

Issue: Group III Written Notice with termination (engaging in sexual behavior towards female ward); Hearing Date: 07/26/04; Decision Issued: 07/27/04; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 772



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No. 772

Hearing Date: July 26, 2004  
Decision Issued: July 27, 2004

APPEARANCES

Grievant  
Attorney for Grievant  
One witness for Grievant  
Superintendent  
Representative for Agency  
Three 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 engaging in sexual behavior towards a female ward.<sup>1</sup> As part of the disciplinary action, grievant was removed from employment effective May 11, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup>

The Department of Juvenile Justice (Hereinafter referred to as “agency”) has employed grievant for six years. He was a Security Manager II (Assistant Superintendent) at the time of his separation from employment.<sup>3</sup>

An agency administrative directive details prohibited conduct by employees. Among the actions relating to employee association with wards, any physical conduct of a sexual nature is specifically prohibited.<sup>4</sup> The directive also prohibits any employee conduct that compromise’s a staff member’s professional role.<sup>5</sup> Staff training emphasizes that employees should never touch female wards except in self-defense, or to prevent injury to persons or damage to property. Employees who have inappropriately touched female wards have been removed from employment in the past.

Approximately two years ago, at the facility at issue herein, the agency decided to change its approach toward wards from punitive to rehabilitative. Shortly thereafter, the facility was converted from a male population to a female population. As part of the change in treatment approach, the agency reassigned grievant from another facility to the current facility because of his treatment background at other facilities as well as his previous employment. Grievant took a proactive approach and emphasized mentoring and counseling of the female wards. Grievant implemented the concept of “cadet seniors” to recognize wards who behaved well. Cadet seniors are allowed certain privileges not granted to regular cadets. Among the privileges is a weekly movie night in a lounge reserved for cadet seniors.

While the superintendent supported grievant’s mentoring and counseling of wards, several staff had voiced concerns that grievant may have been getting too close (physically and emotionally) to certain wards. Among those raising these concerns to both grievant and the superintendent were the Chief of Security, an Assistant Superintendent, two physicians, the Counselor Supervisor and two counselors. The Superintendent counseled grievant on multiple occasions about the need to maintain an appropriate distance (both physically and emotionally) from the wards. Because of the widespread concern about this

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<sup>1</sup> Exhibit 2. Written Notice, issued May 11, 2004.

<sup>2</sup> Exhibit 2. Grievance Form A, filed May 14, 2004.

<sup>3</sup> Exhibit 14. Employee Work Profile Work Description, October 10, 2002.

<sup>4</sup> Exhibit 8. Section D.2, Administrative Directive 05-009.2 *Staff Code of Conduct*.

<sup>5</sup> Exhibit 8. Section D.1, *Ibid*.

issue, the Chief of Security had directed the security staff in late 2003 to make sure that, whenever possible, security cameras monitored grievant's activities in the facility.

On April 29, 2004, grievant and three cadet seniors were watching a romantic comedy movie in the lounge. One cadet sat in an armchair to the left of a couch but dozed off between 19:00 and 19:10.<sup>6</sup> A second cadet sat on a couch directly in front of grievant. Grievant sat on the right side of the couch behind the second cadet; the third cadet (Hereinafter referred to as cadet X) sat on the couch next to grievant. Cadet X was wearing shorts. A video camera is located on the lounge wall facing the couch where grievant and the cadet sat. Grievant knew the camera was there. He was instrumental in having a wide-angle lens installed on the camera to provide a wider view of the lounge. The camera's picture is monitored in a nearby control booth in which an officer is always stationed.

