Issue: Group II Written Notice with Salary Reduction, Demotion and Transfer (creating/allowing a hostile work environment; failure to comply with established written policies); Hearing Date: July 9, 2002; Decision Date: July 22, 2002; Agency: Virginia Department of Transportation; AHO: David J. Latham, Esquire; Case Number: 5457; **Administrative Review: Hearing Office Reconsideration Request received 08/01/02; Reconsideration Decision Date: 08/15/02; Outcome: Insufficient basis to warrant changing decision; Administrative Review: EDR Ruling Request received 08/01/02; EDR Ruling Date: 09/19/02 [Ruling #2002-152]; Outcome: HO did not abuse discretion or exceed authority. Administrative Review: DHRM Ruling Request received 08/01/02; DHRM Ruling Date: 08/23/02 Outcome: No policy violated found; no reason to interfere with decision. Judicial Review: Appealed to the Circuit Court in the County of Louisa on 10/17/02; Outcome: Court upheld HO's decision; found not contradictory to law [CL4321]; Date of decision: 11/26/02**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5457

Hearing Dates: July 9 & 10, 2002
Decision Issued: July 22, 2002

PROCEDURAL ISSUES

Due to availability of the participants, the hearing could not be docketed until the 41st day following appointment of the hearing officer.[1]

Grievant seeks as part of his relief "monetary damages including payment of grievant's attorney's fees and costs."[2] The grievance process authorized by the General Assembly does not include a provision for monetary damages. Hearing Officers have the authority to award back pay if a suspension is removed, but they do not have authority to award monetary damages or attorney fees.[3]

[1] § 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.
[2] Exhibit 16, Grievance Form A attachments, filed March 14, 2002.
[3] § 5.9, Department of Employment Dispute Resolution *Grievance Procedure Manual,* effective July 1, 2001.

APPEARANCES

Grievant
Attorney for Grievant
Seven witnesses for Grievant
District Construction Engineer
Attorney for Agency
Legal Assistant Advocate for Agency
Eight witnesses for Agency

ISSUES

Did the grievant's conduct warrant 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 II Written Notice issued for creating/allowing a hostile, intimidating and offensive work environment and for failure to comply with established written policies over a period of time.[4] As part of the disciplinary action, the grievant's salary was reduced by ten percent, he was demoted, and he was transferred to the central office.[5] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Transportation (VDOT) (hereinafter referred to as "agency") has employed grievant as resident engineer for 34 years. His performance evaluation for the 2000-2001 performance cycle rated him a contributor.[6] Grievant has one other active disciplinary action – a Group II Written Notice issued on February 13, 2002 for interfering with an investigation and retaliating against employees. That discipline was grieved, appealed to a hearing and affirmed by a decision of the hearing officer.[7]

In January 2002, an employee whose employment had been terminated filed a complaint with the agency's central office. Central office notified grievant on January 29, 2002 that investigators would be arriving at his residency on

[4] Exhibit 16. *Grievance Form A*, filed March 14, 2002.
[5] Exhibit 15. Written Notice, issued March 1, 2002.
[6] Exhibit 23. Performance evaluation, October 29, 2001.
[7] Decision of Hearing Officer # 5455, issued July 15, 2002

February 4, 2002 to conduct interviews with employees. A human relations consultant and an equal employment opportunity investigator came to the residency and conducted interviews with nine employees on February 4, 2002. Interviewees expressed multiple concerns that went well beyond the initial complaints of verbal abuse, disparate treatment, and religious discrimination that had been lodged by the discharged employee. The investigators concluded that there was significant stress and tension in the office and that the grievant had interfered with the investigation, retaliated against employees who participated in the interviews, and created a hostile work environment.[8]

One female employee cried during her interview, one male was trembling, and two others were visibly nervous. Two female employees brought documents to show the interviewers but kept them concealed on their person until they were inside the conference room. Several employees either whispered or talked in very low voices because they were apprehensive that someone might be listening outside the conference room. Most indicated that they feared some form of retaliation as a result of speaking with the investigators. On the morning after the interviews, grievant sent an e-mail message to only the nine employees who had been interviewed the preceding day that "intimidated," "scared," and "hurt," many who feared that grievant intended to retaliate against them. Some recalled that grievant had been observed in the past to say, "I never forgive." In the afternoon, grievant distributed a proposed reorganization of the residency. The reorganization significantly reduced the responsibilities of the assistant resident engineer (who was one of those interviewed) and elevated significantly the responsibilities of the transportation operations manager (who was not interviewed). In addition a memorandum attached to the reorganization chart stated that the assistant resident engineer (ARE) would be moved to a smaller and significantly less desirable office, while the program specialist who serves as the resident engineer's secretary would be moved into the ARE's office. Most recipients perceived this as part of the retaliation they had feared.

