

Issue: Group III Written Notice with demotion, pay reduction and transfer (workplace harassment); Hearing Date: 08/10/16; Decision Issued: 08/11/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10842; 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: 10842

Hearing Date: August 10, 2016
Decision Issued: August 11, 2016

PROCEDURAL HISTORY

On June 5, 2015, Grievant was issued a Group III Written Notice of disciplinary action with demotion, disciplinary pay reduction, and transfer for sexual harassment.

On July 2, 2015, 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 July 13, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 10, 2016, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

Agency Party Designee
Agency's Representative

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 Corrections employs Grievant as a Security Officer III at one of its facilities. He had worked as a Security Officer IV at another facility prior to his demotion, ten percent disciplinary pay reduction, and transfer. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked as a Sergeant supervising Officer H and Officer L. Grievant repeatedly invited Officer H to his house. Officer H repeatedly told him she was not interested in him but he continued to ask her to come to his house. Grievant also asked her to go with him to parties. Grievant gave her his telephone number. Grievant told her about the size of his penis.

On one occasion, Grievant was in the Control Booth with Officer H. Grievant stood behind Officer H, pressed his penis against her and rubbed his front against her rear.

Grievant told Officer L he had returned from Miami and he said they should go to Miami together. Officer L said "ok cool." Grievant replied he didn't know if they should go to Miami because he "might send me back to work with a baby in me." Grievant invited Officer L out for drinks and said, "If I take you out for drinks, I'm going to get you drunk and then go home with you." Officer L declined Grievant's invitation. On several occasions, Grievant sent Officer L texts asking her questions about sex and said he wanted to put a baby in her.

Grievant's behavior was not welcomed by Officer H and Officer L.

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

DHRM Policy 2.30 governs Workplace Harassment. It provides:

The Commonwealth 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, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability.

Sexual Harassment is defined as:

Sexual Harassment 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.

Grievant created a hostile work environment based on sex for Officer H and Officer L. Grievant made unwelcomed sexual advances towards them. His advances were repeated and continued after they informed Grievant they were not interested in having a relationship with him. Grievant rubbed his penis against Officer H's rear while they were working in the control booth.

¹ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

² Virginia Department of Corrections Operating Procedure 135.1(V)(C).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

Sexual harassment can be a Group I, II, or III offense. In this case, the Agency has presented sufficient evidence to support the issuance of a Group III offense. In particular, Grievant's action of rubbing his penis against Officer H is sufficient to support a Group III Written Notice.

Upon the issuance of a Group III Written Notice, an agency may remove an employee. In lieu of removal, an agency may suspend, demote with a disciplinary pay reduction, and transfer an employee. Accordingly, the Agency's decision to demote Grievant, reduce his compensation by ten percent, and transfer him to another facility must be upheld.

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"⁴ 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 demotion and disciplinary pay reduction and transfer 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

⁴ Va. Code § 2.2-3005.

Department of Human Resource Management
101 North 14th St., 12th 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 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.⁵

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.