

Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 10/12/12; Decision Issued: 11/16/12; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9928; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 9928**

Hearing Date: October 12, 2012  
Decision Issued: November 16, 2012

#### **PROCEDURAL HISTORY**

On June 22, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace harassment.

On July 2, 2012, 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 September 18, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 12, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Representative  
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 at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

The JCO began working at the Facility in March 2012. When the JCO first met Grievant, Grievant began asking her about whether she was in a relationship with another person. He also asked her about what type of things she liked to do. He asked her if she was seeing someone else. He asked her if she wanted to go bowling and she said she did not "sh-t where she sleeps" meaning that she did not want to date someone with whom she worked.

On May 9, 2012, the JCO returned from training and Grievant asked her out on a date again. She told him "no." Grievant asked the JCO several times for her telephone number and she told him "no." Grievant wrote his telephone number on a piece of paper and gave it to the JCO. Grievant and the JCO were sitting on opposite sides of a desk in a room at the Facility. Grievant stood up and moved to the other side of the desk and kissed the JCO on the forehead. Grievant then walked out of the room. Later on, Grievant returned to the room. The JCO walked to the refrigerator. As the JCO turned around and began to walk, Grievant grabbed her and kissed her forcefully. She put her hands on Grievant's shoulder and said, "What are you doing? Are you crazy, there are camera's in here." Grievant said there were no cameras where they were standing. He patted her bottom and walked out.

On the following day, Grievant asked the JCO why she had not called him. She told him she threw away his telephone number. He asked if she liked the kiss and she said, "no."

The JCO felt uncomfortable working around Grievant because of his behavior but she believed she could "handle the situation."

Several days later, another juvenile correctional officer was abrasive towards the JCO and the JCO met with the Lieutenant regarding that conflict. The JCO commented that she was putting up with a lot at the Facility. She was asked what other problems she had experience and the JCO mentioned her encounter with Grievant.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>1</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

DHRM Policy 2.30 strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual's race, sex, color, national origin, religion, age, veteran status, political affiliation or disability. Workplace harassment is defined 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, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

Sexual harassment is defined 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).

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

- **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.
- **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.

“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.

Grievant kissed the JCO’s forehead and mouth and touched her bottom. His actions were unwelcome. His actions were severe touchings of a sexual nature. The effect of Grievant’s behavior was to create an intimidating and offensive place for the JCO to work. Based on an objective standard, a reasonable person would have found Grievant’s behavior to create a sexual hostile work environment.

Grievant denied he engaged in the behavior alleged by the Agency. Grievant argued that the JCO was untruthful and created a story about Grievant because she wanted to be transferred to another facility. The JCO’s testimony was credible. The evidence showed that the JCO was reluctant to report Grievant’s behavior. She believed she could handle the circumstances and feared being retaliated against if she reported Grievant. She only disclosed Grievant’s behavior inadvertently when attempting to discuss a conflict with another employee.

Grievant argued that the Agency’s investigation was flawed because it did not comply with requirements established by the Equal Employment Opportunity Commission. In particular, Grievant contends the Agency has not corroborated the JCO’s testimony with the testimony of another employee and, thus, the Agency’s burden is not met. This argument fails. The hearing decision is based on evidence presented during the hearing. How the Agency completed its investigation is not significant as long as the Agency presents sufficient facts during the hearing to support the disciplinary action. It is not necessary for the Agency to present corroborating testimony of another employee, so long as the Agency presents credible evidence sufficient to meet its burden of proof. The Agency has done so in this case.

*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 Human Resource Management ....”<sup>2</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing

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<sup>2</sup> Va. Code § 2.2-3005.

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 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.<sup>3</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.