As a consequence of these events, the investigators broadened the scope of their investigation and eventually interviewed 27 employees and former employees, including grievant and the nine employees interviewed on February 4, 2002. The investigation revealed that employees had six areas of concern: 1)

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[8] Exhibit 1. Memorandum from investigators, February 6, 2002.

NOTE: A grievance hearing has previously been conducted regarding the disciplinary action taken on February 13, 2002. The scope of that hearing was limited to the specific charges of interference with an investigation and retaliation, and focused primarily on grievant's actions between February 4 and 6, 2002. The instant hearing involves the broader allegation of creating a hostile work environment over an extended period of time. To the extent that grievant's interference with an investigation and retaliation may also have contributed to a hostile work environment, these actions must be considered as part of the evidence in this decision.

However, the agency's position is that grievant's creation of a hostile work environment covers a period of at least two to four years. While the disciplinary action for grievant's February 2002 action has been affirmed, the hearing officer must assign the appropriate weight to these actions relative to the multi-year period of time cited herein. (The reader is referred to the EDR web site at www.edr.state.va.us for the entire text of Case No. 5455.)

unusually high levels of stress and tension, 2) disparate treatment, 3) abuse of overtime, 4) inappropriate language in the office, 5) misuse of state property, and 6) religious discrimination.[9] The investigators concluded that there was evidence to support the first four allegations but that there was no evidence of religious discrimination. The investigators did not have sufficient time to investigate the allegation of misuse of state property and equipment by grievant. Of the 27 people interviewed during the investigation, only five were unaware of major concerns about the work environment.

It is undisputed that a significant problem exists in grievant's residency between two administrative/program specialists – one of whom functioned as grievant's secretary and one of whom functioned as the business manager. Although the two specialists worked together as necessary to accomplish the daily business of the residency, a rift had developed between the two approximately six years ago (for reasons that no one can now remember). Over time, two "camps" have polarized in the residency. Grievant and his secretary comprise the primary members of one camp although one or two others support them. The other camp is comprised of the business manager and her supporters. Some employees who did not align themselves with grievant's secretary were subject to closer scrutiny by both the secretary and grievant. Others, although not subjected to any identifiable adverse action, were fearful that if they affiliated with the business manager's camp, they would be viewed negatively and their careers would be adversely affected.

Eight witnesses, including two of grievant's witnesses, testified that they had heard grievant's secretary use profane and vulgar language in the office either frequently or occasionally. In addition, the investigators reported that four other employees had heard grievant's secretary use the same foul language in the office.[10] It was acknowledged that other employees had occasionally uttered vulgarities, however, grievant's secretary used foul language far more frequently and loudly than any other employees. One employee interviewed during the investigation observed that it was "difficult for [secretary] to talk without cussing." A private contractor who had overheard the secretary's vulgar language made a written complaint.[11] The secretary's voice is especially loud and carries easily into other offices in the area.

Grievant's secretary had been permitted to work overtime and was reimbursed for such work until April 2001.[12] Grievant prohibited other employees from working overtime and directed that those who violated the prohibition be disciplined. Grievant advised his secretary in April 2001 that she would no longer be paid for overtime. Grievant's secretary has denied working overtime hours

[9] Exhibit 3. Investigation report, February 22, 2002.
[10] The secretary was quoted as having used at various times the words: goddamn, bitch, fuck, slut, asshole, whore, shit, asshole, dumb nigger and son-of-a-bitch.
[11] Exhibit 3. Letter to business manager from private contractor, August 24, 2001.
[12] Exhibit 25. Secretary's overtime report from September 10, 1998 through February 24, 2002.

without reimbursement since that time but several employees have reported seeing her vehicle at the residency and lights on in her office into the evening hours on a significant number of occasions. Grievant has never disciplined his secretary for her violations of the overtime policy.

Grievant acknowledged that he has been aware of the problem between his secretary and the business manager for years. He has counseled both employees but nothing changed. Grievant has never sought assistance from the district human resources office, from central office human resources or from the employee relations unit. Grievant views the business manager as a troublemaker, but a significant majority of those interviewed conclude that grievant's secretary is the source of problems. In the past, grievant had loaned money to his secretary for a major purchase (unclear whether it was a house or car).

Grievant utilized the state-owned computer in his office for the unauthorized personal purpose of "surfing" through the offerings made by an on-line auction company and then placing bids for items he wished to purchase. Grievant's wife has been observed riding in a state-owned vehicle. State policy provides that, "Spouses of state employees are permitted to ride in fleet vehicles only when such travel is directly related to official state business, and even then state employees are encouraged to use personal vehicles."[13] Grievant acknowledged that might have occurred but that his wife must have been assisting with preparations for an employee gathering. He also acknowledged that his daughter might have ridden in the state vehicle.

