

Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 03/26/19; Decision Issued: 03/27/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11315; 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: 11315**

Hearing Date: March 26, 2019

Decision Issued: March 27, 2019

#### **PROCEDURAL HISTORY**

On December 20, 2018, Grievant was issued a Group III Written Notice of disciplinary action with removal for sexual harassment.

On January 19, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 6, 2019, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On March 26, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Corrections employed Grievant as a Corrections Lieutenant at one of its facilities. He had been employed by the Agency for approximately 19 years. No evidence of prior active disciplinary action was introduced during the hearing.

On December 4, 2018, Grievant was in the Unit Housing Officer with Officer J and Officer M. Grievant was seated at his desk. Officer J was seated to Grievant's right approximately three feet away. Officer M was seated to Officer J's right. Both Officer J and Officer M reported to Grievant. The Facility had finished the count procedures and they were having a "general discussion" regarding Agency business. Grievant leaned towards Officer J and extended his right hand and placed it between her legs within an inch of her genitals. The palm of his hand was open as he touched her thigh. Officer J reacted by moving away from his hand and by using her hand to push Grievant's hand away from her. Officer J looked at Officer M who also observed Grievant's action. Officer M observed Grievant place his hand in Officer J's crotch and was shocked by Grievant's action. Immediately after Officer J brushed Grievant's hand away, Officer J and Officer M looked at each other speechless with an "awkward stare". Grievant did not apologize or otherwise explain his behavior. Grievant got up and walked to another location. Officer J and Officer M continued to have a conversation while "still sitting in complete awkwardness." Each person got up and the meeting ended.

Officer J continued her duties for the rest of her shift but was upset by Grievant's action. On the following day, Officer J spoke with Officer M and asked Officer M for

advice about how to respond to Grievant's action. Officer M mentioned possibly speaking with Grievant about his behavior or reporting the matter to Facility managers. Officer J reported Grievant to Facility managers. When Officer J spoke with the Warden she was visibly upset because Grievant inappropriately touched her.

The Agency conducted an investigation. Grievant told the Investigator, "my hand did touch her thigh." Grievant admitted to the Investigator he had previously told Officer J she had a sexy walk and that he liked how she looked.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>1</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

"Violation of DHRM Policy 2.05 Equal Employment Opportunity or Operating Procedure 145.3, Equal Employment Opportunity (considered a Group III offense depending upon the nature of the violation)" can be a Group III offense.

DOC Operating Procedure 145.3 governs Equal Employment Opportunity and defines Sexual Harassment as:

Unsolicited, unwelcome behavior of a sexual nature including, but not limited to, sexual advances, request for sexual favors, or verbal, written, or physical conduct of a sexual nature by a manager, supervisor, co-worker(s) or non-employee (third party). Sexual harassment is unlawful. Examples of sexual harassment are:

Hostile Environment – A form of sexual harassment when a target is subjected to unwelcome and severe and/or pervasive sexual comments, innuendos, touching, or other conduct of a sexual nature that creates an intimidating or offensive work environment.

\*\*\*

On December 4, 2018, Grievant placed his hand between Officer J's legs near her genitals. Officer J did not solicit or welcome Grievant's behavior. His behavior was of a sexual nature. His conduct was a severe touching that created an intimidating or offensive work environment for Officer J. The Agency has presented sufficient evidence

---

<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(B).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(C).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(VI)(D).

to show that Grievant created a hostile work environment for Officer J thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant testified that he was merely gesturing with his hands and accidentally touched Officer J on the thigh. The Agency presented two witnesses testifying that Grievant's action was not accidental and was deliberate. Their testimony was credible and persuasive.

Grievant presented a witness who testified she was in the meeting and did not observe Grievant touch Officer J. The Hearing Officer does not believe that witness was in the same meeting giving rise to the disciplinary action. Grievant admitted to touching Officer J but claimed the touching was accidental. The witness testifying for Grievant did not see Grievant touch Officer J at all and, thus, was not likely at the meeting where Grievant touched Officer J.

Grievant argued he was not provided with proper notice of the Agency's fact finding hearing. To the extent the Agency failed to provide Grievant with proper notice of the fact finding conference, the Agency's failure to do so is harmless error under the Grievance procedure. Grievant had an opportunity to present any defense or argument during the grievance hearing that he could have presented during the Agency's fact finding hearing. Thus, the Grievance process cures the Agency's procedural defect.

*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>4</sup> 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**.

---

<sup>4</sup> Va. Code § 2.2-3005.

## APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.