During the first part of the movie, grievant sat as far to the right of the couch as possible and leaned on his right arm much of the time. Cadet X moved around occasionally but generally sat close to grievant on the couch. At 18:51 she lay down on the couch with her head close to grievant's leg. At 18:57, the cadet lay down and briefly put her head on his left leg but sat up within a second or two. The sequence of events which prompted disciplinary action occurred during a 30-second span between 19:11 and 19:12, by which time the cadet in the armchair had dozed off. The relevant events occurred as follows:

- 19:11:24 - Cadet X lightly slaps grievant's left thigh (apparently in response to something humorous in the movie).
- 19:11:28 - Both Cadet X and grievant look at each other.
- 19:11:33 - Grievant leans forward as if to shift his weight. He places his left hand on the couch next to Cadet X's right thigh. His hand is backward, with palm up and fingers extended toward the cadet's thigh. It is unclear whether he actually touches her thigh.
- 19:11:41 - Grievant moves his left hand to the cadet's thigh. His fingers to are moving as he touches her thigh for about seven
- 19:11:48 seconds. His fingers constantly move at the edge of her shorts; it is unclear whether he is attempting to put his fingers under the shorts.
- 19:11:49 - Grievant returns his hand to his left hip.
- 19:11:50 - Cadet X turns to look at grievant.
- 19:11:56 - Cadet raises herself off the couch and tugs her shorts down.<sup>7</sup>

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<sup>6</sup> Time references in this decision are expressed in military time to be consistent with the video tape time marker and the still photographs in Exhibit 3.

<sup>7</sup> Exhibit 15. Videotape of cadet senior lounge, April 29, 2004. See also Exhibit 3. Photographs excerpted from the videotape.

A corrections officer who was in the control booth doing paperwork happened to look at the television monitor and witnessed this sequence of events. She alerted the control room officer who also saw part of the sequence. They called the shift commander who came to the control room and retrieved the video tape. Thereafter, the Chief of Security and grievant were advised of the tape. On April 30, 2004, grievant spoke with the two corrections officers who had reported the incident. He told them that what they saw on the tape was not what it appeared to be and asked why they had not come to him first before reporting to the shift commander. Grievant admitted to both officers that he should not have permitted Cadet X to sit so close, and that he was sorry about what happened.<sup>8</sup>

The superintendent, his supervisor (agency's Deputy Director), the agency Director, and the Inspector General all viewed the videotape and concluded that grievant's employment should be terminated.

### 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.

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<sup>8</sup> Exhibit 5. Incident report filed by corrections officer, April 30, 2004. See also Exhibit 6. Incident report filed by control room officer, April 30, 2004.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>9</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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>10</sup> The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.<sup>11</sup>

The agency's evidence included the testimony of the two officers who first witnessed the event on a television monitor as it occurred, the superintendent who carefully reviewed the videotape, and the Inspector General's conclusions regarding his review of the video tape.<sup>12</sup> While all those who viewed the video tape were unanimous in their conclusions, the best available evidence in this case is the video tape itself. The Hearing Officer has carefully, and repeatedly, viewed the video tape and formed his own conclusion about what it reveals.

While the resolution and detail of the video tape is less than optimal, it is of sufficient clarity to demonstrate that grievant's behavior was inappropriate and in violation of the Staff Code of Conduct. First, the tape clearly demonstrates that grievant allowed Cadet X to sit directly next to him on a couch that could easily accommodate three people. Grievant could easily have sat in the armchair to the right of the couch thereby assuring that there was a reasonable and appropriate physical distance between himself and the cadet. Even if grievant had initially expected the cadet to sit at the other end of the couch, it quickly became apparent that she was going to sit next to him. By 18:57, the cadet became so bold that she lay her head briefly on grievant's leg. At this

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<sup>9</sup> § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

<sup>10</sup> Exhibit 9. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>11</sup> Exhibit 9. Section 5-10.7.C, *Ibid*.

<sup>12</sup> Exhibit 7. Memorandum from Inspector General, May 5, 2004.

point, grievant could have moved to the armchair but he remained where he was. Second, grievant had another opportunity at 19:11:24 either to move to the armchair or to reproach the cadet for her overly familiar behavior when she lightly slapped his left thigh. Grievant failed to deescalate the cadet's increasingly inappropriate and familiar behavior.