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).

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

[13] Section VII.C., VDOT Rules and Regulations governing the use, operation and maintenance of state-owned fleet vehicles, revised January 1998.

> 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.[14]

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[15] 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.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature and are such that an accumulation of two Group II notices normally should warrant removal from employment.[16]

The agency contends that grievant violated the DHRM policy on workplace harassment. Grievant argues that this policy is not applicable because the agency did not use the word "harassment" in the Written Notice, and because it failed to demonstrate that grievant's conduct was based on any of the nine specific protected classes listed in the policy. The policy defines workplace harassment as:

> Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person **on the basis of** race, color, national origin, age, sex, religion, disability, marital status or pregnancy that (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; …[17] (Emphasis added).

[14] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.
[15] Now known as the Department of Human Resource Management (DHRM).
[16] Exhibit 26. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, September 16, 1993.
[17] Exhibit 4. DHRM Policy No. 2.30, *Workplace Harassment*, effective May 1, 2002.

The hearing officer concurs with grievant that there is no evidence to show that his actions were based on any of the nine protected conditions listed above. Moreover, the evidence does not demonstrate that grievant singled out any one person for harassment. Therefore, Policy No. 2.30 is inapplicable in the instant case. However, this is a red herring, and certainly not dispositive of the matter. The Standards of Conduct provide that, "… any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section [Unacceptable Standards of Conduct]."[18] (Underscoring added). Thus, it is not necessary to have a specific written policy prohibiting every conceivable type of offensive behavior. If a manager creates an intimidating, hostile or offensive work environment, agency management may reasonably conclude that such behavior is unacceptable and subject to appropriate discipline under the Standards of Conduct.

Grievant argues that this disciplinary action, and the disciplinary action issued for retaliation and interference with an investigation constitute double punishment for the same offense. The hearing officer disagrees. The retaliation and interference during a three-day period in February 2002 constituted a clearly defined, separate and limited offense that warranted discipline on its own merits. The much broader offense of creating a hostile work environment over several years likewise requires a separate disciplinary action. Thus, the retaliation/interference offense is a small part of a wider offense and is given appropriate weight herein as corroboration of this broader offense. As noted in footnote 8, the hearing officer will give limited evidentiary weight to grievant's interference with an investigation and his retaliatory behavior from February 4 through 6, 2002.[19] However, because the creation of a hostile work environment is purported to have occurred over a several-year period, the majority of weight must be given to the other areas of concern addressed in the investigation.

With regard to many of the significant issues in this case, grievant's testimony (and that of his secretary) was diametrically opposed to the weight of the testimony and evidence of a large group of employees. For example, grievant denied ever hearing his secretary use foul language. Evidence of her foul language was not only preponderant but also clear and convincing. Grievant's office is located reasonably proximate to the secretary's office. There is no evidence that grievant is hearing impaired, therefore, it is concluded that his denial of hearing such language is not credible.

Subsequent to the issuance of this disciplinary action, grievant's secretary approached several employees in the office requesting that they sign a statement certifying that they had never heard her use offensive language in the office. Two of those who signed such statements testified that the statement was false,

[18] Exhibit 26. Section V.A., DHRM Policy No. 1.60, *Ibid.*

[19] It should be noted that grievant himself opened the door to consideration of this evidence by submitting the reorganization chart that demonstrated retaliation. See Exhibit 20, Tab 3.

and that they had heard the secretary use foul language on multiple occasions. One of the two denied reading the statement before signing it. Based on this employee's demeanor and other factors, his denial of reading the statement before signing is found credible. The second employee said she knowingly signed the false statement in order to attempt to maintain peace in the office. It is troubling that a person at her management level would knowingly sign a false statement for any reason but, based on her extensive and otherwise credible testimony, the hearing officer finds her testimony on this point believable.

Grievant's denial that his secretary continued working uncompensated overtime until February 2002 is unconvincing. The weight of the circumstantial evidence establishes that the secretary had been at the residency in the evening on multiple occasions. Grievant was sufficiently close to his secretary that it would have been impossible for him not to know that she was working. Grievant effectively admitted knowing that his secretary was working overtime when he wrote that he was unaware that his secretary had been "provided with a **lot** of overtime," and that she did not have the opportunity "to engage in **much** overtime" (emphasis added).[20] Thus, grievant admits that his secretary was, in fact, permitted to work uncompensated overtime without being disciplined. It is clear that she was working with his tacit approval and that he never disciplined her for doing so. Grievant's credibility is sufficiently tainted by his denials in the face of overwhelming evidence that, where differences in testimony exist, the testimony of other witnesses has been adopted in many (but not all) cases.

