

Issues: Group III Written Notice with demotion and salary reduction (workplace harassment) and discrimination; Hearing Date: 12/12/05; Decision Issued: 12/16/05; Agency: DOC: AHO: David J. Latham, Esq.; Case No. 8211; Outcome: Agency upheld in full; **Administrative Review: DHRM Ruling Request received 12/30/06; DHRM Ruling issued 03/27/06; Outcome: HO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8211

Hearing Date: December 12, 2005
Decision Issued: December 16, 2005

APPEARANCES

Grievant
Three witnesses for Grievant
Warden
Advocate for Agency
Two witnesses for Agency

ISSUE

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? Did the agency discriminate against grievant on the basis of gender?

FINDINGS OF FACT

Grievant filed a grievance from a Group III Written Notice for workplace harassment.¹ As part of the disciplinary action, grievant was demoted with a salary reduction of five percent.² The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.³ The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for one year and four months. He was a registered nurse coordinator⁴ prior to demotion and is currently a registered nurse clinician.

The Commonwealth's policy on workplace harassment includes all forms of harassment including sexual harassment.⁵ Sexual harassment includes any verbal or physical conduct of a sexual nature by a supervisor. Employee training on sexual harassment emphasizes that unwelcome conduct is determined by the perception of the person subject to harassment. Grievant has received such training.⁶

In the spring of 2005, grievant applied for the position of registered nurse coordinator and ultimately became the successful candidate. A female nurse had applied for the same position, and for a registered nurse clinician position at the same time. When she was not the successful candidate for the coordinator position, she was offered the clinician position, which she accepted. The female nurse began work in July 2005; grievant was her immediate supervisor. Grievant and the female nurse had known each other since 1999 when they both worked at the same location. At that time, grievant was not a supervisor and they had little contact with each other; in fact, they actually worked on the same shift on only one day.

On the female nurse's second day at work (July 6, 2005), a male corrections officer addressed the female by her first name rather than as "Nurse (last name)" as is customary at the facility. Grievant corrected the officer on how to address the nurse. He then told the nurse that she was so attractive that officers would be looking at her and he didn't want them asking her out. The nurse replied that she is married with children and grievant did not have to take up for her.⁷

¹ Agency Exhibit 1. Written Notice, issued August 23, 2005.

² Grievant was offered two positions to which he could be demoted. One position at another facility involved only a one pay band reduction. The other position was at grievant's current facility but was a two pay band reduction. Grievant opted to take the latter position in order to avoid a longer commute to the other facility.

³ Agency Exhibit 1. Grievance Form A, filed September 8, 2005.

⁴ Agency Exhibit 3. Grievant's Work Description, effective May 10, 2005.

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

⁶ Agency Exhibit 4. Orientation Checklist and Training Report.

⁷ Agency Exhibit 2. Nurse's statement, August 6, 2005.

On July 14, 2005, the female nurse and the chief of security were conducting an inventory. Grievant entered the room and began to pat the nurse on her shoulder and back, and then hugged her around the waist with one arm. As grievant continued to touch, pat and massage the nurse's shoulders, the chief of security felt grievant's conduct was inappropriate and almost cautioned him about it. However, because the nurse was smiling, laughing, and talking in a friendly manner with grievant, the security chief did not say anything. The nurse did not object to grievant's behavior at that time and did not show any sign of being offended by his behavior. The nurse did not report this incident to anyone at the time. However, the security chief felt it was sufficiently inappropriate that he promptly sent a memorandum about the incident to the warden.⁸

On July 26, 2005, grievant and the female nurse attended an out-of-town conference and rode together on the trip to the conference. During the ride back, the nurse told grievant she was excited about having made some good business contacts during the conference. Grievant told her she was the "hottest thing in the room," and that he was going to take her everywhere and say "Yeah, that's right, she's with me the tall black man." The nurse did not raise an objection to grievant's statement and did not report it to anyone at that time.

On August 3, 2005, the nurse came to grievant's office to discuss the hiring of an inmate as a worker in the medical department. During the meeting, grievant explained his life style to the nurse stating words to the effect of, "I used to feel like I needed a woman in my life. However, I realized that I can cook for myself, wash clothes for myself, clean for myself, hell I can even sex myself." At the conclusion of this meeting, grievant told the nurse, "I love you."

On August 4, 2005, grievant requested the nurse to come to his office to discuss daily assignment sheets. When the nurse sat where grievant instructed, grievant sat next to her. As the discussion went on, grievant placed his hand on the nurse's leg at or just above her knee. The nurse pulled away and grievant apologized saying he did not mean to offend her. The nurse told grievant she considered his actions and comments to be harassing. After some additional discussion, grievant hugged the nurse who again pulled away. At the end of the meeting as they stood, grievant again hugged the nurse.

