

Issue: Group III Written Notice with termination (engaging in workplace harassment, leaving his security post, and falsifying a State document); Hearing Date: 11/18/04; Decision Issued: 11/19/04; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 7907



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7907

Hearing Date: November 18, 2004
Decision Issued: November 19, 2004

PROCEDURAL HISTORY

On August 6, 2004, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Based on a sexual harassment report filed by [Ms. S], an employee at [Hospital], [Ms. S] alleges and you [Grievant] admitted that while on duty you engaged in conversation with [Ms. S] and asked her personal questions. You admittedly left your post in the Critical Care Unit went to where [Ms. S] was sitting, walked behind her and began to rub her shoulders. When questioned about his incident you, [Grievant] then filed a false Incident Report dated March 18, 2004 denying involvement in harassment that day or engaging in any conversation with anyone and stating that "I always keep direct supervision with inmates on transportation." Based on your own admission as stated above you left your post which is a violation of policy and can be considered a breach of security.¹

On August 30, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant

¹ Agency Exhibit 1.

and he requested a hearing. On October 27, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 18, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal for engaging in workplace harassment, leaving his security post, and falsifying a State document.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employed Grievant as a Corrections Officer Senior until his removal effective August 6, 2004. He had been employed by the Agency for approximately 15 years. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

When an inmate must receive medical treatment at a local hospital, Grievant is sometimes asked to provide security by supervising that inmate while the inmate is in the hospital. Grievant's security post is the room in which the inmate is resting. If Grievant leaves the inmate's room while the inmate is inside and Grievant has not been relieved of his post, he would be leaving his post.

On November 5, 2003, Grievant was assigned security on the Critical Care floor of a hospital. He, along with a second corrections officer, was responsible for maintaining security on an inmate who was a hospital patient. Ms. S, a female hospital employee, entered the inmate's room. As Ms. S was cleaning the room, Grievant asked Ms. S her name and began a conversation with her. Moments later Grievant stood in the doorway of the hospital room and watched Ms. S walking down the hallway and in and out of rooms performing her duties. At one point, she sat down in a chair in the hallway. Grievant walked down the hallway and asked her some questions. He ask if she had a boyfriend and Ms. S responded "no." Grievant told her she was a nice looking lady as he positioned himself behind her and started rubbing her shoulders as she sat in the chair. Grievant rubbed her shoulders for a few seconds and stopped when Ms. S asked him to stop. Grievant told her she was a beautiful lady. Grievant then returned to the inmate's room and stood in the doorway. He continued to watch Ms. S while she worked in the hallway.

On November 6, 2003 at 7:55 a.m., Grievant called the hospital from his home. He asked to speak with Ms. S but she was not available at that time. Grievant left a message for Ms. S with the receptionist. His message was a request for Ms. S to call him at the cell phone number provided. Grievant testified that the purpose of his call to Ms. S was to ask her if a nurse Grievant knew was employed at the hospital. Ms. S did not attempt to call Grievant.

Ms. S complained to the Agency about Grievant's behavior. For some unexplained reason, the investigation did not begin until March 18, 2004. On that date, the Captain asked Grievant what happened at the hospital. Grievant did not recall his encounter with Ms. S and, thus, wrote an incident report denying he had left his post or sexually harassed any hospital employee.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." Department of Corrections Procedure Manual "(DOCPM)" § 5-10.15. Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DOCPM § 5-10.16. Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DOCPM § 5-10.17.

Group III offenses include, "violation of DHRM Policy 2.15² *Sexual Harassment* (considered a Group III offense, depending upon the nature of the violation.)" DHRM Policy 2.30 defines workplace harassment as:

² DHRM substituted Policy 2.30 *Workplace Harassment* for Policy 2.15 *Sexual Harassment* effective May 1, 2002.

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status or pregnancy that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Hostile Environment is defined as:

A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

By commenting on Ms. S's physical appearance and rubbing her back without Ms. S's permission or preference, Grievant denigrated Ms. S because of her gender

existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds that Grievant’s length of satisfactory service alone is not a basis to mitigate the disciplinary action against him.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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. 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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.