However, the hearing officer is mindful that the testimony of some witnesses, as well as the investigator's report, contains generalizations that, in some cases, tend to exaggerate the point being made. Grievant's counsel, through effective cross-examination, brought these generalizations into clearer focus by eliciting objective data from witnesses. Nonetheless, the facts established by the evidence lead to the conclusions discussed below.

In order to state a prima facie case of retaliation, one must demonstrate that: (i) the employee engaged in a protected activity; (ii) adverse action was taken against the employee; and (iii) a causal connection exists between the protected activity and the adverse action.[21] Grievant argues that this test is inapplicable because this case does not involve a Title VII action. While it is agreed that this is not a Title VII case, the test nevertheless provides a useful framework to analyze the facts. In the instant case, nine employees engaged in the protected activity of participating in an investigation conducted by the agency. Further, adverse action in the form of retaliatory e-mail messages and office reorganization was taken against several of the employees. The timing of the retaliatory actions and the fact that the actions were directed only at employees who participated in the interviews establishes the nexus. Therefore, it is concluded that grievant's actions on February 5 & 6, 2002 were retaliatory.

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[20] Exhibit 16. Grievant's attachment to Grievance Form A.

[21] See Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).

Grievant's management style and his behind-the-scene attitude towards employees are reflected in an e-mail message sent to his former assistant resident engineer in November 2000. Grievant had been utilizing his computer for unauthorized personal use by searching an online auction company and then printing copies of auction items available for bid. He was later unable to locate the printouts and wrote to the assistant engineer, "There is someone in this office that cannot be trusted and is a thief."[22] Grievant had no evidence that anyone had stolen the printouts. The current assistant resident engineer documented a conversation with grievant in which she discussed with him the problems caused by employee perceptions of grievant's relationship with his secretary. Grievant stated, "This time, I have decided I don't care what people think … I have decided to keep this friendship, and to hell with all of them!"[23]

Grievant suggests that the investigation conducted by central office was deficient because most employees from other area headquarters and specialty crews were not interviewed. This argument is not persuasive because employees who worked at other locations had little or no regular contact with grievant's residency. Thus, the investigation appropriately focused primarily on employees who worked in the residency or on those who frequently came to the residency.

Grievant acknowledges there was a problem but attempts to shift responsibility elsewhere when he states, "I have not allowed the environment but VDOT has."[24] Grievant's attempt to blame the agency, his district administrator and the human relations department is inappropriate and not supported by the facts. Grievant never contacted human relations for assistance in resolving the problem.

Grievant produced a lengthy list of actions he has taken on behalf of employees such as employee recognition programs, sending birthday cards to employees, annual family picnic, providing better working conditions, etc.[25] It was undisputed that grievant had been involved and fostered the activities he cited. However, the evidence reveals that a hostile work environment existed notwithstanding grievant's activities. As an example, grievant points proudly to the fact that there was 100 percent participation by employees in the annual Combined Virginia Campaign. However, during a staff meeting in which grievant advised employees about progress of the campaign, he stated that there is 100 percent participation except that "We have one dumb asshole who didn't participate." During her testimony, even grievant's secretary corroborated this remark. This was a blatant attempt to intimidate the employee into making a donation. This incident further weakens grievant's credibility in light of his written

[22] Exhibit 6. E-mail message from grievant to assistant resident engineer, November 2, 2000.
[23] Exhibit 8. Memorandum written by current assistant resident engineer, January 30, 2002.
[24] Exhibit 14. Memorandum from grievant to district administrator, March 1, 2002.
[25] Exhibit 20, Tab 9. Grievant's response to investigation report.

assertion that he never used abusive/unprofessional language.[26] During the hearing, grievant admitted to using profanity in the office on several occasions.

Grievant also points to his most recent performance evaluation, which contains glowing commentary about his core responsibility of performance management.[27] Grievant's direct supervisor is a district administrator who is located at another facility many miles distant from grievant's residency. Thus, the administrator has limited exposure to the daily work environment in grievant's residency. Moreover, multiple witnesses testified that they were so fearful and intimidated that they would not complain to district headquarters because they believed grievant's influence would make their complaints useless. They only agreed to come forward during the investigation because they believed the central office investigators were not subject to grievant's influence.

Grievant contends that the business manager had longstanding performance problems and that employees who associated with her were bad employees and malcontents.[28] While the evidence suggests that one employee did have performance problems, grievant was unable to identify any corrective or disciplinary action taken with regard to the business manager. The investigators reviewed the business manager's performance evaluation and concluded there was no evidence to support grievant's assertion.

A hostile work environment can, and often does, involve behavior that is not obvious to the casual observer or to infrequent visitors from outside the office. Such behavior can be initiated by management (as in sweatshops) or, as in this case, allowed to continue without corrective action by management. When a manager fails to take decisive action to end inappropriate behavior, and facilitates disparate treatment by looking the other way when his secretary violates the rules while disciplining others for the same infraction, employees understandably become resentful, fearful and intimidated.

