Issue: Qualification-Sexual Harassment; Ruling Date: February 22, 2002; Ruling #2001-135; Agency: Department of Juvenile Justice; Outcome: not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice/ No. 2001-135
February 22, 2002

The grievant has requested a ruling on whether her grievance initiated on December 1, 2000, with the Department of Juvenile Justice (DJJ) qualifies for a hearing. The grievant alleges that she was subjected to a sexually hostile work environment. Specifically, the grievant contends that management's response to her complaint of sexual assault by a cadet was mishandled. For the reasons set forth below, the issues raised in her grievance are not qualified for hearing.

FACTS

The grievant is employed as a senior corrections officer in one of the agency's correctional facilities. On November 3, 2000, at 8:15 a.m., a sixteen-year-old male cadet grabbed the grievant's buttocks while she was removing him from his cell for his morning shower and recreation period. The grievant notified her sergeant then filed a Discipline Report.[1] The sergeant placed the cadet in the shower. At 8:47 a.m., after the grievant removed the cadet from the shower, the cadet asked her if she had charged him for the earlier incident. When the grievant said yes, the cadet then grabbed her between her legs. The grievant stopped the cadet and stated that she would now issue him a "street charge."[2] The cadet stated that he might as well make the charge worth it, and again grabbed the grievant's buttocks. The grievant immediately informed the sergeant of the second incident and asked that an assault charge be filed with the State Police. The sergeant notified the Superintendent, who then called the grievant and asked her about the incident and whether she had suffered any injuries. At one point during the questioning, the Superintendent queried: "how's your ass?" The grievant found the Superintendent's comment highly offensive; however, she discussed the incident with him and requested that he press criminal charges against the cadet through the State Police.

Because he did not observe that the grievant was injured by the cadet, the Superintendent determined that the incident should be addressed internally, without bringing criminal charges against the cadet. The grievant's Discipline Reports were processed the day she submitted them, November 3, 2000, which resulted in two charges of "sexual misconduct"[3] against the cadet. A hearing was held on the charges on November 7, 2000, and a hearing officer found the cadet guilty and ordered him to "96 additional hours of isolation."[4]

[1] Discipline Report, dated November 3, 2000 (time 0811).
[2] A criminal charge for assaulting staff, which is filed with the Virginia State Police.
[3] Offense Hearing Form, "Charge & Offense Plea," dated November 3, 2000.
[4] Offense Hearing Form, "Hearing," dated November 7, 2000.

The Superintendent signed the order carrying out the sanction the same day.[5] Two counts of "sexual misconduct" were also entered on the cadet's institutional record.[6]

On November 7, 2000, several officers at the institution were injured when responding to an altercation between cadets. The Superintendent called the State Police immediately for assistance in pressing criminal charges in their case. When the grievant observed the treatment of these officers' assault incident, she complained to the Assistant Superintendent that her case had been handled much differently – with less concern for her welfare or desire to punish the cadet who allegedly assaulted her. After learning of this complaint by the grievant, and that she had also complained about his inappropriate comment, the Superintendent reconsidered his initial decision and asked a State Trooper already present to assist with the other officers' assault case to interview the grievant. The Trooper interviewed both the grievant and the cadet and served the cadet with a warrant for "sexual assault" that day. The Superintendent also apologized to the grievant at that time for his earlier inappropriate comment. The grievant asserts that the Superintendent did not subsequently keep her informed of the status of the criminal case, and that he failed to relay messages to her from the office of the Assistant Commonwealth's Attorney – actions that the grievant asserts caused the charges to be reduced and the case settled. The Superintendent has responded that he was not responsible for the prosecution of the case by the office of the Assistant Commonwealth's Attorney once it was referred. He also stated that he cooperated fully when he was asked to contact the office and answer questions on December 8, 2000, and that he had no other involvement with the matter.

The grievant initiated her grievance on December 1, 2000, claiming that the Superintendent mishandled her complaint of sexual assault by the following: (1) making an offensive comment to her when she reported the incident; (2) delaying filing criminal charges against the cadet who allegedly assaulted her; (3) failing to keep her informed of the status of the criminal case and failing to relay messages to her from the office of the Assistant Commonwealth's Attorney, which led to the charges being reduced and the case settled; and (4) subjecting her to further harassment from other cadets who observed that the cadet was not prosecuted criminally.[7]

DISCUSSION

Sexual Harassment/Hostile Environment (Claims 1-4)

State policy prohibits sexual harassment, which is a form of sexual discrimination defined as including "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or

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[5] Ward Discipline Procedure, Isolation Approval, November 7, 2000, signed by the Superintendent.

[6] [Cadet's] Institution Violation record.

[7] The management actions alleged in claims (3) and (4) are not specifically stated on the grievant's Form A or attachments (which simply state the issues presented as "[i]nappropriate comment being made, [s]exual assault occurred and I feel [my complaint] was not handled in a timely manner"). However, the facts presented during this Department's investigation justify this characterization of the grievant's complaint.

offensive work environment."[8] In order to qualify a hostile work environment sexual harassment claim for hearing, the grievant must present evidence raising a sufficient question as to whether the conduct in question was (1) unwelcome; (2) based on her sex; (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[9] An employer is liable only "where it had 'actual or constructive knowledge of the existence of a sexually hostile work environment and took no prompt and adequate remedial action.'"[10] Consistent with this, courts have held that "[p]rison liability may indeed apply when, for example, the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior."[11]

The record clearly supports that the grievant found the cadet's conduct unwelcome (element 1). As stated, the grievant promptly reported the conduct to the sergeant in charge and to the Superintendent and filed two incident reports. She also attempted to personally file charges of sexual assault against the cadet with the local magistrate. These actions show the grievant's concern over the misconduct and her unwillingness to tolerate further harassment. In addition, the grievant has met element (2) because it is undisputed that the conduct was sexual in nature (--e.g., the institution's records document the cadet's behavior as two counts of "sexual misconduct").

