

Issue: Group I Written Notice (creating hostile work environment); Hearing  
Date: March 19, 2002; Decision Date: March 26, 2002; Agency: Department  
of Corrections; AHO: David J. Latham, Esquire; Case Number: 5397



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5397

Hearing Date: March 19, 2002  
Decision Issued: March 26, 2002

**PROCEDURAL ISSUE**

Due to availability of the participants, the hearing could not be docketed until the 28<sup>th</sup> day following appointment of the hearing officer.<sup>1</sup>

**APPEARANCES**

Grievant  
Representative for Grievant<sup>2</sup>  
Ten witnesses for Grievant

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<sup>1</sup> § 5.1 of the *Grievance Procedure Manual* requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

<sup>2</sup> Grievant's representative was the warden who had promoted grievant to assistant warden. The warden was transferred to another facility in June 2001. § 5.8.1 of the *Grievance Procedure Manual* permits parties to select a representative of their choice; the representative does not have to be an attorney.

Warden  
Legal Assistant Advocate for Agency  
Six witnesses for Agency

### ISSUES

Was the grievant's conduct between October 25, 2000 and June 27, 2001 subject to disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

### FINDINGS OF FACT

The grievant filed a timely appeal from a Group I Written Notice issued on October 30, 2001 because he created a hostile work environment.<sup>3</sup> Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing. The Department of Corrections (Hereinafter referred to as "agency") has employed the grievant for eight years. On the date discipline was issued, grievant was an assistant warden.<sup>4</sup>

Grievant had worked at another facility from 1994 to 2000 as a counselor. In May 2000 he was transferred to the current facility and promoted to assistant warden of programs. Grievant had three main areas of responsibility – the treatment program, the medical department and the inmate records unit. The warden who promoted grievant is known as a strict disciplinarian.<sup>5</sup> Among the warden's priorities was making an improvement in the operation of the treatment program. He made it clear to grievant that he was expected to closely manage the counselors and improve the performance of those who were perceived as slackers. The warden was especially concerned that certain counselors appeared to be spending too much time in the medical department.

On April 3, 2001, a female counselor filed a grievance alleging that grievant was creating a hostile work environment.<sup>6</sup> She contended that grievant directed her to type correspondence even though the department has a secretary who is supposed to perform such work. Grievant also directed counselors to deliver and pick up library books for inmates even though this is the librarian's duty. Grievant would threaten her with discipline for missing various deadlines, when it was grievant who had not routed requests to her in a timely fashion. Grievant also directed the female counselor to sit at tables with multiple inmates

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<sup>3</sup> Exhibit 14. *Grievance Form A*, filed November 28, 2001.

<sup>4</sup> After this discipline was issued, grievant voluntarily requested a demotion to counselor and a transfer to another facility.

<sup>5</sup> The Human Resources Manager stated that the warden is the strictest disciplinarian of the seven wardens for whom she has worked.

<sup>6</sup> Exhibit 1. Grievance filed by female counselor, April 12, 2001.

– a security violation at this maximum–security facility.<sup>7</sup> The female counselor indicated that she had been under stress because of grievant's actions. She resigned her employment when she filed the grievance because she expected serious repercussions from filing a grievance.

On June 21, 2001, another female counselor filed a grievance complaining that grievant was creating a hostile work environment, was unprofessional, and was embarrassing her.<sup>8</sup> She maintained that grievant avoided working with her, ignored efforts to address departmental issues and created negativity. She was unaware that anyone else had filed a grievance about the hostile work atmosphere. When she filed her grievance, this counselor was actively seeking employment elsewhere because of the oppressive work environment and low morale in the treatment unit.

In June 2001, a new warden arrived at grievant's facility and the warden who had promoted grievant was transferred to another facility. On July 2, 2001, a male counselor filed a grievance alleging that grievant had created a hostile work environment by making personal attacks against him, which resulted in stress-related physical problems and lost time from work.<sup>9</sup> He indicated that grievant had been harassing him since at least October 2000. On October 25, 2000, grievant interrogated the male counselor about why he was speaking to a teacher in the education area.<sup>10</sup> Grievant threatened the male counselor with the possibility of discharge, told him he was not doing his job<sup>11</sup> and directed the counselor not to have any further contact with the teacher.