After careful evaluation, a preponderance of the evidence establishes that grievant's actions, as well as his inaction, contributed to an environment that many employees found to be intimidating, hostile or offensive. While some employees were not intimidated or offended, those employees either did not work in the immediate residency office, remained neutral by not affiliating with either camp, or were part of the grievant/secretary camp. However, a significant number of employees who worked in the immediate residency office were offended by the secretary's language, resentful of the apparent privilege she had to work overtime, fearful of her power because of her influence over grievant, and intimidated from reporting the situation to human resources because of grievant's perceived ability to squelch complaints. Moreover, many believed that grievant ignored rules relating to the use of state vehicles and state equipment and

[26] Exhibit 17, page 5. Grievant's notes for second-step resolution meeting.
[27] Exhibit 20, Tab 3. Performance Evaluation for 2000-2001 performance cycle.
[28] Exhibit 18, page 4. Memorandum from deputy commissioner to grievant, May 9, 2002.

property. While these allegations were unproven, grievant's actions contributed to employee *perception* that he had one set of rules for himself and a different, more restrictive set for employees. Further, grievant admitted during the hearing that he had been utilizing the state-owned computer in his office for an unauthorized personal purpose.

The agency concluded that the atmosphere in grievant's residency was so damaged by the hostile working environment that the issuance of a written notice alone would be insufficient to correct the situation. Loss of trust among a large number of employees had grown over such a long period of time that only a new manager can repair the damage. The agency therefore demoted grievant to a position in the central office that will utilize his technical skills. Grievant maintains that many of the allegations surprised him. If true, this suggests that grievant was so detached from his employees that he could no longer be an effective manager. Given the totality of the circumstances, the agency's disciplinary action was an appropriate and measured response that retains the services of a longtime employee while at the same time giving the agency the opportunity to provide new leadership for the residency.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice for creation of a hostile work environment, ten percent reduction in salary, demotion, and transfer are hereby AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

APPEAL RIGHTS

You may file an administrative review request within **10 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.

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-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.[29]

[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]

_____
David J. Latham, Esq.
Hearing Officer

[29] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5457

Hearing Date:	July 9 & 10, 2002
Decision Issued:	July 22, 2002
Reconsideration Received:	August 1, 2002
Reconsideration Response:	August 15, 2002

PROCEDURAL ISSUE

Due to a heavy hearing docket during the first two weeks of August, as well as the length of grievant's reconsideration request, the response required more than 10 calendar days.[30]

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request 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. A request to reconsider a decision 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. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution (EDR).[31]

[30] § 7.2(c), EDR *Grievance Procedure Manual* indicates that a hearing officer *should* issue a written decision on a request for reconsideration within 10 calendar days of receiving the request.
[31] § 7.2 *Ibid.*, effective July 1, 2001.

Grievant submitted a combined request for reconsideration by the Hearing Officer, a request for review by the Director of the Department of Employment Dispute Resolution (EDR), and a request for review by the Director of the Department of Human Resource Management (HRM). Grievant listed 10 reasons for review by the Directors and 68 reasons for his reconsideration request. To facilitate reading by other reviewers, the Hearing Officer will comment on the 78 enumerated points in the same order as presented by grievant. In the interest of economy, this opinion does not restate each of grievant's concerns but instead provides the response to each of the 78 points.

OPINION

First list – 10 reasons for appeal

1. The Decision relies, as it must, on testimony and evidence presented during the hearing.[32] Written Notices provide only a brief description of the offense and are not required to include every detail relating to the offense.

2. The Standards of Conduct provides examples of the acts and behavior that constitute each level of offense. However, as the Standards further note:

> The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.[33] (Underscoring added)

The Decision amply described the offense that required corrective action.

3. Mitigating circumstances were considered, both by the agency and the Hearing Officer. The agency's testimony established that grievant is an employee with long service and valued technical skills. Rather than discharge grievant, the agency elected to transfer him to another position. The last paragraph of the Opinion portion of the Decision makes two references to these circumstances.

4. The Standards of Conduct does not require that counseling occur prior to disciplinary action. If an offense is sufficiently severe, an employee may be discharged immediately or given the appropriate level of Written Notice.

5. This issue has been addressed previously. (See first full paragraph on page 7 of the Decision.)

[32] Section V.A., *Rules for Conducting Grievance Hearings*, effective July 1, 2001.
[33] Exhibit 26. Section V.A, DHRM Policy 1.60, *Standards of Conduct,* September 16, 1993.

