

Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: 9/11/07; Decision Issued: 09/20/07; Agency: DOC; AHO: John R. Hooe, III.; Case No. 8660; Outcome: No Relief, Agency Upheld in Full; **Administrative Review**: HO Reconsideration Request received 10/04/07; Reconsideration Decision issued 10/10/07; Outcome: Original decision affirmed; **Administrative Review**: EDR Ruling Request received 10/19/07; EDR Ruling #2008-1864 issued 11/07/07; Outcome: Request untimely; **Administrative Review**: DHRM Ruling Request received 10/19/07; DHRM form letter issued 10/29/07; Outcome: Request untimely; Judicial Review: Appealed to the Circuit Court; Outcome: Hearing Officer's Decision Affirmed (File No. CL07001445-00)

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of : Case No. 8660

Hearing Date: September 11, 2007
Decision Issued: September 20, 2007

APPEARANCES

Grievant
Attorney for Grievant
Representative for Agency
Agency Advocate
Six Witnesses for Agency
Three Witnesses for Grievant

ISSUES

1. Did the Grievant violate the Virginia Department of Corrections Operating Procedure and Standards of Conduct Policy 135.1 “sexual misconduct with a member of staff”? If so, what was the appropriate level of disciplinary action for the conduct at issue?
2. Should mitigating factors result in less severe discipline?

EXHIBITS

The Agency Exhibits admitted into evidence were contained in a single notebook with the following contents:

- Tab 1 - The written notice, the Grievant’s Form A and related documents
- Tab 2 - Report of investigation and related documents
- Tab 3 - Incident report and related documents
- Tab 4 - Incident report and related documents
- Tab 5 - Grievant work profile, performance evaluation
- Tab 6 - Policy 2.30 “workplace harassment”
- Tab 7 - Operating Procedure 135.1 “Standards of Conduct”
- Tab 8 - Personnel orientation checklist

In addition, added to the notebook were the following additional documents:

1. Incident report dated January 13, 2007, two pages.
2. Investigative interview dated January 23, 2007, five pages.

3. Incident report dated January 13, 2007, two pages.
4. Incident report dated January 17, 2007, one page.
5. Investigative interview dated January 20, 2007, one page.
6. Investigative interview dated January 24, 2007, one page.
7. Investigative interview dated January 25, 2007, one page.

FINDINGS OF FACT

The Grievant filed a timely appeal from a Group III Written Notice issued on February 5, 2007 for violation of Policy 135.1 Standards of Conduct for sexual misconduct. The disciplinary action taken in addition to issuing the written notice was termination of employment effective February 5, 2007. The grievance, not having been resolved, was qualified for a hearing.

Three co-workers of the Grievant complained of sexual harassment. One of the co-workers complained of an inappropriate physical touching, while two of the co-workers complained of inappropriate comments.

The first co-worker who testified stated that the Grievant asked her sexually explicit questions such as how and what she liked in a sexual relationship, as more particularly set out in the written statement contained at Tab 2 of the Agency's notebook of exhibits.

The second co-worker who testified stated that the Grievant "placed his right hand on the back of my neck and began to massage it. I pulled away from him.", as more particularly set out in the written statement located at Tab 3 of the Agency's notebook of exhibits.

The third co-worker who testified stated that the Grievant asked her "Have you ever cheated?" The complaint is more particularly set out in the written statements contained at Tab 4 of the Agency's notebook of exhibits.

All three co-workers who testified stated that the Grievant's comments and actions made them uncomfortable.

The Grievant testified that he did not make any of the inappropriate comments and never touched the one co-workers neck as alleged. The Grievant could offer no motivation for the three co-workers bringing the complaint against him. The Grievant stipulated that he was aware of the relevant Standards of Conduct.

The Warden testified that the Grievant was terminated because he believed the co-workers, that the Grievant's conduct was a Group III violation and that a Group III violation normally results in termination. The Warden further testified that because the Grievant was a supervisor of the co-workers, the Warden did not reduce the penalty due to any mitigating circumstances, including consideration of the Grievant's long service with a history of otherwise satisfactory work performance. In addition, the Warden testified that in his initial meeting with the Grievant the Warden did not believe that the Grievant was honest with the

Warden.

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 (A) 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.

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resource Management 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 to provide appropriate corrective action.

The Virginia Department of Corrections Operating Procedure No. 135.1 sets out its Standards of Conduct under the authority of the Code of Virginia § 2.2-1201. Operating Procedure 135.1 sets out at XII. Third Group Offenses (Group III), B.19. that the violation of DHRM Policy No. 2.30 Workplace Harassment is considered a Group III offense "depending upon the nature of the violation."

Policy No. 2.30 defines "workplace harassment" as "any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the

basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose of effect of creating an intimidating, hostile or offensive work environment;...” Subsection C.1. of Operating Procedure 135.1 provides that discipline should normally take the form of the notice and removal or notice and up to 30 work days maximum suspension without pay in lieu of removal.

Grievant denies the allegations. In the alternative, the Grievant would argue that even if the complaints were deemed to be true, the Grievant should not have been terminated due to his long history of being a good employee.

The Agency has demonstrated, by a preponderance of the evidence, that the Grievant made the comments to two of the co-workers and inappropriately touched the back of the neck of the third co-worker and thus proved that the Grievant is guilty of the alleged Group III violation. The Warden adequately explained why termination was selected as the punishment rather than a lesser punishment due to mitigating circumstances.

DECISION

The disciplinary action of the Agency is affirmed. The Group III Written Notice issued to the Grievant on February 5, 2007 and the termination imposed are **AFFIRMED**.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director’s authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in

compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (8-4) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first 5 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

John R. Hooe, III
Hearing Officer

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS
RULING ON REQUEST TO RECONSIDER
THE DECISION OR REOPEN THE HEARING**

In the matter of : Case No. 8660

Hearing Date: September 11, 2007
Decision Issued: September 20, 2007

The Hearing Officer received directly from the Grievant a two page document titled "Request to reconsider or reopen a hearing" dated October 4, 2007, which document consisted of twelve numbered paragraphs.

It is the Opinion of the Hearing Officer that the request to reconsider the decision or reopen the hearing does not set out grounds to do either.

Accordingly, it is the DECISION of the Hearing Officer that the request to reconsider the decision is denied. Further, it is the DECISION of the Hearing Officer that the request to reopen the hearing is denied.

John R. Hooe, III
Hearing Officer

Date: October 10, 2007

October 29, 2007

RE: **Grievance of Grievant v. Virginia Department of Corrections**
Case No. 8660

Dear Grievant:

The agency head of the Department of Human Resource Management has asked that I respond to your request for a review of the hearing officer's decision in the above referenced case. Please note that as stipulated in the Grievance Procedure Manual, §7.2(a), "all requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision."

The records show that the hearing officer issued his original decision on September 20, 2007. The Department of Human Resource Management received your request for administrative review on October 29, 2007, more than 15 calendar days after the date of the original decision. Thus, this request is untimely and the issues you raised in this appeal will not be reviewed.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services