

Issue: Group III Written Notice with termination (workplace harassment); Hearing Date: 06/12/12; Decision Issued: 07/03/12; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9826; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9826**

Hearing Date: June 12, 2012  
Decision Issued: July 3, 2012

**PROCEDURAL HISTORY**

On March 9, 2012, Grievant was issued a Group III Written Notice of disciplinary action for with removal for workplace harassment.

On March 20, 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 she requested a hearing. On May 8, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 12, 2012, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's 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. 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. The purpose of her position was:

Provides juveniles with a safe environment by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform. Facilitate work skills and/or training prior to release from a [Facility] or from parole supervision. Address criminogenic factors associated with recidivism by facilitating delivery of appropriate treatment services that will assist juvenile's reentry to the community. Provide assistance as needed to facilitate the juveniles planned for reentry to the community that addresses the transitioning of work, school, housing, and treatment needs. Improve relationships with our local and state government partners to ensure maximum services for youth.<sup>1</sup>

Grievant began working for the Agency in October 2003. She was removed from employment effective March 9, 2012. Grievant had prior active disciplinary action. On August 27, 2010, Grievant received a Group I Written Notice for unsatisfactory work performance and disruptive behavior. On December 3, 2010, Grievant received a Group I Written Notice for disruptive behavior.

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<sup>1</sup> Grievant Exhibit 6.

Officer H was employed at Facility 1. He filed an application for employment as a Juvenile Correctional Officer at Facility 2. If Officer H had applied for a transfer to Facility 2, the transfer request would have been granted by the Superintendent because the Superintendent was responsible for overseeing both facilities. Officer H chose to apply for a position at Facility 2 in order to avoid informing employees at Facility 1 of his desire to transfer.

On January 5, 2012, Officer H was interviewed by the Superintendent for the position at Facility 2. The Superintendent asked Officer H why he was applying for a position and going through the interview process when he could have circumvented that process and asked to be transferred to Facility 2. Officer H was evasive in his response and said that there was "a lot of stuff going on" at Facility 1 that the Superintendent would not understand. He told the Superintendent if he asked for a transfer, he would have to explain to supervisors at Facility 1 that he was leaving and that doing so was not a good idea. The Superintendent continued to ask Officer H about his concerns at Facility 1. Officer H said that what he was being sexually harassed but refused to provide additional details. He told the Superintendent that she would not understand and that he did not want to talk about it. He said that he would not disclose any more information at this time or at a later time. He refused to give details of the sexual harassment. He said he did not wish to get anyone in trouble and did not want to reveal names. He said he was not a snitch and did not want any trouble from anyone; he just wanted to keep his job. Officer H told the Superintendent that he had been on a leave of absence because of the sexual harassment. He said that he really needed his job and he felt like he could not keep his job if he talked about the sexual harassment. The Superintendent perceived Officer H to be truthful in his statements to her.

On the following week, Officer H returned to work. The Superintendent met with Officer H and told him that because of the allegations, there had to be an investigation. She told Officer H that he can provide her with details or she could "push" the matter to the Agency's Central Office. She told him that it was a condition of his employment that he must participate in official investigations and that the matter was now an official investigation. Officer H continued to be resistant to the questioning the sexual harassment he experienced. Officer H told the Superintendent that he and his wife could manage the situation by being in therapy and asking for a job at Facility 2. Officer H was embarrassed to speak with the Superintendent. He held his head down and was "sheepish" about not wanting to say things that he had experienced.

The Superintendent met with Officer H on January 9, 2012 and asked Officer H to provide a statement regarding his interaction with Grievant. Officer H drafted a statement stating, in part:

On January 5, 2012, I was interviewed by [Superintendent] regarding a position at the [Facility 2]. I am currently employed at the [Facility 1]. During the interview I expressed concerns over several sexualharassment incidents that have occurred over a period of about 4 months involving other employees at my current location.

In August 2011, because of school scheduling, I requested and was granted a change of shifts from B-break to A-break at my current facility. The harassment incidents began almost immediately. Graphic sexual comments were made to me by female employees, [Grievant] and [Officer S]. The incidents involving [Grievant] progressed from verbal to unwanted physical aggression.