Finally, the video tape plainly shows that grievant's touching of the cadet's thigh from for seven seconds from 19:11:41 to 19:11:48 was intentional. While in the earlier sequence (at 19:11:33) grievant was leaning forward and apparently shifting his weight, he did not do so in the sequence beginning at 19:11:41. Grievant's only movement was to place his hand adjacent to the cadet's leg and repeatedly touch the cadet's thigh with his fingers. Having established that grievant inappropriately touched Cadet X, a remaining question is whether the touching was of a sexual nature.

Only the grievant knows whether he intended his touching to be a sexual overture. Grievant denies that he touched the cadet at all; the cadet also denies that grievant touched him. The videotape, however, reveals their denials to be untrue. Grievant's denial could be either self-serving, or he may have convinced himself that he did not touch the cadet. It is more likely than not that grievant's denial is self-serving. In his written statement, grievant denies touching the cadet at all.<sup>13</sup> However, during the hearing, in response to a direct question as to whether he touched the cadet, grievant said only that he does "not recall." The cadet's denial can reasonably be attributed to her being overly protective of grievant. Cadet X stated that she has "a very close father and daughter relationship" with grievant.<sup>14</sup> It is only natural for a daughter to be protective of, and believe only the best about, her father.

In the written notice, the agency characterized grievant's offense as "sexual" behavior. The agency has not proven that grievant's behavior was overtly sexual in nature because nothing further occurred and because his touching of the cadet could have been intended as nonsexual, e.g., tickling. Nonetheless, grievant's conduct does constitute an offense subject to discipline under the Standards of Conduct. It is more likely than not that those who have seen the tape or heard about it (probably the entire staff of the facility) perceived grievant's behavior as sexual in nature. Human nature being what it is, it would be impossible to convince them otherwise even if grievant could somehow prove that he did not have a sexual intention. Moreover, grievant's denial that he touched the cadet (despite video tape evidence to the contrary), only lends credence to the belief that grievant is denying the event because he was attracted to the cadet. Thus, grievant's touching of the cadet, has irreparably damaged his reputation and ability to perform his professional role effectively. Under these circumstances, the agency truly had no alternative but to remove grievant from employment.

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<sup>13</sup> Exhibit 4. Grievant's written statement, May 4, 2004.

<sup>14</sup> Exhibit 4. Cadet X's written statement, May 3, 2004.

Grievant asserts that the agency is focusing on only a few seconds of behavior when he has had a long career of good work. In fact, however, the agency had been counseling grievant for several months that his behavior with respect to female wards was perilously close to going over the line. Virtually every high-ranking management person at the facility had warned grievant that he was getting too close to a few female wards. Grievant apparently did not heed those warnings sufficiently.

Grievant acknowledges that he could have moved away from Cadet X but that he was "caught up in the moment." Grievant sat next to her throughout an entire movie lasting nearly one and a half hours; 90 minutes is an extraordinarily long "moment." Grievant says he could not have anticipated that Cadet X would have momentarily placed her head on his leg. While that may be true, once it occurred, grievant could have promptly moved to the armchair in order to preclude any further contact, and to let the cadet know that she had gone over the line. His failure to do so could only provide further encouragement to the cadet.

Grievant points out an inconsistency in the testimony of the two corrections officers who reported the incident. While there was an inconsistency, the existence of the videotape as the prime witness renders the testimonial inconsistency moot.

Grievant notes that Cadet X did not move when grievant touched her and suggests that her immediate lack of reaction is proof that he did not touch her. However, in view of the cadet's actions during this video tape, it is clear that she was exceedingly comfortable with grievant and accordingly, she was apparently receptive and agreeable to grievant's touching. Moreover, the cadet looked at grievant as he removed his hand from her thigh and, six seconds later, pulled her shorts down.

### DECISION

The decision of the agency is affirmed.

The Group III Written Notice and grievant's removal from employment effective May 11, 2004 are hereby UPHELD. The disciplinary action shall remain active for the period specified in Section VII.B.2 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E Main St, Suite 400  
Richmond, VA 23219

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>15</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>16</sup>

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<sup>15</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>16</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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