The grievant has also established that her work environment was rendered hostile (element 3). Notwithstanding the limited number of actions at issue, they involved unwelcome, forcible physical contact with the most intimate parts of the grievant's body. Courts have "repeatedly recognized that even one act of harassment will suffice if it is egregious."[12] A fact finder could reasonably interpret this conduct as sufficiently invasive, humiliating and threatening to alter the grievant's work environment, even though it was an isolated occurrence.

The grievant cannot establish her sexual harassment claim, however, because her evidence does not raise a sufficient question that the agency has some liability for the harassment (element 4). As stated above, the agency will not be liable for the hostile environment absent proof that it failed to take appropriate remedial measures once apprised of

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[8] *See* Department of Human Resource Management (DHRM) Policy No. 2.15(II)(B).
[9] Mikels v. City of Durham, 183 F.3d 323, 329 (4th Cir. 1999).
[10] Spicer v. Virginia Dep't of Corrections, 66 F.3d 705, 710 (4th Cir. 1995); Mikels v. City of Durham, 183 F.3d 323, 329 (4th Cir. 1999). Note that in a case of *supervisor* harassment where the harassment culminates in a tangible employment action (such as job termination or demotion), an employer is automatically liable unless it can establish that: (1) it exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the victim unreasonably failed to take advantage of any preventative or corrective opportunities provided. *See* Burlington Industries v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
[11] Weston v. Commonwealth of Pennsylvania Department of Corrections, 251 F.3d 420, 427 (3rd Cir. 2001); also see Slayton v. Ohio Dept. of Youth Services, 206 F.3d 669, 677-678 (6th Cir. 2000)(holding that the general rule against prison liability for inmate conduct does not apply when the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior).
[12] Hostetler v. Quality Dining, Inc., 218 F.3d 798 at 806-808 (7th Cir. 2000); Ferris v. Delta Airlines, Inc. 2001 U.S. App. LEXIS 27191 (2nd Cir. 2001).

the harassment.[13] The evidence shows that the agency promptly investigated and charged the cadet, and disciplined him with an additional 96 hours of isolation. Additionally, when management learned of the Superintendent's inappropriate comment to the grievant, he was counseled about his unprofessional behavior.[14] Also, there is no evidence that the harassment continued after the grievant's complaint on November 3, 2000 (claim 4). While the grievant's concerns over the Superintendent's unprofessional comment (claim 1), his perceived delay in calling the State Police (claim 2), and his alleged failure to relay information and the message(s) in question (claim 3) are all understandable, they do not demonstrate that the agency failed to take appropriate remedial measures once she made her complaint.

Misapplication or Unfair Application of Policy (Claims 1-4)

The conduct the grievant contends constitutes a misapplication or unfair application of policy is the same as that cited above. In support of her claims that policy was applied unfairly in her case, the grievant points to the Superintendent's handling of the above-cited incident of November 7, 2000, when several officers were assaulted in an altercation between cadets. The grievant asserts that the Superintendent called the State Police during or immediately after that incident, and that he did not subject the officers in question to offensive remarks or fail to convey information to them from the Assistant Commonwealth's Attorney's office about their case.

Although the Superintendent called the State Police four calendar days --one of his workdays-- later in the grievant's matter than in the case cited (claim 2), this is not sufficient to show a misapplication or unfair application of policy. Moreover, while the Superintendent's offensive comment was clearly unprofessional (claim 1), he nevertheless called the State Police, and did so within a reasonable amount of time. Similarly, even assuming the Superintendent acted unprofessionally by failing to convey a message to the grievant from the Assistant Commonwealth's Attorney (claim 3), this is not sufficient to show a misapplication of policy. There is no policy requirement that the Superintendent be the point of contact between officers and the Assistant Commonwealth's Attorney in such cases, and no other evidence that the grievant could not have been contacted (assuming that she was not) by numerous other means than through messages left with the Superintendent. Finally, as stated above, there is no evidence presented that the agency's handling of the grievant's complaint subjected her to further harassment by other cadets (claim 4).

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[13] Spicer v. Virginia Dep't of Corrections, 66 F.3d 705, 710 (4th Cir. 1995); Mikels v. City of Durham, 183 F.3d 323, 329 (4th Cir. 1999). See also Burlington Industries v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[14] The Superintendent is no longer employed by the agency. It should be noted that while the Superintendent's comment "how's your ass?" was unquestionably inappropriate, his choice of words used to inquire as to the well-being of the grievant following the attack was not different from the language used by the grievant to describe her attack. The grievant wrote in her 11/03/2000 Discipline Report that the cadet "grabbed my ass." Under the standard set forth in Faragher, the sexually objectional environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so. Faragher, 524 U.S. at 787.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, she should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

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Neil A.G. McPhie, Esquire
Director

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