

Issue: Group III Written Notice with demotion, transfer and salary reduction (harassment and fraternization); Hearing Date: 11/10/04; Decision Issued: 11/15/04; Agency: DJJ; AHO: David J. Latham, Esq.; Case No. 7891



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No. 7891

Hearing Date: November 10, 2004
Decision Issued: November 15, 2004

APPEARANCES

Grievant
Seven witnesses for Grievant
Superintendent
Two 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 harassment and fraternization.¹ As part of the disciplinary action, grievant was demoted to corrections officer, transferred to another facility, and her salary was reduced by five percent. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Department of Juvenile Justice (Hereinafter referred to as “agency”) has employed grievant for 18 years. She was a corrections sergeant at the time of this disciplinary action.

The facility at which grievant works has promulgated a policy that discourages dating and intimate or sexual relationships between supervisors and those they supervise because they present an appearance of impropriety and may result in poor morale, allegations of favoritism and other workplace disputes.³ The Department reserves the right to reassign employees to another work location in order to eliminate any actual or *perceived* conflict of interest. The Commonwealth’s policy on workplace harassment defines that term to include unwelcome verbal conduct that shows hostility or aversion toward a person on the basis of their sex when that conduct has the effect of creating an intimidating, hostile or offensive work environment.⁴

In June 2004, a male probationary corrections officer asked grievant for advice on what he should do to enhance his prospects for being promoted to the level of sergeant. Grievant suggested they meet at a movie theater on Saturday, June 26, 2004 to discuss the matter. Before the movie started, the male officer decided to play a video game and asked grievant to hold his wallet. Grievant put his wallet in her purse. While they were watching the movie, the male officer’s wife arrived at the theater and noticed his car outside the theater. She entered the theater and walked through the aisles looking for her husband. The male officer saw his wife, got up, and went outside the theater with his wife, leaving grievant in the theater.

When grievant went home and realized she still had the male officer’s wallet, she searched through it and found a piece of paper with a phone number but no name on it.⁵ Grievant called the phone number to determine who the number belonged to. A recorded greeting identified the owner of the number and grievant recognized her to be a female probationary corrections officer who worked on the night shift at grievant’s facility. Later, grievant called the number a second time, spoke with the female officer and asked her why her telephone

¹ Exhibit 2. Written Notice, issued July 20, 2004.

² Exhibit 2. Grievance Form A, filed August 18, 2004.

³ Agency Exhibit 5. Administrative Directive 05-009.2, *Staff Code of Conduct*, December 20, 2002.

⁴ Agency Exhibit 5. Department of Human Resource Management (DHRM) Policy 2.30, *Workplace Harassment*, May 1, 2002.

⁵ Agency Exhibit 2. Office of Inspector General Investigation report, July 12, 2004.

number was in the male officer's wallet.⁶ The number grievant called is the female officer's unlisted cell phone. The female officer felt offended, demeaned, harassed, and intimidated that grievant had called her on a private number that she had never given to grievant, and because grievant was questioning her about a personal matter. She cursed grievant and terminated the conversation.

Subsequently, grievant called the male officer's wife and told her that she had found the telephone numbers of females in the male officer's wallet.

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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁷

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

⁶ Agency Exhibit 1. Female officer's *Incident Report*, June 27, 2004.

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

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.⁸ Violation of Policy 2.30, *Workplace Harassment*, is one example of a Group III offense. 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.⁹

The agency's disciplinary action was based on two charges against grievant – harassment and fraternization. Grievant's second telephone call to the female probationary officer to ask her why her telephone number was in the wallet of a male corrections officer was harassment. Grievant claimed her purpose in making the first call was to find out who the telephone number belonged to. Grievant accomplished that goal because she recognized the female officer's voice and because the female identified herself in the recorded greeting. Accordingly, grievant had no reason to call the number a second time; the only apparent reason for doing so was to harass and intimidate the female officer. Grievant has offered no cogent reason that would justify calling the number a second time. Therefore, it is concluded that grievant's second call to the female officer's unlisted number was harassment.

The charge of fraternization resulted from grievant's meeting with a married male corrections officer at a movie theater. While the evidence did not establish that grievant and the male officer were having an intimate or sexual relationship, going together to a movie theater would appear to a reasonable observer to constitute a date. There is nothing inherently wrong with grievant giving advice to a subordinate on how to advance his career. Further, it is not inappropriate to meet with a subordinate after work hours to have such a discussion. However, the circumstances under which grievant met with the male officer are far more consistent with a date than a legitimate business meeting. Grievant could have met with the male officer at his home or a restaurant with his wife present if the real intent had been a serious discussion about career advancement. One cannot reasonably have such a discussion while watching a movie in a public theater or while playing video games in a noisy lobby area.

⁸ Exhibit 7. DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

⁹ Exhibit 7. Section V.A, *Ibid.*

However, even if grievant's intent was as she has stated, meeting with a married male officer in a movie theater presented an unmistakable appearance of impropriety. Others who may have seen grievant and the male officer together in that setting would not assume that they were there to discuss career advancement; the assumption would be that they were on a date. Grievant knew, or reasonably should have known, that her actions would be perceived as fraternization.

In any case, grievant's credibility has been tainted by the inconsistency of statements she gave to the investigator. She first claimed that she was at the theater with the male officer *and* his wife and children. She later changed her story, admitting that the male officer's wife inadvertently discovered them together at the theater when she happened to go to the same theater complex and saw her husband's car in the parking lot. Grievant initially said she never entered the movie theater and was only in the theater lobby; later grievant admitted she and the male officer watched the movie for nearly two hours when the male officer's wife found them together. Grievant's false statements to the investigator suggest that she was attempting to conceal the true reason for meeting the male officer at the theater.

Moreover, the male officer also provided false information to the investigator

Grievant observed that other employees have been together outside work but that they were not disciplined. The examples she cited include male employees who go fishing or play golf together, one employee helping another move into a residence, an employee babysitting or providing child care for the children of another, and employees exercising (walking on a track) together. In each of these cases, the employees were not fraternizing but merely engaging in acceptable social activities together or helping one another. Grievant also cited an example of two employees who dated and then married subordinates. However, grievant did not show that either of these situations involved the dating of married subordinates.

Grievant also raised the issue of disparate treatment contending that others had harassed a ward without being disciplined. In fact, the unrebutted testimony of the superintendent established that the two officers who had harassed the ward were disciplined, and a lieutenant was counseled for not following procedures after the incident had occurred.

Given the totality of the circumstances in this case, the disciplinary action, demotion, salary reduction, and transfer were reasonable and appropriate. A Group III Written Notice was appropriate because grievant fraternized with one subordinate and harassed a second subordinate. Because of her long service, the agency decided not to discharge grievant but to demote her to a nonsupervisory position.¹⁰ Given the number of people involved in this investigation, grievant's transfer to another facility was in the best interest of the agency and all those involved.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice, demotion, salary reduction, and transfer effective July 20, 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

¹⁰ Section II.C of the *Standards of Conduct* mandates a salary reduction of at least five percent in the event of a demotion or transfer.

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.¹¹ 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.¹²

[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]

¹¹ 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).

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

David J. Latham, Esq.
Hearing Officer