It has been an extremely difficult and uncomfortable situation. I have attempted to disregard, ignore, and even laugh off the verbal encounters without success. When I did not respond to the verbal comments, they progressed to unwanted physical encounters. During the month of August and September 2011, there have been numerous incidents where [Grievant] physically groped/grabbed my genitals. I have also witnessed the same type of incident involving [Grievant] groping another employee, [Officer C]. Specific details on ... incidents:

(1) August or September 2011 in the Control Room. I entered the Control Room to obtain a set of handcuffs where [Grievant] was seated in a chair. [Grievant] turned around in the chair and groped/grabbed my genitals. I immediately turned away and left the room.

(2) August or September 2011 incident in B Cottage Unit. [Grievant], as she walked passed, reached down grabbing my genitals as she had passed.

(3) In October 2011 in the Control room. [Grievant] and I were in the Control Room in charge of cameras and the count desk. [Grievant] unzipped her pants and drop them exposing her underwear in my view. I immediately stood up and left the room.

(4) October 2011 in B Cottage Unit office. (Grievant) entered the room closing the door behind her. She then jumped on my lap and began to rub against me. I managed to get her up and off of me and I left the room.

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I have sought counseling for dealing with the situation and I'm very apprehensive about continuing my career on this break or at this facility. I do not feel as though I am able to approach my supervisors about this simply because I feel as though they do not have my best interest at hand.

The Agency's Employee Relations Manager and a Special Agent conducted an investigation. During the investigation, Officer H told the investigators that between August and October 2011, Grievant asked him how "big his d—k was" and stated "I want to suck your d—k" and stated "I want to have just one night with you." Officer H

told the investigators that these types of comments were made so frequently to him by Grievant that he was unable to recall all of the comments made, or the specific dates of these comments. He said that he tried to ignore her, laugh off these comments initially, and that he did not report them to anyone other than [Officer C]. He said he did not feel comfortable complaining about these matters to his supervisor, Sergeant S, because he believed that Sergeant S had overheard similar comments by another officer and ignored the comments. He told investigators that he had had problems in the past with the Lieutenant who referred to him as “white chocolate”, a term he considered offensive. He stated that the Lieutenant and Grievant were personal friends outside of the workplace. Officer H said he had no confidence in either the Captain or the Assistant Superintendent taking action. He believed that the complaint filed by Officer C in November 2011 had been “swept under the carpet” and was not appropriately addressed by supervision. Officer H told the investigators that on December 9, 2011 he left the workplace and took “stress-related” leave. He began receiving counseling to better deal with his experiences at work.<sup>2</sup>

The Employee Relations Manager believed that Officer H’s statements to him were truthful. Officer H appeared to be embarrassed to talk about Grievant’s behavior. Officer H was reluctant to use the same words Grievant had used towards him.

On February 27, 2012, the Employee Relations Manager contacted Officer H’s Counselor and asked the Counselor about the reasons Officer H was receiving counseling. Officer H had given the Counselor authority to disclose the nature of the counseling. The Counselor told the Employee Relations Manager that Officer H’s primary complaints revolve around sexual harassment that he had been experiencing at work. The Counselor noted that Officer H complained of behaviors from unwelcome sexual tension and comments and the physical groping of his genitals by a female coworker.

The Employee Relations Manager interviewed Grievant. He asked Grievant about Officer H’s allegation that she groped his genitals in the control room in August or September 2011. Grievant replied “I don’t recall that incident that occurred in the control room. I’ve never touched him.” When questioned again about her response, Grievant again stated “I don’t recall it at all.”

The Employee Relations Manager asked Grievant why she thought Officer H would fabricate such allegations against her. Grievant replied “To be honest with you, I have no idea.” Grievant stated that Officer H was a good friend of Officer C, and that Grievant and Officer C had “a few words” with each other and that Officer H became angry at her. She also stated that an incident occurred in Muster involving Officer C and that she and others had to write a statement about his actions. Grievant stated that

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<sup>2</sup> The Counselor wrote a letter dated December 7, 2011, indicating that Officer H had “symptoms of depression and anxiety precipitated by stressors in the workplace. It is therefore recommended that he take a leave of absence for 30 days to enhance coping skills. It is recommended that he returned to work on January 9, 2012.”

these were the only reasons she could think of for Officer H to submit a sexual harassment complaint against her.

