

Issues: Group II Written Notice (failure to follow policy), Group II Written Notice (failure to follow policy), demotion and pay reduction; Hearing Date: 05/16/18; Decision Issued: 05/25/18; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 11182; Outcome: Partial Relief; **Administrative Review: Ruling Request received 06/11/18; EEDR Ruling No. 2018-4742 issued on 07/16/18; Outcome: Remanded to AHO; Remand Decision issued 07/31/18; Outcome: Second Group II upheld along with demotion and salary reduction; Administrative Review: Ruling Request on 07/31/18 remand decision received 08/14/18; EEDR Ruling No. 2019-4769 issued 09/06/18; Outcome: AHO's Remand Decision affirmed.**

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,  
OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

IN RE: DEDR CASE NO.: 11182

### **DECISION OF HEARING OFFICER**

HEARING DATE: MAY 16, 2018

DECISION DATE: MAY 25, 2018

#### **I. PROCEDURAL BACKGROUND**

The agency issued the grievant two Group II Written Notices on December 18, 2017. The grievant filed a Form A to each disciplinary action on January 11, 2018. The agency qualified the grievances for hearing on February 22. I was appointed as Hearing Officer on March 20. I conducted a prehearing conference call with the advocates for the parties on March 26. Because the advocates had not received copies of certain documents related to the matter prior to the hearing, documents were exchanged on the hearing date without objection. The grievant and his advocate also received video footage the morning of the hearing. The hearing was conducted on May 16 and lasted approximately four and one-half hours.

#### **II. APPEARANCES**

The agency was represented by an advocate. It presented four witnesses in-person and one by telephone. I accepted eleven agency exhibits into evidence.

The grievant testified and presented two additional witnesses. He offered twenty-two exhibits. An advocate represented him.

#### **III. ISSUES**

A. Whether the agency properly issued a Group II Written Notice for violating Operating Procedure 310.2 for violation of the rules regarding password security?

B. Whether the agency properly issued a Group II Written Notice for violating Operating Procedures 145.3 and 135.3 for workplace harassment and bullying?

#### **IV. FINDINGS OF FACT**

The agency, at all relevant times, employed the grievant as a Corrections Officer holding the rank of Lieutenant. One of his job duties was to input the hours worked by offenders into a database. This responsibility was to be performed by only the grievant and one other individual. On October 13, 2017 the grievant requested a Corrections Officer working under him to assist in inputting the information. The grievant had fallen behind in this duty due to being off work previously. The database to be used was a restricted one. For anyone to assist the grievant, that person would either be required to use the grievant's computer or to be provided with his password. The grievant provided his password to the Corrections Officer and the work was performed by him.

Later, the Corrections Officer reported to a Sergeant at the facility (also one of his superior officers) the grievant's providing him the password. The Sergeant was able to confirm, by logging into the database, that the password provided by the Correction Officer as being that of the grievant was correct. Approximately two weeks later the Sergeant was finally able to report to the Chief of Housing that the grievant had provided the password to the Corrections Officer.

In the interim, on October 18, 2017, the Corrections Officer used the grievant's password to send an e-mail to a Captain at the facility. The e-mail appeared to come from the grievant. It praised the Correction Officer and one other officer for their work performance. It stated that the Corrections Officer has helped out the grievant in putting in time for workers. The e-mail stated

that “these two officers need an incentive pay raise due to the help they give me and make my job so much easier.” The Captain read the e-mail and concluded without investigation that it was not from the grievant. Upon having a chance encounter with him shortly thereafter, the Captain advised him that he needed to keep an eye on his computer, that apparently someone had been using it. The grievant did not respond directly to the Captain but did change his password later that day.

After receiving the information from the Sergeant regarding the password, the Chief of Housing commenced an investigation into the matter. The Corrections Officer confirmed the information he had provided to the Sergeant and admitted that he had sent the e-mail dated October 18. In a meeting with the Chief of Housing, the grievant denied having provided the password to the Corrections Officer. That meeting occurred on November 27.

On November 29 the grievant spoke with the Corrections Officer by telephone. He asked the officer if he had been contacted by anyone regarding the password. The officer lied and replied that he had not. The grievant then encouraged him to not disclose that the password had been given. He discussed with the officer arrangements that could be facilitated by the grievant which would possibly result in the officer being promoted or otherwise advancing his career. Approximately one hour later the Corrections Officer reported the substance of the telephone call to the Chief of Housing.

The Sergeant who used the password of the grievant to log in to the protected database was given an oral counseling by the agency. The Corrections Officer who sent the e-mail was issued a Group I Written Notice.

