

Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 07/23/07; Decision Issued: 07/27/07; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8647; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: EDR Ruling Request received 08/10/07; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8647

Hearing Date: July 23, 2007
Decision Issued: July 27, 2007

PROCEDURAL HISTORY

On February 2, 2007, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace harassment. On February 20, 2007, 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 June 29, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 23, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 Juvenile Justice employed Grievant as a Juvenile Correctional Officer until his removal effective February 2, 2007. He began working for the Agency on July 25, 2005. The purpose of his position was:

To ensure the protection of citizens of the Commonwealth by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform.¹

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On November 22, 2006, Grievant spoke to the Lieutenant and said she was a "fine black woman". On November 23, 2006, the Lieutenant gave Grievant a written counseling stating, in part:

This is a written counseling statement informing you that on 11-22-06 while working on the [hallway] you approached me and made an inappropriate comment. At that time I informed you that the comment was

¹ Agency Exhibit 4.

inappropriate and directed you to the assistant superintendent of security concerning that comment.

This type of behavior will not be tolerated. At no time are you to address any female staff in that manner.²

Grievant worked with Juvenile Correctional Officer P. On one occasion while they were working together, Grievant told Juvenile Correctional Officer P that he wanted to perform oral sex on her. On another occasion, Grievant asked Juvenile Correctional Officer P what was her bra size. Grievant also asked her what type of sexual activities she enjoyed.

Juvenile Correctional Officer P was offended by Grievant's comments. Following his comments, Juvenile Correctional Officer P told Grievant she did not like his comments. Grievant told her he would stop making comments of a sexual nature to her. She believed she had resolved the issue.

Grievant and Juvenile Correctional Officer P were attending on-the-job training scheduled for approximately 5 days. Grievant told her he was thinking of getting a hotel room for the remainder of the training session and that she could stay with him for the night. Juvenile Correctional Officer P interpreted Grievant's comment to be an invitation for her to have sex with him in the hotel room.³ She was offended by Grievant's comments. She believed Grievant would continue to make offensive sexual comments to her despite his prior statement that he would not do so.⁴ On December 3, 2006, Juvenile Correctional Officer P approached the Captain and suggested that he review the Facility's sexual harassment policy with staff. The Captain asked her why that was necessary; Juvenile Correctional Officer P told the Captain that someone had been making inappropriate sexually-oriented comments to her. She declined to identify Grievant as the offender. The Agency began an investigation. During the Agency's investigation, Juvenile Correctional Officer P identified Grievant as the employee making the offensive comments to her.

An Agency investigator also spoke with Juvenile Correctional Officer R. Juvenile Correctional Officer R began working for the Facility in September 2005. She worked with Grievant. On several occasions, Grievant told her he wanted to give her a massage. On one occasion, he attempted to give her a neck massage. He placed his

² Agency Exhibit 8.

³ Grievant admitted he told Juvenile Correctional Officer P that he was thinking of renting a hotel room and that she could stop by to visit. He denies he intended his comments to mean she could stop by for sex. Juvenile Correctional Officer P's assertion is more believable than Grievant's denial based on the nature of their relationship and the credibility of their testimony.

⁴ She also believed that Grievant was telling wards that she and Grievant were having sex. Her belief was based on the assumptions of another employee and those assumptions may or may not have been mistaken.

hands on her neck and began rubbing, but she brushed him aside and Grievant stopped. In November 2006, Grievant brushed his body against Juvenile Correctional Officer R's body and told her that after he took care of a few things he would return to the unit and take her with him into the staff bathroom. She understood his comment to mean he wanted them to have sex in the bathroom. She did not wish to have sex with Grievant. She called Juvenile Correctional Officer O and told Juvenile Correctional Officer O what Grievant had said to her and asked her to remain on the line when Grievant returned. Juvenile Correctional Officer R said she was concerned about what Grievant would do if she were to hang up the telephone.⁵

Grievant asked Juvenile Correctional Officer O personal questions about her sex life. On one occasion, he asked her whether she was taking birth control.⁶ He repeatedly asked her whether she was taking birth control. She answered his question because that was the only way she thought she could get him to stop asking the question.

The Agency also presented testimony from Juvenile Correctional Officer C to support its allegations. The evidence revealed that neither Grievant nor Juvenile Correctional Officer C liked one another. Grievant's comments to her were not intended by Grievant to be of a sexual nature.

CONCLUSIONS OF POLICY

"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.

⁵ Although Juvenile Correctional Officer O left the Facility before the hearing and did not testify, an Agency investigator spoke with Juvenile Correctional Officer O as part of the investigation and she confirmed the telephone call took place.

⁶ Grievant asserted that he asked her about birth control because she had expressed a desire to return to school and that he felt if she became pregnant that would interfere with her educational choices.

- **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.

Grievant engaged in workplace harassment by creating a hostile environment. While he was working at the Facility he made several comments of a sexual nature to Juvenile Correctional Officer P and Juvenile Correctional Officer R.⁷ Although Grievant testified that he had a close relationship with each coworker, no credible evidence was presented that either female officer welcomed his comments or that the friendships were sufficiently close so as to justify Grievant believing his offensive comments were appropriate within the context of their friendships. Grievant's behavior was pervasive. Within the period of approximately 12 months, Grievant made several sexual comments to two female officers. The female officers were offended by Grievant's behavior such that it became difficult for them to work with Grievant. Grievant created an intimidating or offensive workplace as measured by the reactions of the two female officers and by the likely reaction of any reasonable person.

“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.”⁸ Grievant engaged in workplace harassment thereby justifying the issuance of a Group III Written Notice with removal. Grievant's behavior was sufficiently severe to support the Agency's decision to issue a Group III Written Notice instead of either a Group II or Group I Written Notice.

Grievant argues that the statements of the two female officers were not credible and that he did not engage in the behavior alleged.⁹ The Agency has met its burden of proof in this case. The testimony of Juvenile Correctional Officer P and Juvenile Correctional Officer R was credible for several reasons. First, the demeanor of each female officer during her testimony reflected truthfulness. Second, Grievant did not present evidence of any motive or reason why either woman would lie about him. Third, Juvenile Correctional Officer O confirmed to the Agency investigator that Juvenile Correctional Officer R called her and said Grievant had asked Juvenile Correctional Officer R to go into the staff bathroom with him. Fourth, the female officers were

⁷ Expressing a desire to perform oral sex on a woman or to have sex in a bathroom or hotel are clearly comments of a sexual nature and are inappropriate in a State workplace.

⁸ DHRM Policy 2.30.

⁹ Grievant argued that if the Agency investigators had viewed recordings from the video cameras in the Facility, they would have learned that the events alleged by the two women did not occur. This argument fails because the video tapes did not record sound. In addition, the Agency's camera system records over tapes every 30 days. Tapes of the period in question do not exist and may not have existed at the time of the investigation.

"reluctant witnesses". Neither woman approached the Agency with the intent to harm Grievant.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."¹⁰ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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

¹⁰ Va. Code § 2.2-3005.

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 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. 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. 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.¹¹

[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/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.