

Issue: Group III Written Notice with demotion, transfer and salary reduction (workplace harassment); Hearing Date: 10/31/03; Decision Issued: 11/07/03; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 5829



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5829

Hearing Date: October 31, 2003
Decision Issued: November 7, 2003

PROCEDURAL HISTORY

On July 23, 2003, Grievant was issued a Group III Written Notice of disciplinary action with transfer, demotion, and 5% pay reduction for:

Violation of DHRM Policy #2.30, WORKPLACE HARASSMENT. Any unwelcome sexual advance, verbal or physical conduct of a sexual nature by a supervisor. On several occasions at work you made comments to a subordinate staff member that were perceived by her to be of a sexual nature. During the hearing, you did admit to making several statements that were inappropriate that could have been perceived to be of a sexual nature. Also, you stated you went by the employee's house on June 13, 2003, while in uniform.

On August 22, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On October 1, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 31, 2003, a hearing was held at the Agency's regional office. Upon motion of a party, the Hearing Officer found just cause to grant an extension of the 30 day time frame for issuing the decision because of the conflicting schedules of the parties.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion, transfer, and salary reduction for workplace harassment.

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 Lieutenant. He was demoted to Corrections Sergeant with a five percent pay reduction and transfer because he received a Group III Written Notice.

Ms. W is a Corrections Officer working at Grievant's Facility. She did not report directly to Grievant but came in regular contact with him at the Facility. As they interacted, they became friends. They discussed both personal and work-related matters. At one point, Grievant told Ms. W that he was romantically interested in her. She informed Grievant that she would not be interested in a relationship with him and that she would not "cheat" on her boyfriend. Grievant responded that "when I want something, I get it."

On June 13, 2003, Ms. W was at her home unpacking. She had recently moved to a new home closer to the Corrections Facility. Her cell phone rang and at the same time someone knocked on the door. She saw her boyfriend's telephone number on the caller ID of the phone and she assumed he was at the front door. She opened the door

and was surprised to see Grievant standing at the door. Grievant walked in without being asked to come inside. He was wearing his uniform. He had left work and went to an ATM machine near Grievant's home. He knew where Grievant lived because Ms. W had informed him of the general location where she was moving and Grievant had observed Ms. W's moving truck the prior weekend when he had also gone to the ATM machine. Grievant told Ms. W he came by to make sure she was living in a safe area. Ms. W showed Grievant around her new home and said that her home was really messy and Grievant needed to go. As they walked into the kitchen, Grievant grabbed Ms. W's waist from behind. She pushed his hands off. Grievant responded that "he wasn't going to hurt" her. Not wanting to hurt Grievant's feelings, Ms. W said she was ticklish. Grievant kept getting closer to Ms. W and she said he really should go. Just as Grievant was leaving, he grabbed Ms. W around the waist with one arm and kissed her on her cheek. Ms. W moved away, opened the door, and said Grievant really had to leave. Grievant left.

While Grievant and Ms. W were working on July 12, 2003, Grievant told her that she was lucky to have her job and that he had to fight for her because "they don't hire pretty girls." Ms. W said, "Well, I earned my job not on looks." Grievant apologized for coming to Ms. W's house. Grievant said he was out of line, but that Ms. W had nice legs.

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.

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, natural origin, age, sex, religion, disability, marital status or pregnancy." State policy defines sexual harassment 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).

- **Quid pro quo** – A form of sexual harassment when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors. Typically, the harasser

requires sexual favors from the victim, either rewarding or punishing the victim in some way.

- **Hostile environment** – A form of sexual harassment when a victim is subject 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.

“Any employee who engages in conduct determined to be harassment, or who encourages such conduct by others, shall be subject to corrective action under Policy 1.60, Standards of Conduct, which may include discharge from employment.”¹ Grievant created a hostile work environment because he grabbed Ms. W from behind and then grabbed her from the side and kissed her. Grievant’s actions were not welcomed by Ms. W because she had expressed that she did not wish to have a dating relationship with him and that she would not cheat on her boyfriend. Grievant’s actions were severe given that he knew or should have known that Ms. W did not wish to have a romantic relationship with him.

In many instances, the romantic pursuits of employees occurring outside of work hours and the workplace are private matters, even when the employees work together. In this instance, however, Grievant’s actions that occurred after work hours are within the Agency’s control for several reasons. First, the relationship between Department of Corrections employees is different from the relationship between employees working in most State agencies. Security staff wear uniforms and hold rank. Subordinates are expected to follow lawful orders without question. Even though Grievant may not have directly supervised Ms. W, his position of Lieutenant placed him a significantly higher position of power over Ms. W. The Lieutenant – Corrections Officer relationship did not end when the parties left work. Second, Grievant appeared at Ms. W’s house wearing his uniform. Grievant should not have been wearing his uniform. IOP 402 states, “The uniform will be worn only to and from work and during each tour of duty.” He should have removed his uniform at work or gone directly to his home to change out of his uniform. Third, during work hours, Grievant indicated Ms. W had nice legs. When these factors are considered together, the Agency has established that Grievant’s behavior occurring outside of work hours carried into the workplace.

Grievant contends that when he hugged Ms. W, the hug was a “mutual hug.” He denies kissing Ms. W on the cheek. Ms. W’s testimony was credible. Her demeanor while she testified suggested she was telling the truth. No motive was presented for Ms. W to lie about Grievant. Sufficient portions of Grievant’s testimony (excluding discussion regarding physical contact) were consistent with Ms. W’s testimony to suggest that Ms. W has accurately described the events taking place. Accordingly, the Agency has presented sufficient credible evidence to support its disciplinary action.

¹ DHRM Policy 2.30.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, 5% salary reduction, and transfer is **upheld**.

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. 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.²

[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

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.