.
[12] Exhibit 2H, pp. 1-2. Support control booth logbook, May 18-19, 2002.
[13] Exhibit 10. Master Control logbook, May 19, 2002.
[14] Exhibit 8. Administration Building front entry logbook, May 19, 2002. NOTE: Undisputed testimony established that the clock used in the Master Control booth and the clock used by the front entry duty officer are not synchronized and may be as much as five minutes different from each other.

hours.[15] In fact, the duty roster for May 19, 2002 shows grievant's time in as 0430 hours. Grievant habitually writes in this time since he usually arrives each day at this time. He believes that he erroneously wrote this entry at the end of the shift without recalling that he had actually arrived late that morning. Grievant overslept on the morning of May 19, 2002. He called the watch commander and advised that he would be late to work.[16] As further corroboration of his late arrival on May 19, 2002, grievant provided a copy of his cellular telephone bill for that date. While enroute to the prison, grievant called the prison at 6:20 a.m. to advise his estimated time of arrival at the facility.[17]

Officer M brought to the hearing a photocopy of what she claims is an entry made in a personal journal that she maintains at home.[18] The actual journal was not produced at the hearing and therefore this document could not be authenticated. Officer M had never previously mentioned this journal to anyone at any time. Even after the agency investigator told her that, without any witnesses or supporting documentation her case was very weak, officer M did not tell him that she had a journal that purportedly contained corroborative evidence. As the original journal has not been produced, the photocopy of one page will be accorded little evidentiary weight.

September 17, 2002

The uncontraverted testimony established that grievant did not initiate, propose, or have any role in issuing disciplinary action against officer M for alleged telephone misuse. Grievant's only involvement was to deliver the paperwork and witness that officer M had been served with the disciplinary action. Therefore, officer M's contention that grievant was attempting to intimidate her is completely unfounded. Moreover, officer M's suggestion that grievant was attempting to discredit her claim of harassment is without merit because officer M did not file her harassment allegation until more than four months later.

Failure to take appropriate action

The undisputed testimony of grievant and two assistant wardens establishes that grievant did report officer M's allegation of sexual harassment by another captain. The matter was not formally reported when officer M first told grievant that "someone" had harassed her because she did not divulge the name of the harasser. However, when she later told grievant that the alleged harasser was a specific captain, grievant did report what he had been told to the assistant warden. He did not write a report because officer M told him that she was

[15] As a captain, grievant is part of agency management and therefore an exempt employee. He does not receive overtime pay for time worked beyond his regularly scheduled hours.
[16] Grievant lives in North Carolina and has a long commute to work.
[17] Cellular telephones are not permitted inside the prison.
[18] Exhibit 7. Photocopy of one page of officer M's alleged personal journal.

preparing a written complaint for the warden. It does appear, however, that grievant could have reported the matter more quickly and filed a written report of his own.

Officer M's credibility

Officer M stated in her written complaint only that grievant "attempted to kiss me." However, in her testimony, she avers that grievant grabbed her right arm. Her claim does not appear in the purported page from her personal journal. Further, in her personal journal, she states that grievant said, "You know you want it." However, this statement does not appear in her written complaint and she did not testify that this happened. If grievant had actually said such a thing at the time, it is surprising that officer M would not have included it in her complaint and her testimony. It is more likely than not that, like the alleged kiss, the statement never happened. Officer M also stated in her complaint that grievant had put his tongue in her mouth.[19] However, when testifying during the hearing, she recanted, saying that grievant had never tongue-kissed her.

In her letter to the Attorney General, officer M contends that she was "nearly raped."[20] When questioned during the hearing, officer M affirmed that this allegation applied to both the other captain and to grievant. After being told by the investigator that she had a weak case, officer M raised the level of her allegation from "attempted kiss" to "sexual assault" to "nearly raped," in an apparent effort to gain attention. Officer M's gross exaggeration of what purportedly began as an attempted kiss significantly taints her credibility.

Officer M asserts that she did not report her allegation until many months afterwards because there are no female management employees above the level of captain. However, she did not hesitate to speak with the warden about her dispute with grievant about the issuance of discipline in September 2002. 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 also significantly tainted by her denial of having any knowledge of a prior disciplinary action against the other captain. 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 outlined in my complaint. … These men have been the subject of numerous allegation (sic) of sexual misconduct in the

[19] Exhibit 2A, p. 6. Grievant's written complaint, January 18, 2003.
[20] Exhibit 2I. Letter to Attorney General from grievant, January 22, 2003.

work place… It has come to my attention that I am not the only person that has been emotionally and physically affected…"[21] 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.