6. The issues in both hearings are inextricably intertwined. For administrative efficiency, EDR made an appropriate decision to assign both cases to the same hearing officer. Notwithstanding the fact that some witnesses testified in both hearings, the Hearing Officer made two separate decisions based on the facts elicited in each hearing.

7. Parties must comply with the requirements of the grievance procedure. All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge noncompliance at a later time.[34] Grievant failed to raise his concerns regarding steps two and three immediately and therefore forfeited his right to challenge them. In any case, any alleged procedural noncompliance has subsequently been cured by grievant's participation in a hearing that afforded him full due process and representation by an attorney.

8. The Hearing Officer addressed DHRM Policy 2.30 because a party raised this issue during the hearing. However, the Hearing Officer concluded that this policy was not applicable in this case (See discussion beginning in the third paragraph on page 6 of the Decision).

9. The Decision includes recognition of grievant's performance evaluation for the most recent performance cycle (See second paragraph in Findings of Fact).

10. See response to number 7 above.

Second list - 68 concerns

1. Grievant has been employed by the agency for 34 years, 21 of which have been as resident engineer.

2. Grievant's overall rating was "Contributor;" he received the higher rating only on one element of the evaluation. The District Administrator was unaware of the seriousness of the situation in grievant's residency. Had he been fully aware, grievant would not have received the evaluation he did.

3. Grievant has not articulated a concern.

4. See response to item 6 in first list regarding the use of one hearing officer for both hearings. The standard practice is to limit closing statements to a brief summary. Both attorneys knew well ahead of time that the hearing would end at 1:00 p.m. They elected to spend more time on cross-examination and limit their closing statements to the time remaining. The Decision of a

[34] § 6.3, EDR *Grievance Procedure Manual*, effective July 1, 2001.

Hearing Officer is based on facts and evidence presented under oath. Closing statements by attorneys are not under oath and are therefore not evidence.

5. Grievant's meaning is not clear. One paragraph in the Findings of Fact is similar to, but not exactly the same as, a paragraph in the companion decision because it describes the same facts.

6. Grievant makes an allegation but does not support it with evidence.

7. Grievant has not expressed a cogent concern.

8. Grievant makes a statement of fact but fails to articulate a concern.

9. Employees indicated they feared some type of retaliation; they could not predict what form the retaliation would take.

10. Grievant's attorney had ample opportunity to cross-examine and to provide rebuttal testimony.

11. The actions of grievant's successor are not relevant to the issues adjudicated in this case.

12. The significance was in the fact that grievant effectively rewarded one person who did not speak with the investigators, while at the same time he diminished the status and responsibilities of an employee who did talk with investigators.

13. Grievant takes issue with the investigator's methodology but this does not alter the testimony and evidence presented during the hearing.

14. It was, and still is, impossible to pinpoint a precise period of time because the memories of those involved fade over time. This factor should have had no impact on grievant's ability to prepare for the hearing.

15. Parties to grievance hearings are expected to anticipate all possible evidence raised by the other side and prepare their defense accordingly. Grievant was provided with a copy of agency exhibits and a witness list at least four working days prior to the hearing (Standard EDR practice).

16. Grievant again questions the methodology used by the investigators. The fact that some people were not interviewed does not change the fact that many who were interviewed found the work environment to be hostile.

17. Grievant was the resident engineer and had full authority and the responsibility to address and correct the problem between the two

administrative specialists. He did not correct it and as a result, the problem was exacerbated. Grievant did not seek help from the Human Resources Department.

18. The opinions of two experienced investigators are different from grievant's view of the situation.

19. Same response as 18.

20. The fact that grievant helped an employee obtain a large salary increase does not change the fact that the employee did want to associate with the business manager for fear of adverse consequences. In fact, the employee may have concluded that the way to get good pay increases was to avoid being friendly with the business manager.

21. The signed letters obtained by grievant's secretary initially raised a concern given that eight witnesses unhesitatingly testified that the secretary often used vulgar and profane language, as well as racial slurs in the office. It appeared however, that some who signed the letter did so because they may not have heard such language. However, it is more likely than not that others signed either to keep the peace in the office, or to placate the secretary, or because they may have been concerned that the secretary still retains some residual influence that could adversely affect those who refused to sign. The testimony of a non-state employee who overheard the secretary's vulgar language also carried significant evidentiary weight in resolving this issue.

22. The statement is one person's opinion and was given appropriate evidentiary weight.

23. The appearance of the August 2001 letter was not mysterious; the person who received it believed at the time that it would do no good to pursue the matter and she decided to keep it. The non-state employee who heard the secretary's foul language and who testified during the hearing authenticated the letter. Since she had no bias in favor of either party, her testimony carries significant weight.