On March 6, 2012, the Superintendent met with Grievant. The Superintendent asked Grievant whether she had groped Officer H. Grievant's response was that she did not recall doing so. The Superintendent was surprised at Grievant's answer because she believed that an individual should clearly know whether or not she groped another employee. An individual who had not groped another employee would know that and adamantly denied doing so when first asked. The Superintendent perceived Grievant's answer as indicating that there was truth to Officer H's allegations. The Superintendent asked Grievant why she answered that she did not recall groping Officer H. Grievant replied that she was nervous. She stated that she was not attracted to men of Officer H's color. Grievant admitted to engaging in unprofessional behavior in the workplace by talking about sexually inappropriate topics with coworkers. Grievant stated that she and her coworkers mutually talk about "eating pu—y" and "sucking d—k".

### **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>3</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."

Department of Human Resource Policy 2.30 prohibits Workplace Harassment. 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, sexual orientation, 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:

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<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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.
- **Hostile environment** – A form of sexual harassment when a victim is subjected 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.

Agency Administrative Directive 05–004.04, Discrimination and Harassment, restates the standards set forth in DHRM Policy 2.30 and adds:

Any employee who engages in conduct determined to be in violation of this policy, or who encourages such conduct by others, shall be subject to corrective actions under DHRM Policy 1.60, Standards of Conduct, which may include discharge from employment. It shall be a violation for any employee to knowingly make a false complaint under this policy or failed to cooperate with agency investigation of discrimination or harassment.

Grievant engaged in workplace harassment by creating a hostile work environment for Officer H. She engaged in severe behavior by groping Officer H's genitals. Grievant engaged in pervasive repeated behavior by making offensive sexually-oriented comments and proposals for sexual acts over several months. Her behavior was unwelcome by Officer H. Officer H found the work place so intimidating and offensive that he attempted to transfer to another Facility. Under both an objective and subjective standard, Grievant's behavior constituted sexual harassment. Given the severity of Grievant's behavior in this case, the Agency's assertion that her behavior rises to the level of a Group III offense is supported by the evidence. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant testified at the hearing and denied the allegations. Officer H did not testify during the hearing.<sup>4</sup> The question becomes whether the Agency has presented

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<sup>4</sup> At the time of the hearing, Officer H no longer was employed by the Agency and had filed a claim against the Agency for sexual harassment. The Agency lacked the ability to compel Officer H to attend the hearing.



sufficient evidence to meet its burden of proof. In this case, the Hearing Officer concludes that the Agency has presented sufficient evidence to establish its burden of proof based on hearsay evidence for several reasons. First, Officer H was absent for work due to stress caused by Grievant's sexual harassment. This was confirmed by statements from the Counselor. Second, Officer H attempted to leave Facility 1 in a manner so as to avoid raising suspicion and retaliation from his coworkers at Facility 1. Third, Officer H was evasive and reluctant to disclose his concerns to the Superintendent when he spoke with her in January 2012. Fourth, the Superintendent observed Officer H and concluded that he was credible with respect to his allegations. Fifth, Officer H was reluctant to provide details to the Employee Relations Manager and appeared embarrassed to discuss them. The Employee Relations Manager believed Officer H was truthful with respect to his allegations against Grievant. Sixth, when the Employee Relations Manager asked Grievant about Officer H's allegations of groping, she said that she did not recall those incidents. Groping another employee is not something an individual would likely have difficulty recalling. An employee who had not groped another employee should have little difficulty denying doing so. By stating that she could not recall whether she had groped Officer H, Grievant's response suggested that Officer H's allegations against her were true.

Grievant argued that Officer H retaliated against her because she complained about his friend, Officer C. This argument is not persuasive. If Officer H wanted to retaliate against Grievant, he could have initiated his complaint voluntarily and without being compelled by the Superintendent. It is difficult for the Hearing Officer to believe that Officer H would have taken leave from work and sought mental health counseling merely in order to provide a framework to retaliate against 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..."<sup>5</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

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<sup>5</sup> Va. Code § 2.2-3005.

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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Office 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:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
  
101 North 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
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.<sup>6</sup>

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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