Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: 12/28/06; Decision Issued: 01/03/07; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8475; Outcome: Agency upheld in full; **Judicial Appeal: Appealed to the Circuit Court in Fairfax County on 01/29/07; Outcome pending.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8475

Hearing Date: December 28, 2006
Decision Issued: January 3, 2007

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Representative for Agency
Four witnesses for Agency

ISSUES

Did grievant's actions warrant disciplinary action under the Commonwealth of Virginia 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 appeal from a Group III Written Notice for sexual harassment of a coworker.[1] As part of the disciplinary action, grievant

[1] Agency Exhibit 4. Group III Written Notice, issued July 19, 2006.

was removed from state employment effective July 19, 2006. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[2] The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") employed grievant for five years as a direct service associate.

State policy defines sexual harassment to include unwelcome and severe or pervasive repeated sexual comments, innuendo, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.[3] An employee who engages in such conduct is subject to corrective action which may include termination of employment. Grievant has received sexual harassment training.[4]

A female wage employee with a degree in special education was attending college for a graduate degree; she worked at the agency's facility performing direct care of residents on a part-time basis during the summer of 2005, the winter break of 2005, and part of the summer of 2006.[5] Grievant was a medication aide working in the same building as the wage employee. During the summer of 2005, grievant and the wage employee had a casual, friendly relationship. As the summer progressed, grievant began telling her that she looked good, was sexy, and he occasionally hugged her. His conduct did not make her uncomfortable during that summer. During her brief employment in the winter of 2006, the female wage employee told grievant that she had ended a relationship with a male. Grievant became more familiar with her, occasionally patting her buttocks. On one occasion, he started to give her a backrub but then put his hands over her shoulder and started to move down towards her chest. She quickly pushed him away and told him his behavior was inappropriate.

When the female returned to work in June 2006, grievant said he wanted to visit her in her college dorm or get a hotel room. She rejected his advances but he said she would be begging for him. On one occasion, grievant faced her and pushed her against a wall with his full body so that she could feel his erection. A few days later when she was sitting on a couch, grievant straddled her and asked if she could feel his erection, referring to it as his "black cobra." On both occasions, the female told grievant to stop and pushed him away. No other staff members were present during these two incidents. One resident was present during the couch incident but he is unable to communicate. The female was very uncomfortable with grievant's advances and went home crying on a few occasions. She told her boyfriend, her family, and his family who all agreed that she should report grievant's unwelcome behavior. She had not reported him

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[2] Agency Exhibit 6. *Grievance Form A*, filed August 9, 2006.

[3] Agency Exhibit 2. Department of Human Resource Management (DHRM) Policy 2.30, *Workplace Harassment*, May 1, 2002.

[4] Agency Exhibit 3. Pre-Service Training Record, June 20, 2002.

[5] The employee completed her graduate degree in May 2006 and in July 2006 accepted full-time employment as a teacher in a public school system.

because she did not want to make waves, and because she was applying for employment and did not want to jeopardize her chances. Finally, a week after the last incident, she did report grievant's behavior to human resources on July 6, 2006.

The facility director promptly assigned an investigator to look into the charges. The investigator interviewed both grievant, the female wage employee, and nine other employees.[6] Two other employees had witnessed grievant verbally flirting with the female wage employee at various times. One of these two had witnessed grievant giving her a backrub. Another employee had heard grievant tell the wage employee "you look hot." Grievant received procedural due process prior to termination of his employment.[7]

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 the grievant must present his evidence first and prove his claim by a preponderance of the evidence.[8]

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[6] Agency Exhibit 1. Investigation, July 17, 2006.
[7] Agency Exhibits 5 & 6. Various memoranda regarding resolution steps.
[8] § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

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 effective September 16, 1993. The *Standards* provide a set of rules governing the professional and personal conduct and acceptable standards for 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.[9] Sexual harassment is a form of workplace harassment.[10] Violation of the workplace harassment policy can be a Group I, Group II, or Group III offense depending upon the nature of the violation.[11]

To a large degree, this is a "he said; she said" case. The most egregious offenses occurred when grievant was alone with the female employee and there were no corroborating witnesses. It is therefore necessary to consider other circumstantial evidence. Two employees acknowledged witnessing behavior that was characterized as flirtatious, thereby corroborating the wage employee's allegations about sexually-oriented comments and the fact that grievant was observed attempting to be near her when possible. One of these employees had also observed grievant rubbing the female employee's back, corroborating that incident, at least in part.

Most persuasive is the relative credibility of the only two people with full knowledge of what actually occurred. Grievant was evasive when questioned about some of his inconsistent statements to the investigator. On multiple occasions he asserted that an answer he had given might appear inconsistent because of how a question had been posed to him. When pressed however, he was unable to recall the question. Grievant had an opportunity to read his typed statements before signing and did not assert any inaccuracy or ambiguity when he signed them.

The female wage employee testified credibly and forthrightly. The evidence did not reveal any motive for her to fabricate her testimony. She endured grievant's gradually increasing attentions for a long time thinking that she had the situation under control. It was only when grievant's conduct went from verbal to physical that she became upset because of his unwelcome advances. At the time she reported grievant's behavior to human resources, she knew that she would be leaving her job in one more week to take full-time

[9] Agency Exhibit 2. Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct, September 16, 1993.
[10] Agency Exhibit 2. DHRM Policy 2.30, *Workplace Harassment*, May 1, 2002.
[11] Agency Exhibit 2. DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

employment in her chosen career field. It would have been much easier for her to work her few remaining days and then leave without reporting grievant's conduct. Had she done so, she would not have had to endure the investigation and testifying at this hearing. Moreover, as an ex-employee, she was under no legal requirement to testify at this hearing. She asserts that after much discussion with her boyfriend and their families, she concluded that reporting such inappropriate behavior was the right thing to do.

Thus, the female wage employee has demonstrated that her motivation for reporting the behavior and following through with testimony at this hearing six months after her employment ended was a desire to see that grievant would not be allowed to sexually harass anyone else. Grievant has not rebutted her testimony in this regard, and more importantly, has not shown that she had any other adverse motivation for reporting him. Grievant suggested that someone else encouraged grievant to report grievant. While that may be true, in the final analysis, it was grievant's decision alone to actually make the report and follow it through to a conclusion.

Based on the above factors, the agency has shown that grievant committed the offensive behavior charged by the female wage employee. His verbal comments were of a subtle but nonetheless sexual nature; his physical behavior was overtly sexual, was unwelcome, and created an offensive place for the female employee to work. The evidence is preponderant that grievant sexually harassed the female employee and is therefore subject to disciplinary action.

Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case, grievant has been employed for only five years (not considered long service) but has otherwise satisfactory performance.[12] The agency considered these factors but concluded that the severity of the offense was such that grievant should not be retained in state employment. Based on the totality of the evidence, the hearing officer concludes that the agency properly applied the mitigation provision.

DECISION

The disciplinary action of the agency is affirmed.

[12] Grievant Exhibit 4. Performance Evaluations, 2001-2005.

The Group III Written Notice and removal from state employment effective July 19, 2006 are hereby 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. 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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[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] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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

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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.