24. The Decision addresses this issue in the last paragraph on page 4.

25. Same response as 24.

26. The policy provides that non-exempt employees who work more than 40 hours in a week must be paid overtime. When such employees work more than 40 hours without appropriate compensation, the agency is in violation of the Fair Labor Standards Act.

27. Grievant's assessment is at variance with the preponderance of evidence.

28. The investigators originally interviewed only nine but later interviewed 16 more people.

29. Grievant corroborates the statement by concluding that the business manager is a "trouble-maker," apparently due solely to her disagreement over the discharge of one employee.

30. Grievant's secretary testified during the hearing that she had borrowed money from grievant.

31. The Written Notice provides only a brief overview of the offense and rarely provides every detail, especially where the offense involves many facets.

32. Parties must comply with the requirements of the grievance procedure. All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge noncompliance at a later time.[35] Grievant failed to raise his concerns regarding the steps two and three immediately and therefore forfeited his right to challenge them. In any case, any alleged procedural noncompliance has been subsequently been cured by grievant's participation in a hearing that afforded him full due process and representation by an attorney.

33. All of these issues were addressed in the hearing.

34. The Hearing Officer addressed DHRM Policy 2.30 because a party raised this issue during the hearing. However, the Hearing Officer concluded that this policy was not applicable in this case (See discussion beginning in the third paragraph on page 6 of the Decision).

35. Grievant's concern is not clearly articulated.

36. Grievant's language is obfuscatory and his meaning is unclear. The Decision speaks for itself as to the hostile work environment that existed in the residency.

37. If grievant is making the same argument as in number 21, the response is the same as number 21 above.

38. The current assistant resident engineer admitted under oath that she signed a false statement, and that she had heard grievant's secretary use vulgar and profane language. There was no evidence that the doors to offices were closed at all times.

[35] § 6.3, EDR *Grievance Procedure Manual*, effective July 1, 2001.

39. The witness testified under oath during the hearing that he signed the secretary's pretyped letter without reading it, "In order to make peace and harmony."

40. The current assistant resident engineer testified under oath during the hearing that she signed the secretary's pretyped letter in order to keep on the good side of the secretary.

41. The totality of the evidence makes it more likely than not that grievant's secretary worked beyond the 40-hour limit and that grievant knew, or reasonably should have known, about it.

42. No response necessary.

43. The preponderance of the evidence is not consistent with grievant's view.

44. The Hearing Officer disagrees with the first statement but agrees with the second sentence.

45. Previously addressed.

46. Previously addressed in the decision. The majority of employees perceived that the "proposed" reorganization was a "done deal."

47. Even if a confidential document was also missing, grievant had no basis to leap to the conclusion that someone in the office was a thief. As far as grievant knew, the document was only misplaced. By accusing some unidentified employee of being a thief, grievant unnecessarily created an environment which may have caused employees to be suspicious of 1) what was so confidential that the boss is angry about it, and 2) who was the alleged thief. With no evidence of theft, grievant's memorandum was unprofessional and served only to foster a negative atmosphere.

48. The investigators did focus primarily on the residency. They also interviewed employees from outside the immediate residency building including some from other area headquarters. It would have been inappropriate for the investigators to spend significant amounts of time to interview employees who came to the residency building only rarely or not at all.

49. Previously addressed.

50. The Hearing Officer does not discredit the positive activities that grievant promoted. Grievant was properly commended in his performance evaluations for such activities. However, the evidence established that, despite all grievant's good efforts in these activities, many employees nonetheless viewed the environment as hostile. Grievant may well have been deluded

from the apparent pleasure of employees participating in these activities, that there were no problems in the residency. However, the large number of employees who testified against grievant makes it abundantly clear that they perceived a hostile environment.

51. The testimony from witnesses varied on this issue. However, even if the word "dumb" was not used, the word "asshole" certainly was. There was no testimony that the campaign had been closed out when grievant referred to the non-participant as an asshole.

52. Grievant's plaint that the written notice didn't mention his use of offensive language again seeks to obfuscate the issue. The use of such language by a manager at grievant's level in any agency is demeaning, unprofessional, and is one factor that contributes to an unpleasant work atmosphere (also known as a hostile work environment).

53. During the hearing, grievant did not elicit from the district administrator the quotations he now attributes to him. Grievant did not offer any other evidence to corroborate the administrator's alleged comments. The preponderance of evidence suggests that the administrator's performance evaluation of grievant was inaccurate, at least with respect to the element involving personnel management.

54. The testimony of multiple witnesses outweighs grievant's assertion. While employees knew that they could appeal to the district office, some felt that the influence of grievant and his secretary extended into the district office and that complaints would be swept under the rug. While this perception may or may not have been accurate, the feeling that such complaints would fall on deaf ears did exist. Others knew from experience that complaints to the district office had simply been referred back to grievant and his secretary for resolution.