## V. ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual (GPM)*. This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the *GPM* provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It also has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The *GPM* is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolution, *Rules for Conducting Grievance Hearings*. These *Rules* state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The agency Operating Procedure 310.2(VI)(C) prohibits certain activities regarding passwords in order to protect the security of digitally maintained information. Employees are not allowed to “share accounts or allow others access through their user ID” without prior approval. Although the grievant denies having provided the password to the Corrections Officer, I find the officer’s version to be the more credible one. The officer timely reported the violation

to the Sergeant. The Sergeant then used reasonable efforts to make a timely report to the Chief of Housing. As discussed in greater detail below, I do not find that these actions were part of a plan of collusion against the grievant.

The evidence is undisputed that the Corrections Officer sent an e-mail using the account of the grievant on October 18. Although questions exist regarding the information contained on Exhibit 9 of the agency, I do find that the e-mail was sent to the Captain on that date. The most likely basis for that occurring was the voluntary transmission of the password by the grievant to the Corrections Officer. The use of the password by the officer after having made the report to the Sergeant a few days earlier was, to put it mildly, unwise. The fact that the officer used the e-mail, whether jokingly as he claimed in his testimony or not, to self-promote indicates a lack of concern that would be exhibited if he had inappropriately acquired the password without the knowledge of the grievant.

To support its issuance of the discipline regarding the telephone call, the agency recited in the Written Notice Operating Procedures 145.3 and 135.3. I do not find either of those policies to apply to this situation.

Agency Operating Procedure 145.3 is labeled "Equal Employment Opportunity." The stated purpose is one of providing "Equal Employment Opportunity... in regard to all employment practices, to educate employees in the recognition and prevention of discriminatory practices and workplace harassment, and to provide an effective means of preventing and eliminating such discrimination, harassment, and retaliation from the workplace." The Operating Procedure is clearly the agency's policy to implement the Federal and State prohibitions against certain types of discrimination. The policy defines discrimination in the terms of the rights of a member of a protected group. It recites the common factors of race, sex, color, national origin,

religion, sexual orientation, gender identity, age, political affiliation, veterans status, or an otherwise qualified person with a disability. No argument has been made that the Corrections Officer falls within a protected class or that the alleged harassment by the grievant was based on membership in any of those classes.

Agency Operating Procedure 135.3 is labeled “Standards of Ethics and Conflict of Interest.” The stated purpose is to insure that employees “understand and comply with requirements to act professionally and ethically.” This aspirational language would seem to cover the conduct of the grievant in placing the telephone call to the Corrections Officer. It would also seem to cover, however, an almost unlimited number of activities. Section IV(C) of the Operating Procedure states what is prohibited conduct under the procedure. Each of the items listed in that section reflect concerns over conflicts of interest and expected standards of behavior with regard to gifts or other similar matters that could affect, or appear to affect, the conduct of an employee in the performance of his official duties. I cannot find that any of the purposes of the Operating Procedure were frustrated by the grievance making the telephone call to the Corrections Officer. I am not condoning his action in making the call and attempting suborn a falsehood.

Agency Operating Procedure 135.1 is labeled “Standards of Conduct.” This is the procedure under which an employee receives the type of formal discipline issued to the grievant in this case. The agency issued the discipline to the grievant pursuant to this policy. At the hearing, the argument was made that the telephone call constituted a violation of the prohibition against workplace harassment. The Commonwealth’s Department of Human Resource Management Policy 2.30 would have supported the issuance of this discipline. The agency, however, failed to recite that particular policy as being the basis for the issuance of the Notice.

This occurred despite the fact that the Chief of Housing included in her investigation report to the Assistant Warden a recommendation that the workplace harassment policy be used. I find that the agency is limited to using the actual policies cited in the charging document.

Also, that Written Notice states that the grievant “has active Group II Written Notice for violation of policy.” No evidence was presented of the grievant having a separate active Group II Written Notice aside from the one issued concurrently for the information security violation. The use of that Group II Written Notice as a considered circumstance, as phrased, was improper.

The grievant argues that he was disciplined in retaliation for a complaint made by him against a superior officer, a Major, in August 2017. His argument appears to be that the events involving the Corrections Officer, Sergeant, and Chief of Housing are part of a plan to discipline him. As stated above, the heading on the copy of the subject e-mail (Agency Exhibit 9) is curious and confusing. The grievant further points out that the meeting between the Sergeant and the Corrections Officer could not have occurred on October 13 as they each testified. These factors do cast some doubt on the agency’s version of events. I cannot ignore, however, that both the Sergeant and Corrections Officer testified to self-reporting their improper activities. Although the Corrections Officer did not admit to the e-mail immediately, the message was easily traceable to him, his being one of the two officers mentioned in it. If this was a criminal case, the grievant may very well have a winning argument based on the failure to prove the charges beyond a reasonable doubt. The standard of proof, however, is a preponderance of the evidence. The agency met its burden with regard to the events. The suspicious factors raised by the grievant are not sufficient to contradict the agency’s substantial evidence for me to find that it has not met its burden of proof.



