Issue: Group III Written Notice with termination (sexual harassment); Hearing Date: 12/14/07; Decision Issued: 12/19/07; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 8756; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTHOF VIRGINIA, DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

RE: DEDR CASE NO.: 8756 (DEPARTMENT OF CORRECTIONS)

DECISION OF HEARING OFFICER

HEARING DATE: DECEMBER 14, 2007
DECISION ISSUED: DECEMBER 19, 2007

PROCEDURAL HISTORY

The grievant instituted this proceeding by filing his Form A on September 11, 2007. The grievance challenged the Group III Written Notice given to him and his termination from employment on September 10. I was appointed as hearing officer on November 20. The pre-hearing was conducted by telephone on November 28. The hearing was conducted on December 14 and lasted approximately three hours.

APPEARANCES

Grievant, without a representative

Representative for Agency

Warden

Seven Witnesses for the Agency

Three Additional Witnesses for Grievant

ISSUES

1. Whether the agency properly issued the Group III Written Notice for sexual harassment occurring on August 28 and August 29, 2007?

2. Whether the agency properly terminated the grievant as a result of those offenses on August 28 and August 29, 2007?

FINDINGS OF FACT

The grievant had been employed by the agency, beginning as a correctional officer, for approximately 12 ½ years. On or about November 25, 2001 he was promoted to the rank of lieutenant. In that same year he became certified as a training officer and was recertified as such in 2005.

For the week of August 27, 2007 the grievant was assigned as an instructor for portions of Phase II training for new employees of the agency. This training was for employees who would be in charge of custody of inmates. The grievant conducted portions of the training on August 28 and August 29.

On August 30 the Institutional Training Officer received complaints from trainees of unprofessional behavior by the grievant during the training sessions. The grievant was relieved of his training duties on that date and interviews were conducted of several of the trainees. They complained about the grievant's use of profanity, racially offensive comments and other derogatory language. No minorities were included in the class. At least two trainees complained of being shown a sexually explicit photo on the cell phone of the grievant. The grievant had been observed spending time on his cell phone during the training sessions.

One female trainee (hereinafter referred to as Trainee No. 1) rode to the training with the grievant on at least one day. She was unprepared for class on a certain subject on one occasion and gave as an explanation that she had left her book behind the following day and did not have the chance to study overnight. The grievant made a statement, in front of the entire class, that gave the impression that he and Trainee No. 1 had spent the previous night together. That impression was incorrect.

During the ride, either to or from the training site, Trainee No. 1 and grievant had discussed many personal things. During the physical training portion of the class, Trainee No. 1

made a statement about her shorts being too big. The grievant then made a comment about "butt floss" to indicate that Trainee No. 1 was wearing thong underwear. This statement was made in the presence of other class members. The grievant intended the statement as a joke. Trainee No. 1 was one of the individuals in the class who saw an inappropriate or objectionable picture on the cell phone of the grievant during the class.

Another female trainee (hereinafter Trainee No. 2) was involved in three inappropriate comments or actions by the grievant. On August 28 she requested permission from the grievant to leave the training to wash her hands. She returned in a timely manner. Upon her return the grievant directed her to come before the class and perform pushups. This was not during the physical training portion of the class and pushups, or any other form of exercise, were an inappropriate form of punishment during the training being conducted by the grievant. When she went to the front of the class the grievant made a statement to the effect that he had told the class that he could get any woman down on her knees. Trainee No. 2 recalls the statement and being that the grievant could get any woman down on "all fours." This statement in one version or the other was heard by other members in the class. Trainee No. 2 refused to perform the pushups.

On the following day August 29, the grievant was conducting the physical training portion of the course. Trainee No. 2 had injured her pectoral muscle and had been seen by medical staff prior to that time. The grievant directed Trainee No. 2 to perform a one arm pushup. He placed his closed fist underneath the body of Trainee No. 2 such that when she lowered herself in the course of the pushup his fist contacted her at her breast line. She was able to perform two pushups of this type before being unable to continue. As she rolled over she felt the grievant touch her breast area.

Trainee No. 2 also received additional verbal harassment by the grievant. He made the comment, again within the hearing of other class members, that the trainee could give herself a black eye during the physical training. This comment was in reference to the breast size of Trainee No. 2.

The grievant believes that a training video seen by him and provided by the agency showed that the placement of the fist at the breast area of a trainee doing pushups was appropriate. This video was not introduced into evidence. No other trainee had his or her pushups monitored in that manner. All other trainees performed the exercise with the fist of the grievant positioned such that their chin hit the fist rather than the breast area.

The grievant and Trainee No. 2 had been acquainted for a number of years. The grievant has not denied making the statements attributed to him. He has stated that he believes his error was in not leaving his friendship with her and Trainee No. 1 at the door of the training room.

The warden and the grievant had more than one informal discussion in the time proceeding these incidents regarding inappropriate language and unprofessional conduct by the grievant. The grievant, prior to this situation, had a work record clean of any disciplinary actions which had been founded. On his performance evaluations he had consistently been found to have met or exceeded expectations.