55. The evidence speaks for itself.

56. Grievant's observation does not require a response.

57. Grievant is correct in noting that the evidence indicates that some counseling of the business manager occurred.

58. The evidence does not support Grievant's opinion.

59. Grievant's argument that he did not get support from management is self-serving. Resident engineers have a significant amount of power and authority over subordinates. Grievant could have taken any number of actions to deal with the situation, as long as his actions complied with agency and DHRM policies.

60. The witnesses who testified against grievant significantly outnumbered grievant and his secretary.

61. These issues have been discussed in the decision, and are supported by testimony and evidence in the record.

62. Multiple witnesses testified that they had seen grievant utilize his computer for unauthorized personal purposes.

63. The agency inferred from overwhelming evidence that the atmosphere in the residency had been damaged sufficiently to require the disciplinary action it took. The evidence presented during the hearing affirms that the agency's assessment was correct.

64. Obviously this is a matter of opinion and the ultimate issue in this case. The agency, its investigators and the hearing officer all concluded that a hostile environment did exist.

65. The conclusion that loss of trust had occurred is part of the opinion expressed by the decision.

66. Again, the statement to which grievant objects is opinion, derived from an assessment of the facts.

67. The agency did not offer, and grievant did not ask for, an explanation of why he was both demoted and transferred. The Standards of Conduct provides that demotion is an appropriate disciplinary mechanism, and the agency concluded that this level of discipline was necessary.

68. Grievant's opinion is different from the facts and conclusions dictated by the totality of the evidence. Typically investigators focus on ascertaining whether charges are substantiated by the evidence. Grievant correctly observes that the report does not include positive aspects, but grievant offered ample testimony and evidence regarding the positive actions he has taken. However, notwithstanding the positives, the negatives sufficiently negated them so as to create the environment that employees found hostile and offensive.

DECISION

Much of grievant's request is argument regarding interpretation of the evidence. His challenges to the hearing officer's decision, when examined, simply contest the weight and credibility that the hearing officer accorded to the testimony of the various witnesses at the hearing, the resulting inferences that he

drew, the characterizations that he made, or the facts he chose to include in his decision. Such determinations are entirely within the hearing officer's authority.

After careful review of the request, the Hearing Officer concludes that there is insufficient basis to warrant changing the Decision issued on July 22, 2002.

APPEAL RIGHTS

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.

_____
David J. Latham, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of Mr. Willie Gentry v.
Virginia Department of Transportation

August 22, 2002

The grievant has appealed the hearing officer's July 22, 2002, decision in Grievance No. 5457. The grievant is challenging the decision because he contends that, among other things, the hearing officer's decision relies on information and evidence that fall outside the scope of the written notice, the hearing officer and the agency fail to make any specific finding of any behavior that warrants corrective action, and the hearing officer uses DHRM Policy No. 2.30 that became effective two months after the agency issued the written notice.[*] The agency head, Ms. Sara Redding Wilson, has requested that I respond to this appeal.

FACTS

The Department of Transportation employs the grievant. On March 1, 2002, the grievant was charged with "Creating/allowing a work environment that can be described as intimidating, hostile, and offensive" and "Failure to comply with established written policies/procedures." He was issued a Group II Written Notice, demoted to a lower level position, transferred to the central office, and had his pay reduced by 10%. He filed a grievance and in his decision the hearing officer upheld the agency's disciplinary action. The grievant appealed the hearing officer's decision to the Director of the Department of Employment Dispute Resolution, the Director of this Agency, the hearing officer, and the Sr. Employee Relations Consultant at VDOT.

The relevant policy, the Department of Human of Human Resource Management's Policy #1.60, states that it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The examples are not all-inclusive.

[*] The grievant had several points of concern with the hearing officer's decision. However, the only issue that this Agency reviewed is the one dealing with Policy #2.30.

In the instant case, the Department of Transportation charged the grievant with conduct that created a hostile work environment. The VDOT determined, through an investigation, that these incidents occurred over a time period of several months. While no singular incident in and of itself may have been sufficient to justify the level of discipline that the agency took against the grievant, collectively the incidents were severe enough to cause the agency to issue to the grievant the discipline he received. The hearing officer reviewed the evidence and determined that the agency's actions were justified.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge of the hearing officer's decision by either party must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the grievant identified DHRM Policy #2.30 as being misapplied by the hearing officer when he made his decision. However, our review of the hearing officer's decision and the issues raised by the grievant reveals that there is no misapplication of the policy. Rather, the hearing officer stated that the policy was not applicable here. He further stated, and correctly so, that "…any offense which, in the judgment of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section [Unacceptable Standards of Conduct]." Since we find no policy violation, we have no basis to interfere with this decision.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley, Manager

Employment Equity Services