

Issue: Group III Written Notice with suspension, demotion, pay reduction (sexual assault, failure to report an incident, unprofessional conduct); Hearing Date: 08/06/04; Decision Issued: 08/10/04; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 781



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 781

Hearing Date: August 6, 2004
Decision Issued: August 10, 2004

APPEARANCES

Grievant
Attorney for Grievant
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 assault, failure to report an incident, and unprofessional

conduct.¹ As part of the disciplinary action, grievant was suspended without pay for 30 days, demoted from sergeant to corrections officer, and his salary was reduced by five percent.² Following failure of the parties 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 22 years. He is currently a corrections officer. Grievant has one prior active disciplinary action – a Group III Written Notice for sexual harassment and sexual battery.⁴

On November 30, 2003, grievant had just overseen the changing of control room officers in a housing unit. He assigned a male corrections officer to replace a female corrections officer in the control booth. The female officer was to be assigned to a different building. The female officer went to get a drink and then returned to the area outside the control booth where grievant was sitting on a bench. The female officer put on her uniform jacket but was unable to zip it. She had been experiencing difficulty with the zipper for several days; during this period she had asked various officers to help her zip her jacket.⁵ A corrections captain was passing through the area and the female officer asked him for assistance in zipping the jacket. The captain told her to ask grievant to help her. The female approached grievant who attempted to help zip the jacket. Grievant then stood up to facilitate his attempts to zip the jacket but was still unsuccessful.

The captain left the area as grievant attempted to zip the jacket. The male control room officer was busy with his duties but occasionally glanced at grievant and the female officer during this time. He did not observe anything unusual during the encounter. Because the control booth is surrounded by thick glass windows, the control room officer could not hear any conversations outside the booth. When the jacket could not be zipped, grievant and the female officer left the building together. The control room officer had to electronically open the door for them to exit. As he did so, he observed the female officer’s demeanor and saw nothing unusual. Grievant and the female officer were talking with each other as they left the building.

APPLICABLE LAW AND OPINION

¹ Exhibit 1. Written Notice, issued March 9, 2004.

² When he was disciplined, grievant requested a transfer to another facility. The agency agreed and approved grievant’s request for transfer but the transfer was not part of the disciplinary action.

³ Exhibit 2. Grievance Form A, filed March 10, 2004.

⁴ Exhibit 8. Written Notice, issued March 6, 2003.

⁵ The female officer had attempted to obtain a replacement jacket but her size was not available by the date of this incident.

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.⁶

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.⁷ 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. The DOC Standards of Conduct addresses Group III offenses, which are defined

⁶ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

⁷ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

identically to the DHRM Standards of Conduct.⁸ Violation of DHRM Policy 2.15, *Sexual Harassment*, is considered a Group III offense, depending upon the nature of the violation.⁹

This case is based on the female officer's accusation that grievant touched her genital area while helping her with her jacket zipper. She claims that when grievant first attempted to assist her, she told him, "Be careful. You don't want anyone to think you're sucking my titties." She alleges that grievant put his hand in her crotch area and said, "No, I'll be sucking this."

This case is not without its troubling aspects. The grievant was previously charged with, and ultimately admitted to, making suggestive comments to and fondling a different female corrections officer in October 2002.¹⁰ On the other hand, the female corrections officer who has currently accused grievant had made similar allegations against another sergeant in early 2003. By her own admission she had an affair with a corrections officer in 2000, married a different officer in 2001 and is now divorcing him, and has been the subject of numerous rumors about her involvement with other officers at the facility. Nonetheless, the fact that grievant had been guilty of sexual harassment on a prior occasion is not proof that he was guilty on this occasion. Similarly, the female officer's previous accusation against another officer neither proves nor disproves her veracity on this occasion. Accordingly, this decision is based on whether or not the agency has shown that it is more likely than not that grievant committed the offense with which he has been charged.

The agency's case is based on the uncorroborated testimony of grievant's accuser. There are no witnesses or any other evidence that supports the female officer's accusation against grievant. Grievant denies both that he made any inappropriate comments to the female officer, and that he touched her genital area. Grievant's denial is corroborated, in part, by the testimony of two employees – the control room officer, and a captain, both of whom observed nothing out of the ordinary. There are several factors, discussed *infra*, that lead to a conclusion that the agency has not borne the burden of proof in this case.

First, there are three people who verify that the captain was present during part of the encounter – a fact that the female accuser denies. The captain, grievant, and the male control room officer all agree that the captain came through the area and was in front of the control booth for a short time. Both grievant and the captain agree that the female officer first asked the captain to help her with her zipper. The captain then directed her to ask grievant for help. The female officer denies not only that the captain was present but that she had

⁸ Exhibit 9. Section 5-10.17, Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

⁹ Exhibit 6. DHRM Policy 2.15 was superceded by DHRM Policy 2.30, *Workplace Harassment*, effective May 1, 2002. Policy 2.30 incorporates sexual harassment as one type of workplace harassment.

¹⁰ Exhibits 3 & 3H. Office of Inspector General, *Report of Investigation*, December 29, 2003.

NOTE: An allegation made in 1992 against grievant was never substantiated.

any conversation with him. There is no evidence to suggest that either the control room officer or the captain have any reason to be untruthful about this course of events. There is also no evidence to suggest that either the control room officer or the captain are beholden to grievant or have any reason to falsely support his version of the events.

Second, the female officer asserts that she was shocked when grievant allegedly touched her. She testified that she was so stunned that she said nothing, walked away and left the building. However, both grievant and the control room officer maintain that the female officer left the building *with* grievant, appeared to be carrying on a routine conversation with him, and did not appear to be upset. The control room officer has a clear recollection of their exit because he had to electronically open the exit door as they left together.

Third, the female officer's statement with regard to grievant's alleged actions are not totally consistent. In one written statement she claims that grievant touched her in the crotch area; however, in her interview statement she states that grievant put his hand in her crotch area, but makes no mention of actual touching.¹¹

Fourth, the female officer acknowledged that she had a varied history of involvement with employees at the facility, and that many of the officers believed she was intimately involved with all the supervisors. In view of the swirl of rumors surrounding the female officer, it is inconsistent that she would be asking supervisors to help her with her zipper, since this could only fuel the rumor mill. It is equally inconsistent that, while a supervisor was actually helping her with the zipper, she would make a provocative statement about "sucking her titties." This is particularly strange in view of the fact that she knew about grievant's past discipline for sexual harassment.¹²

Fifth, the warden has concluded that the female officer is immature, both professionally and personally. In fact, he has counseled her about this in the past. In view of the facts elicited in this case, as well as the female officer's demeanor during the hearing, the warden's conclusion about her personal immaturity appears to be founded.

Finally, grievant would have had to be extremely foolhardy to touch the female officer given the circumstances. They were standing in an open area into which anyone might have come at any time. The control room officer had them in his view and grievant could not know whether the officer might look at him at just the wrong moment. Further, the captain was close by and might have

¹¹ Exhibits 3A & 3B. Female officer's written statements, December 4, 2003 & December 12, 2003, respectively.

¹² The female officer said that although she knew about grievant's prior disciplinary action, she did not believe that he had committed the offense.

returned to the area just as grievant made a move. Given his past disciplinary action, it is unlikely that grievant would take such a risk in an open area.

For all of these reasons, it is concluded that the agency has not shown, by a preponderance of evidence, that grievant committed the offenses cited in the written notice.

DECISION

The decision of the agency is reversed.

The Group III Written Notice, suspension, demotion, and salary reduction issued on March 9, 2004 are hereby RESCINDED.

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 14th St, 12th 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.¹³ 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.¹⁴

[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

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.