On January 11, 2001, grievant met with the above male counselor and a female counselor. It was implied that grievant and the warden suspected the two counselors were having an affair. The male counselor is married, as is the female counselor. They had a friendship at work and would often spend lunchtime or break time together, however, the relationship was nothing more than friendship. Both counselors emphatically denied any relationship other than friendship. Grievant told the two to separate themselves from each other and that if they did not, one of them would be transferred to another facility. The incident that prompted the male counselor to file his grievance was a staff meeting on June 26, 2001 during which grievant asked each counselor if they wanted to address any issues. The male counselor made some suggestions for

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<sup>7</sup> Grievant had transferred to this facility from a facility that is two security levels lower. While appropriate security measures are in place at his former facility, directives at the current facility (a super maximum-security institution) require significantly stricter security to assure the protection of staff, visitors and inmates.

<sup>8</sup> Exhibit 6. *Grievance Form A*, filed June 21, 2001.

<sup>9</sup> Exhibit 1. *Grievance Form A*, filed July 2, 2001.

<sup>10</sup> The teacher in question was the former assistant warden of programs; she was removed by the warden and subsequently accepted a teaching position with the Department of Correctional Education at the same facility.

<sup>11</sup> On October 20, 2000, grievant gave the male counselor his annual performance evaluation and told him he was doing a good job.

certain procedural changes. On June 27, 2001, grievant called the male counselor into his office and expressed his displeasure about the counselor's suggestions, stating that they shouldn't have been addressed during the meeting.

The agency assigned a special agent, who reports to the central office in Richmond, to conduct an investigation. Seven counselors and the treatment program's secretary who were interviewed during the investigation felt that grievant created a working environment that was hostile. In particular, they cited grievant's frequent threats of discipline (rather than working with staff to correct problems), his inability to make decisions, his habit of blaming staff for missed deadlines when grievant was responsible for the delay, and his negativity in staff meetings. The departmental secretary confirmed that counselors would complete work and turn it in to grievant on time but that grievant would retain the work until after the deadline and blame counselors for the delay. Two counselors felt that they personally were not subjected to a hostile work environment but had observed that grievant treated three other counselors differently and created a work environment that appeared oppressive for those three. Four counselors did not sense a hostile work environment but feel that grievant needs to improve his people and communication skills. Only two counselors had nothing negative to say about the grievant.<sup>12</sup>

Multiple witnesses during the hearing attested to low morale in the treatment unit during grievant's supervision of the area. Grievant was variously described as curt and short in dealing with staff, frequently threatening discipline, rude, frustrated and angry during staff meetings, disrespectful to subordinates and embarrassing counselors by counseling them in front of other employees.

Following completion of the investigation, the Warden, human resources and the central office reviewed the matter. It was decided that grievant should be given a Group I Written Notice for creating a hostile work environment.<sup>13</sup>

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

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<sup>12</sup> Exhibit 1. *Report of Investigation*, August 23, 2001.

<sup>13</sup> Exhibit 7. *Written Notice*, issued October 30, 2001.

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>14</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training<sup>15</sup> promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I offenses include acts and behavior that are the least severe in nature. The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department.<sup>16</sup> Section 5-10.15 of the DOC Standards of Conduct addresses those offenses that include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force. One example of a Group I offense is inadequate or unsatisfactory job performance.

Grievant argues that the evidence in this case does not support a finding of "hostile work environment" as defined in cases brought pursuant to Title VII of the Civil Rights Act of 1966.<sup>17</sup> Grievant is correct because there is no evidence

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<sup>14</sup> § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

<sup>15</sup> Now known as the Department of Human Resource Management (DHRM).

<sup>16</sup> Exhibit 8. DOC Procedure Number 5-10, *Standards of Conduct*, June 1, 1999.

<sup>17</sup> The courts have interpreted the law to bar "hostile work environment" harassment, speech or conduct that is (i) "severe or pervasive" enough to (ii) create a "hostile or abusive work

that he discriminated on the basis of any of the protected classes identified by the courts. However, his reliance on this argument is misplaced because the discipline grieved herein is not a Title VII action. The employer disciplined grievant because his actions as a manager created a work environment that was perceived by many of his subordinates as hostile. Grievant's behavior affected subordinates irrespective of their gender, ethnicity or other status. Thus, the defenses grievant might utilize in a Title VII action are not applicable in this case. The agency has the burden to demonstrate by a preponderance of the evidence, only that grievant's actions created a work environment or atmosphere that was oppressive or hostile.