On August 5, 2005, the nurse met with the warden to report everything that had occurred. The warden told the nurse to avoid contact with grievant until he could look into the matter. On Saturday, August 6, 2005, the nurse was working a scheduled shift. Grievant, who was not scheduled to work and who rarely comes in on Saturday appeared unexpectedly in the medical department. The nurse immediately left and called the warden; the warden then summoned grievant to his office. The warden confronted grievant with the nurse's description of what had occurred on August 4th. Grievant admitted touching the nurse's leg, hugging her on two occasions, and telling her that he loved her.⁹ He

⁸ Agency Exhibit 2. Memorandum from security chief to warden, July 16, 2005.

⁹ Agency Exhibit 2. Memorandum from warden to Health Care Administrator, undated.

then instructed grievant to have no further contact with the nurse until a meeting the following week with the Health Care Administrator. During that meeting, in the presence of the warden, the Regional Director, and the Health Care Administrator, grievant again admitted to touching the nurse's leg, hugging her twice and telling her that he loved her.

Grievant's immediate supervisor for medical/clinical issues is the Health Care Administrator who works at another location. For personnel issues, the warden is grievant's immediate supervisor. The nurse contacted the warden rather than the Health Care Administrator because of the warden's onsite availability and his responsibility for personnel issues.

An employee who works with, but not for, grievant stated that he frequently makes complimentary statements about her looks and appearances of other females and that his statements were "unwanted and unsolicited."¹⁰

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. In all other actions, such as a claim of discrimination, the

¹⁰ Grievant Exhibit 2. Investigative interview with psychologist, August 10, 2005.

employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹¹

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 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.¹² 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. Section 5-10.17 of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.¹³ Procedure 5-10 specifies that violation of the policy on sexual harassment (formerly DHRM Policy 2.15 but now Policy 2.30) can be a Group I, II or III offense depending upon the nature of the violation.

The agency has shown, by a preponderance of evidence, that grievant engaged in inappropriate behavior and made inappropriate comments to the female nurse. While grievant has denied some aspects of his behavior and attempted to minimize the seriousness of other aspects, the weight of the evidence is sufficient to conclude that grievant's actions were inappropriate and constitute sexual harassment as that term is defined in policy. The Security Chief's description of what occurred on July 14, 2005 is especially persuasive since he was a disinterested and presumably reasonably objective observer. His description varies significantly from grievant's admission that he hugged the nurse once during that incident. Most significantly, grievant admitted on two occasions that he had touched the nurse's leg, hugged her twice, and told her he loved her. This type of conduct would be inappropriate even among peers. However, it is especially egregious for a supervisor to behave in this manner toward a subordinate.

Grievant asserts that he did not intend any of his actions to be sexual in nature. However, it is clear that the nurse found his actions to be unwelcome regardless of grievant's intent. Moreover, as a supervisor, grievant knew, or reasonably should have known, that his behavior could be interpreted as being sexual in nature.

¹¹ § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

¹² DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹³ Agency Exhibit 6. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

With regard to the incident of July 14th during which grievant hugged the nurse, patted her several times, and massaged her shoulders, grievant asserts that he had done the same thing with several other female employees. However, the witnesses who testified on grievant's behalf did not corroborate this assertion. Moreover, even if his assertion were true, this is an admission against grievant's interest because a male supervisor should not engage in such behavior with female subordinates.

Grievant objected to the agency's decision to discipline him before an Internal Audit investigation was completed. When the agency decided to discipline grievant, it believed the evidence was sufficient to justify its action. It also knew from experience that the Internal Audit investigation would likely take several more months. The agency is not required to await the results of an Internal Audit investigation if it already has sufficient information to justify discipline. Accordingly, the agency's disciplinary action was not premature.

Grievant alleged that the warden had "hand picked" four other employees for interviews. In fact, the four employees had been named by the complaining nurse – not by the warden. Therefore, it was entirely appropriate to interview the four people who purportedly had corroborative information. Grievant alleged that the warden had "encouraged" the complaining nurse to pursue sexual harassment charges. In fact, the warden testified that the nurse had complained to him and that he in no way "encouraged" her to do anything other than report what had occurred.

Discrimination

Grievant believes the agency disciplined him because he is the only male nurse at the facility and that this constitutes gender discrimination. An employee may demonstrate discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact. In this case, grievant has not presented any testimony or evidence of remarks or practices, statistical evidence, or a showing of disparate impact that would constitute gender discrimination in the discipline process. While grievant may be the only male nurse, he is also the only nurse who committed the offenses for which he was disciplined. Therefore, grievant has not borne the burden of proof to demonstrate that the disciplinary action was based on his gender.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice, demotion, and salary reduction, issued on August 23, 2005 for workplace harassment is hereby AFFIRMED.

Grievant has not borne the burden of proof to show that the agency's disciplinary action was discriminatory.

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. 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 15 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 15-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.¹⁴ You must file a notice of appeal with the clerk of the circuit court in the

¹⁴ 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

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁵

[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]

S/ David J. Latham

David J. Latham, Esq.
Hearing Officer

that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.