The grievant further argues that the issuance of a Group II Written Notice is unfair, given the relative lack of discipline to the Sergeant and Corrections Officer. The Sergeant received no formal counseling because his use of the password of the grievant was for the purpose of verifying information provided to him by a subordinate officer, I cannot find that the lower level of discipline was inappropriate and evidence of discrimination against the grievant.

The Corrections Officer received a Group I Written Notice for his sending of the e-mail. That action by him was certainly ill-advised. The evidence presented, however, is that the Captain did not take the message seriously, nor were the operations of the agency adversely impacted. Giving due deference to the discretion of the agency, I find that the issuance to the officer of a lower level of discipline not to be evidence of discrimination against the grievant.

## **VI. DECISION**

I affirm the issuance of the Group II Written Notice for the violation of Operating Procedure 310.2. I reverse the issuance of the Group II Written Notice for the violation of Operating Procedures 145.3 and 135.3. Because no additional sanction was imposed on the Group II Written Notice I am affirming, the grievant shall be restored to his prior pay band and receive back pay to compensate him for the disciplinary pay reduction that took effect on December 25, 2017. He shall further be restored to any benefits adversely affected by the issuance of that Group II Written Notice.

## **VII. 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].

RENDERED this May 25, 2018

/s/Thomas P. Walk  
Thomas P. Walk, Hearing Officer

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

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,  
OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

IN RE: DEDR CASE NO.: 11182

### **DECISION UPON RECONSIDERATION**

By Ruling No. 2018-4742, the Department of Human Resource Management has remanded this matter to me for reconsideration of certain issues. I will discuss them in the order presented in the Ruling. My Findings of Fact in my decision of May 25, 2018 are incorporated herein.

#### Workplace Harassment:

The agency has argued that its Operating Procedure 145.3 is broad enough to cover any type of workplace harassment, whether the actions were against an individual with a protected status or not. As noted in Ruling No. 2018-4742, the definition of “Workplace Harassment” includes any unwelcome verbal, written or physical conduct that denigrates or shows hostility or a version towards a person. The definition has a second prong - that the conduct either has the purpose or effect of creating a difficult work environment or unreasonably interferes with an employee’s work performance or opportunities or compensation. As discussed in my original decision, the questioned conduct of the grievant was designed to influence a fellow employee to relate a false version of events if questioned. That version was more favorable to the grievant than the facts as found by me. The telephone call with the other employee was more a failed attempt to curry the favor of the employee. Therefore, I cannot find that the grievant denigrated or showed hostility or aversion toward the other employee. Without those findings, the question of whether a hostile environment was created becomes of no

relevance.

I have also been directed to revisit whether the grievant violated DHRM Policy 2.30 dealing with workplace harassment. The actions of the grievant were not in violation of that policy. The definition of harassment in that policy requires that the victim be within a protected class. There was no evidence presented that the fellow employee of the grievant was such a victim. Accordingly, I find that the grievant was not guilty of workplace harassment in violation of agency Operating Procedure 145.3 or DHRM Policy 2.30.

Unethical Conduct:

The agency has asserted that the conduct of the Defendant during the subject telephone call constituted unethical conduct under its Operating Procedure 135.3. In a preliminary section that document states that agency employees “shall conduct themselves by the highest standard of ethics so that their allegations will not be construed as. . . conduct unbecoming an employee of the Commonwealth.” Other general statements are found in the policy regarding the expected conduct of an employee.

The conduct of the grievant was clearly improper and unbecoming of an employee of the agency. Operating Procedure 135.3, in addition to the aspirational statements mentioned above, contains a lengthy list of types of conduct that are prohibited. The action of the grievant does not fall within any of the specifically listed categories.

Because of the determination set forth in Ruling No. 2018-4742 that the general, aspirational statements found in Operating Procedure 135.3 are sufficient to support a finding of misconduct and issuance of a written discipline, I hereby uphold the issuance of the Group II Written Notice that my original ruling vacated. I note, however, that the agency did not specifically recite language about “conduct unbecoming” in the issuance of the written notice.

That fact distinguishes this case from the case of *Virginia Dept. of Corrections v. Compton*, 47 Va. App. 202, 623 S.E. 2d 397 (2005). The grievant here did not raise the argument raised by the grievant in *Compton* that due process considerations prohibited the agency from relying on the “conduct unbecoming” language. Therefore, I express no opinion on that issue.

As stated above, I hereby uphold the issuance of the Group II Written Notice for the unethical conduct of the grievant. My prior order restoring any lost pay and benefits is hereby vacated.

ENTERED this July 31, 2018

/s/Thomas P. Walk  
Thomas P. Walk, Hearing Officer