During the hearing, officer M offered a photocopy of a page that purportedly comes from 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. When a party has the ability to provide the best possible evidence (original document), but fails to do so, the failure to provide this critical evidence suggests that the journal either does not exist or does not contain any probative evidence. Officer M never mentioned the alleged journal to the investigator, to the warden, or to anyone else until the day of the hearing. Officer M failed to offer any explanation of why she would make such an entry in her personal journal, but not record grievant's presence in the support control booth logbook.

Even more significantly, officer M testified that she did not make any journal entries regarding the alleged harassment by the other captain. Her complaint about the other captain describes a much more determined attack that allegedly occurred *after* grievant's attempted kiss. Officer M has failed to offer any explanation for not writing a journal entry about that subsequent and more serious incident.

Finally, officer M denies that she ever told grievant about her allegations of sexual harassment by another captain. Officer M's denial is not only incredible but also illogical. This matter was first volunteered by grievant during his interview with the investigator. It makes no sense that grievant would volunteer such information unless officer M had, in fact, told him about the allegations. Grievant's written interview statement is contrary to his own self-interest because he stated that he did not [immediately] report the conversation. It appears more likely than not that grievant mentioned this in order to fully disclose all of his knowledge to the investigator. It does not appear from his interview statement that grievant was attempting to shift attention to the other captain.

Officer M had told grievant that her "boyfriend" wanted to watch her and grievant have sex with another female. A male corrections officer testified that officer M had, over time, cajoled him into calling her at home and then to coming to her house. Officer M had told him that they could have group sex but the male officer decided to leave before any sexual activity occurred. Officer M told the officer that her "husband" would not object to him being with her. A captain testified that the male corrections officer had told him that officer M said she wanted to come to her house for a "threesome" with her husband. A sergeant

[21] Exhibit 2I. *Ibid.*

testified that officer M had attempted to grab him while they were alone and told him that she "needed some." All three witnesses testified credibly. Their testimony was undisputed.

In summary, officer M's allegations are so inconsistent and illogical, and her reputation is so sullied that she can not be believed. Moreover, her filing of such a fictitious complaint is not only disruptive behavior but probably a falsification of official state documents.

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."[22] None of the 32 respondents stated that they had ever witnessed this type of "physical contact."

The agency infers that the results of this survey cast doubt on grievant's recollection that he might possibly have hugged officer M in a congratulatory manner on the occasion of a birthday or anniversary. 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 results would be more useful and perhaps probative. 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 suggestion that it was possible that he might have hugged officer M in a congratulatory manner at some time in the past. The agency recognized that the allegations made by officer M are uncorroborated, and that there are no witnesses to the alleged incident. Thus, this case largely becomes a credibility determination between grievant and his accuser. Accordingly, the agency apparently seized upon grievant's acknowledgement of a possible welcome contact with officer M and took this to be a *mea culpa* statement. This convoluted reasoning cannot

[22] Exhibit 3L. Investigative Interview questionnaire, March 18, 2003.

withstand the scrutiny of a logical, deductive approach. Grievant has been disciplined for two specific charges alleged to have occurred on May 19, 2002 and September 17, 2002. The case must rise or fall on whether that conduct occurred as charged – not on an event that occurred at some indeterminate time, 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. The preponderant testimony and documentary evidence prove that grievant was not working at 4:30 a.m. on May 19, 2002 when officer M alleged he kissed her. Further, undisputed testimony establishes that on September 17, 2002, grievant was only a messenger delivering a disciplinary action initiated by the warden. 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,[23] her very curious denial of knowledge about the other captain's 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 report[24] and a departmental investigative report that includes a reference to the analysis of the polygraph test results.[25] A third reference to the polygraph test result is contained in the warden's notes prepared after grievant's pre-disciplinary meeting.[26] 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 …[27] (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

[23] Officer M testified that the other captain (who had allegedly sexually harassed her) and a female lieutenant requested that she transfer from night to day shift. She made a request for transfer to the warden and told him that the other captain and lieutenant asked her to transfer. The other captain and the lieutenant both denied ever making such a request.
[24] Rejected Exhibit 2E.
[25] Exhibit 2, p. 5. Report of Investigation, undated.
[26] Exhibit 1, p. 7. Warden's notes, March 31, 2003.
[27] Va. Code § 40.1-51.4:4. Prohibition of use of polygraphs in certain employment situations.

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 II Written Notice issued on April 3, 2003 for failure to take appropriate action is RESCINDED. Grievant should be counseled about the necessity to report allegations of misconduct promptly.

The Group III Written Notice issued on April 3, 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 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.[28] 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.[29]

[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

[28] 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).

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