After careful evaluation of the evidence in this case, it is concluded that the agency has borne the burden of proof necessary to show that grievant's actions did create a work environment that was perceived as hostile by most of his subordinates. Grievant undoubtedly believed that he was acting in the best interest of the agency by following the warden's instructions and by attempting to improve the performance of subordinates. However, the facts reveal that the manner in which grievant attempted to accomplish these objectives was harsh, abrasive, demoralizing, and even demeaning to some subordinates. Former president Theodore Roosevelt is perhaps best known for his motto, "Walk softly and carry a big stick." Although grievant carried, and brandished, a big stick (the threat of discipline), he failed to walk softly (by treating employees politely, courteously and respectfully).

Grievant argues that many of the events complained of by counselors occurred more than thirty days prior to the filing of their grievances. The general rule is that grievances "must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute."<sup>18</sup> However, a recognized exception provides that when one is demonstrating a prolonged pattern of conduct (such as harassment or an oppressive work environment), examples of such conduct beyond the 30-day period may be used to support the allegation.<sup>19</sup>

Grievant suggests that several of the counselors engaged in a conspiracy to get him removed from his position. It is understandable that grievant might believe his subordinates were acting collusively. However, other than suspicion, grievant has offered no testimony or evidence to support his conspiracy theory. While three subordinates filed grievances against him, they were filed over a three-month period. There is no evidence that any of the counselors knew that others had filed grievances. Each grievance is supported by evidence that was subsequently corroborated by an independent investigation. Moreover, those

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environment" (iii) based on race, religion, sex, national origin, age, disability, veteran status, or, in some jurisdictions, sexual orientation, political affiliation, citizenship status, marital status, or personal appearance, (iv) for the plaintiff and for a reasonable person.

<sup>18</sup> § 2.2 EDR *Grievance Procedure Manual, Ibid.*

<sup>19</sup> The instant decision draws no conclusion as to whether the grievances filed by counselors during the first half of 2001 met the grievance access requirements.

who grieved had no assurance that their grievances would result in grievant's removal. Rather, they sought only relief from the oppressive atmosphere in which they were working. Finally, the action ultimately taken against grievant did not remove him but only disciplined him at the lowest possible level.

Grievant also speculates that some of his subordinates were pursuing grievances against him as a way of striking back against the former warden. The former warden had promoted grievant into his position and is, by all accounts, a strict disciplinarian. Grievant acknowledged that he had adopted the aggressive management style favored by the former warden but stated that he had not intended to create a hostile working environment. Grievant's loyalty to the former warden is admirable and his adoption of the warden's strict disciplinary attitude understandable. However, the preponderance of evidence reflects that grievant went beyond what the warden may have intended by being overly oppressive to subordinates.

Grievant also contends that the agency's independent investigator was biased against both grievant and the facility in which he worked. However, grievant has offered no evidence to support this allegation. The investigator is a special agent, with extensive law enforcement experience and training in conducting internal investigations. His report appears objective and devoid of bias.

Grievant notes that the new warden who disciplined him had not been at the facility long enough to become fully acclimated to the situation. The new warden has many years of service with the agency and had been a warden prior to his transfer to this facility. He went through a careful and deliberative process, supported by an independent investigation, and human resource department agreement, before issuing the discipline. There is nothing to suggest that the warden acted either inappropriately or precipitously.

Grievant suggests that the disciplinary action should be removed because he was not counseled prior to the action. When considering what type of corrective action to utilize, management can opt between verbal counseling or more formal action in the form of a written notice. Each case must be decided on its own merits. In this instance, management felt that the oppressive atmosphere had existed for several months and was pervasive enough that mere counseling would not send a strong enough message. The evidence herein is sufficient to conclude that management's decision was not unreasonable.

The discipline given was a Group I Written Notice – the lowest level of disciplinary action available. The role of supervision and management is to facilitate accomplishment of the agency's mission. While discipline is sometimes a necessary function of management, each manager should strive on a daily basis to create a harmonious work environment. A manager who creates a work environment that is hostile is not performing satisfactorily. A manager who



frequently threatens employees with discipline, accuses employees of illicit relationships, acts rude or dismissive, and undercuts the work of subordinates is performing his job unsatisfactorily. In this case, notwithstanding his denials, the preponderance of evidence establishes that grievant's job performance was unsatisfactory – a Group I offense.

### DECISION

The decision of the agency is hereby affirmed.

The Group I Written Notice issued on October 30, 2001 is AFFIRMED. The Written Notice shall be retained in the grievant's personnel file for the period specified in Section 5-10.19.A of the Standards of Conduct.

### APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the

decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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David J. Latham, Esq.  
Hearing Officer