DISCUSSION AND ANALYSIS

This matter arises under the Virginia Personnel Act (Chapter 29 of Title 2.2 of the Code of Virginia), and Operating Procedures 101.2 and 135.1 of the Virginia Department of Corrections. The Virginia Personnel Act establishes the procedures available to state employees, such as the grievant who have been disciplined for work-related activities or other proscribed conduct. Agency Operating Procedure 101.2 is a policy drafted to prohibit “discriminatory

practices and work place harassment." Under Operating Procedure 135.1 violation of the work place harassment policy may constitute either a Group I, Group II or Group III offense, depending on the nature of the violation. Included in the definition of work place harassment is "any unwelcome verbal or physical conduct that either denigrates. . . that has the purpose or effect an intimidating hostile or offensive work environment." Sexual harassment is a form of work place harassment.

A hostile environment is created when "a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching, or other conduct of a sexual nature that creates an intimidating or offensive place for employees to work. Operating Procedure 101.2 (III).

No question exists that the grievant engaged in the conduct described by the trainees. He has admitted to everything, with the exception of the "groping" of Trainee No. 2. I have found that such physical contact did occur. Both of the female trainees were demeaned by the words and actions of the grievant. I closely observed the demeanor of Trainee No. 1 as she testified. I conclude that she likely gave no indication to the grievant that she would approve of his public disclosure of private information, whether true or untrue. She appeared to remain affected by the incident. The testimony and statements from certain of the male trainees establishes that they were also offended by the behavior of the grievant.

I believe that the statement implying that Trainee No. 1 had spent the night with the grievant to be the type of "severe" sexual comment proscribed by the applicable policies. I make the same finding as to the "get a woman on her knees" statement. The other comments and actions of a sexual nature, although not severe when viewed in isolation, do establish a pattern of pervasive comments and actions. This is particularly true in light of the more severe comments

made by the grievant. I further find that the physical contact between the grievant and the breast of the Trainee No. 2 to have been a serious violation of policy.

The next inquiry is whether these actions and statements are sufficiently egregious to support the level of discipline and punishment imposed. My role as a hearing officer is not to serve as a "super-personnel officer" but to review the factual findings of the agency and to modify its actions only where appropriate after giving due deference to them. Tatum vs. Virginia Department of Agriculture and Consumer Services, 41 Va. App. 110, 582 S. E. 2d 452 (2003). The policies give little guidance in determining what level of discipline is appropriate when sexual harassment is proven. My task is made easier in this case by virtue of the numerous violations by the grievant. It is not necessary for me to determine which of the actions, if any, by itself would have been sufficient to sustain a Group III Written Notice. Each of the actions or statements individually would have supported the issuance of a Group I level of discipline. Viewing the violations as a pattern of behavior, I believe that the agency did act reasonably in issuing the Group III Written Notice.

I also agree that the termination of the grievant was appropriate. This finding is based on three specific factors. First, the other unprofessional conduct by the grievant during the training sessions showed him to be out of control of his actions. He has explained that during this time frame he had a drinking and other problems for which he was receiving counseling. Those reasons do not justify or mitigate his actions. Secondly, as a training instructor the grievant is held to a higher standard. Section VII of Operating Procedure of 101.2 states that "it is the responsibility of all managers and supervisors to maintain a non-hostile, bias-free

working environment and to insure that employees are free from harassment of any kind." The grievant failed to set a good example and to serve as a role model for the trainees. Instead, he distracted them and detracted from their important training. Finally, the prior incidents where the warden counseled the grievant support my giving additional deference to the termination decision.

The grievant has argued that the agency is unfairly applying its policies to him. He cites the case of another correctional officer at the facility at which he was employed. In 2004 this correctional officer made explicitly sexually suggestive comments to a co-worker. That correctional officer had been given only a Group II offense and suspended for a relatively short amount of time. I do not find that the grievant is "similarly situated" with that officer. The grievant, as stated above, was acting as a supervisor rather than a co-worker. Also, that incident involved only a single employee. Here, the grievant created a hostile environment for two female employees and several male employees. In the 2004 case the grievant here to teased the female employee about the harassment by the other officer. He was a part of the problem then, according to the exhibit admitted at his own request. The document adds weight to the testimony of the Warden and buttresses his decision to terminate the grievant.

The grievant has also argued that his case is similar to that of the grievant in DEDR Case No. 8506. In that case, the hearing officer reduced a Group III to a Group I violation (of obscene words). That case is distinguishable from the present case. There, as pointed out by the hearing officer, the grievant did not know that a female co-worker was in the area where she could overhear the offensive statement. Here, the comments were directed toward the female trainees. Also, that decision relies on the definition of sexual obscenity rather than an application of the workplace harassment policies.

The grievant has further argued that the notice was improperly issued because of a violation of the section of the policy (Section 135.1) (8) requiring that he be given oral or written notice of the offense prior to any suspension. The grievant did not testify under oath and merely presented his defense through cross-examination and his opening and closing statements. The evidence, therefore, does not support his claim that he was given improper notice when he was contacted by a supervisor by telephone to apprise him of the suspension. In any event, any procedural violation has been waived by the grievant. See DEDR Ruling No. 2008-1765.

DECISION

For the reasons stated above, the issuance of the Group III Written Notice to the grievant and his termination from employment by the agency are upheld.

APPEAL RIGHTS

As the Grievant 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be

sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 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 E. Main St., Suite 400, Richmond, VA 23219 or faxed to (804) 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**. A copy of each appeal must be provided to the other party.

A hearing officer=s original decision becomes a **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 court shall award reasonable attorneys= fees and costs to the employee if the employee

substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

ENTERED this December 19, 2007.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer