Issue: Group II Written Notice with 2-day suspension (interfering with an investigation/ creating a hostile work environment, and use of abusive language); Hearing Date: 11/12/02; Decision Date: 11/27/02; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5562; **Administrative Review: Hearing Officer Reconsideration Request received 12/06/02; Reconsideration Decision Date: 12/09/02; Outcome: No newly discovered evidence or incorrect legal conclusions. Request denied; Administrative Review: EDR Ruling requested 12/06/02; EDR Ruling Date: 02/03/03; Outcome: HO's decision found not to be out of compliance with grievance procedure (#2002-233); Administrative Review: DHRM Ruling requested 12/06/02; DHRM Ruling dated: 01/07/03; Outcome: No policy violation identified; no reason to interfere with decision**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5562

Hearing Date: November 12, 2002
Decision Issued: November 27, 2002

PROCEDURAL HISTORY

On March 8, 2002, Grievant was issued a Group II Written Notice of disciplinary action with two-day suspension for:

> *As a result of an investigation of the [Residency], evidence was provided that you: (1) Interfered with an ongoing investigation and created an intimidating and hostile work environment, (2) Frequently used abusive and offensive language in the workplace.*

On April 5, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 17, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 12, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee

Legal Assistant Advocate
Business Manager
Former employee
Senior Employee Relations Consultant
Real Estate Paralegal
Program Administrative Specialist III
Environmental Specialist
Administrative Officer Specialist III
TOM II
Contract Administrator
Former ARE
TOM II
PO II Operator
Assistant Editor
Former Resident Engineer
HR Generalist
District Administrator
Assistant Resident Engineer

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with two-day suspension.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as an Administrative and Program Specialist III. She has been employed by the Agency for approximately 14 years. She has received numerous favorable evaluations and awards. No evidence of prior disciplinary action against Grievant as presented.

A former Office Service Specialist sent an email to the Agency's human resource director alleging unfair work practices and conditions such as verbal abuse, disparate treatment and religious discrimination at the Residency where Grievant worked. The Agency began an investigation and notified the Resident Engineer that its investigators would begin interviewing numerous employees within the Residency. Investigators interviewed approximately 27 current and former Residency employees. They concluded that the Residency had problems with (1) Abnormally high levels of stress and tension, (2) Special Treatment/ Disparate Treatment, (3) Abuse of Overtime, and (4) Verbal abuse of employees/unprofessional language. The Agency removed the Resident Engineer based on the investigator's recommendation. In addition, the investigators recommended that Grievant receive a Group II Written Notice for interfering with an ongoing investigation and for creating an intimidating and hostile work environment and a Group I Written Notice for use of abusive and offensive language in the workplace.[1]

An Administrative Assistant employed by a vendor sent the Business Manager a letter dated August 24, 2001, stating that she was visiting the residency on August 16, 2001, when she heard very offensive language from Grievant. She contends Grievant stated to another person, "I don't know who the f'''' you think you re, but won't F'''' talk to me like that." She also heard Grievant say to another person, "I don't know who that B'''' thinks she is but she better not F'''' with me." The Administrative Assistant did not testify at the hearing. Both Grievant and the person to whom Grievant was speaking denied uttering curse words.

Other individuals reported to the Agency investigators that Grievant used abusive language. Grievant presented written statements and witness testimony of co-workers indicating they had never heard Grievant use offensive or abusive language in the workplace. Although some witnesses indicated Grievant may have cursed on occasion, none of her cursing was directed to the person she was speaking and none of the witnesses felt her cursing was offensive or abusive.

Mr. RL worked at the Residency. He was a close friend of the former Resident Engineer. On February 12, 2002, the day before his scheduled interview, Grievant went to Mr. RL's house at approximately 5:55 p.m. She told Mr. RL that several other employees were out to get her and the former Resident Engineer. Grievant said she went to see a lawyer and the lawyer advised that Mr. RL should not admit to selling coins on state time. Grievant told Mr. RL that he should only answer the questions asked and not to volunteer any information. During his interview at the Residency on February 13, 2002, Mr. RL did not fully cooperate with the investigators. Investigators called Mr. RL to come to the Central Office where he was interviewed a second time. During this second interview, he revealed what Grievant had told him at his home.

[1] Rather than issuing a separate notice for use of abusive and offensive language, the Agency chose to incorporate that offense into the Group II Written Notice.

Grievant and the Business Manager dislike each other. Grievant does not supervise the Business Manager, but they have regular contact because they work in the same Residency. The Business Manager reports to the Assistant Resident Engineer who reported to the former Resident Engineer.

CONCLUSIONS OF LAW AND POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[2] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

The Agency contends Grievant should be issued a Group II Written Notice because Grievant: (1) interfered with an ongoing investigation, (2) created an intimidating and hostile work environment, and (3) used abusive and offensive language in the workplace. Each of these allegations must be evaluated separately and together to determine whether there exists a sufficient basis for disciplinary action. If any of the allegations are sufficient to support the disciplinary action, the discipline must be upheld.

Abusive or Offensive Language in the Workplace

"Use of obscene or abusive language" is a Group I offense.[3] Webster's New Universal Unabridged Dictionary defines "obscene" to include "offensive to morality or decency; indecent; depraved; *obscene language.*" "Abusive" is defined to include, "using, containing, or characterized by harshly or coarsely insulting language; *an abusive author; abusive remarks.*" The context in which words are spoken is key to determining whether an employee has used obscene or abusive language. Curse words are not necessarily obscene or abusive language warranting disciplinary action. For example, if an employee working in his office accidentally drops a heavy object on his foot and utters a curse word, that employee has not expressed obscene or abusive language. On the other hand, if an employee speaks with a co-worker and directs curse words at that co-worker, then the employee has likely used offensive or insulting language that would be obscene or abusive.

Although Grievant may have uttered curse words on occasion, the evidence is insufficient for the Hearing Officer to conclude that her words were offensive or abusive.

[2] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

[3] DHRM § 1.60(V)(B)(1)(c).

The Agency's evidence is insufficient to support its contention that Grievant used abusive language on August 16, 2001. Grievant and the Assistant Resident Engineer denied that Grievant cursed at the Assistant Resident Engineer during their meeting. Grievant presented numerous statements of coworkers stating that she had never used abusive or offensive language.

Creating Intimidating and Hostile Work Environment

Although not expressly stated, the Agency defines an intimidating and hostile work environment as one where certain behavior is so severe as to prevent a unit or department from functioning properly.[4] One symptom of a hostile work environment can be stress among employees. The existence of stress, however, is not in itself sufficient to show that a manager should be disciplined for causing the stress. For example, a manager who is properly supervising poorly performing subordinates will likely cause stress among those subordinates until their performance improves. The question is why does the stress exist in the workplace and who caused it.

The majority of the stress and other problems within the Residency resulted from the actions of the former Resident Engineer. Grievant may not be disciplined for the actions of the former Resident Engineer.

The Agency contends Grievant singled out the Business Manager for hostile treatment. A few of these examples include: (1) the Business Manager was not permitted to have anyone in her office for more than five minutes, (2) the Business Manager had to take two hours of annual leave when a former employee visited her at the officer, (3) Grievant did not permit her staff to assist the Business Manager, and (4) Grievant was permitted to work more than 40 hours per week without compensation while the Business Manager was not permitted to work more than 40 hours per week.

None of these examples show Grievant created a hostile work environment. Grievant did not supervise the Business Manager. The former Assistant Resident Engineer prohibited the Business Manager from having anyone in her office for more than five minutes because the Business Manager was not getting her work done timely. The Business Manager properly took annual leave when a former employee visited her at the office. The Commonwealth of Virginia does not pay employees to socialize for two hours.[5] Grievant did not make the decision as to whether her staff assisted the Business Manager. The former Resident Engineer was responsible for staffing and workload

[4] Although hostile work environment is a term of art in gender discrimination, the Agency is not alleging unlawful discrimination. The Agency points to some of the language contained in draft DHRM Policy 2.30 relating to workplace harassment. Grievant may not be disciplined for violating a draft policy. Even if the policy were in effect, Grievant did not violate its terms because a violation must result from behavior based on race, color, national origin, age, sex, religion, disability, marital status, or pregnancy.

[5] The former Resident Engineer testified that he is the one who noticed the amount of time the Business Manager had a visitor. There is nothing wrong with a supervisor noticing how much time an employee spends socializing at work.

decisions. Grievant intentionally disregarded the former Resident Engineer's instruction not to work more than 40 hours and the former Resident Engineer chose to ignore her defiance. The Business Manager chose to follow the former Resident Engineer's instruction.

The Agency contends Grievant inappropriately counseling a subordinate employee for failing to speak directly with Grievant when the employee had a flat tire and had to come late to work. The employee contacted the receptionist and asked the receptionist to notify Grievant. Grievant has previously instructed her subordinates to speak with her directly when they were late or absent from the office. Requiring an employee to speak directly with a supervisor is not unreasonable. Grievant's behavior shows strict management, but it does not show a hostile environment.

Interfering with an Ongoing Investigation

Grievant interfered with the investigation by appearing at Mr. RL's house on the day before his interview and attempting to coach him regarding how to respond during his interview. In particular, Grievant informed Mr. RL that she had consulted with an attorney and that attorney advised that Mr. RL should not admit to selling coins on state time. Grievant also advised Mr. RL only to answer questions that were asked and not to volunteer any information.

Grievant contends she did not interfere with the investigation because when she spoke with Mr. RL, no one had been instructed not to speak with anyone else about interview questions and answers. This argument fails because Grievant knew that an investigation had begun about the Residency's practices before she spoke with Mr. RL. As a manager and as an employee she should have either refrained from giving advice to other employees or advised them to cooperate fully with the investigators.

Grievant contends she did not advise Mr. RL as he claims. She contends his statement was not credible because he gets very nervous and is taking medications. The Hearing Officer has no reason to disbelieve Mr. RL's written statement. Mr. RL had no motive to lie. He was a friend of the former Resident Engineer and of Grievant. Mr. RL's first interview was conducted at the Residency. He was not fully responsive to the investigators. Grievant suggests this shows Mr. RL was not credible; but it is equally likely that Mr. RL was unduly influenced by Grievant's suggestions such that he did not fully cooperate with the investigators. During the second interview, Mr. RL was questioned at the Agency's Central Office without being influenced by Grievant.

Other Defenses

Grievant contends she was retaliated against for speaking freely during Central Officer interviews. No credible evidence was presented suggesting the Agency retaliated against Grievant. Grievant contends she was discriminated against based on her age. No evidence was presented suggesting the Agency had discriminated against her on the basis of age.

Grievant contends she was denied requested documents during the step process. The evidence is unclear regarding what documents were presented to Grievant during the step process. If the Agency failed to produce all of the required documents, Grievant could have sought a compliance ruling from the Director of the Department of Employment Dispute Resolution. In any event, all Agency documents were disclosed in accordance with the Hearing Officer's prehearing order, and, thus, Grievant's objection is moot.

Conclusion

After considering the Agency's allegations individually and together, Grievant's interference with an ongoing investigation rises to the level of a Group II offense. An agency cannot properly manage its workforce when supervisors attempt to limit the transfer of information. A two-day suspension is consistent with a Group II Written Notice.[6]

The Residency suffered significant management problems. Grievant may have aided the former Resident Engineer in mismanaging the Residency, but the full extent of her responsibility cannot be determined. Normally, a subordinate is expected to follow the instructions of a supervisor. Grievant was not disciplined for promoting poor management by the former Resident Engineer. Ultimate responsibility for the mismanagement rested with the former Resident Engineer. The Agency has taken logical steps to resolve the management problems at the Residency by removing the former Resident Engineer.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**.

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

[6] DHRM § 1.60(VII)(D)(2)(a).

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.[7]

[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].

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Carl Wilson Schmidt, Esq.
Hearing Officer

[7] 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: 5562-R

Reconsideration Decision Issued: December 9, 2002

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Grievant sets forth several reasons why she believes the disciplinary action against her should be removed. None of these reasons support reconsideration of the original decision.

Grievant argues she was not given certain evidence until after the second step. If Grievant believed she should have been given additional documents during the step process, she could have asked for a compliance ruling from the EDR Director. Her concern is now moot.

Grievant argues she was influenced strongly to reduce her witness list by the Hearing Officer. Section 5.7 of the *Grievance Procedure Manual* authorizes the Hearing Officer to admit evidence, exclude evidence, and accept offers of proof of excluded evidence. During a prehearing conference, the Hearing Officer asked Grievant to establish the reason for calling her witnesses. Grievant either withdrew witnesses or admitted that calling certain witnesses would result in redundant testimony. Even after excluding several witnesses, many of Grievant's witnesses offered redundant testimony. This was especially true regarding the issue of whether Grievant used abusive language. She offered written statements from witnesses and then called those witnesses to testify to what was already in the statement.

Grievant objects to the Agency being able to add a witness to its list of witnesses. Grievant does not identify these witnesses; but in any event, Grievant did not offer any

evidence of prejudice to her at the hearing. The Hearing Officer's prehearing order is intended to foster a productive hearing and does not serve as an exclusionary rule. If a witness or document is not disclosed four workdays before the hearing, the Hearing Officer will only exclude the document or witness if the opposing party can show some form of prejudice, namely that he or she would have prepared for the hearing differently or added additional documents or called additional witnesses. Grievant presented no credible evidence of any prejudice.

Grievant objects to the Assistant Resident Engineer having Grievant's witnesses and the Agency's witnesses wait to testify in separate areas. There is nothing wrong with the Agency separating waiting witnesses. Grievant did not present any evidence suggesting witness testimony was affected by where they waited to testify.

Grievant objects to the Assistant Resident Engineer remaining in the hearing room while two of her subordinates testified. The ARE was the Agency's party designee and thus could remain in the hearing room throughout the hearing.

Grievant contends the Agency made no attempt to resolve the issues before the hearing. Whether or not this contention is true, is not a matter before the Hearing Officer.

Grievant contends the Agency did not meet its burden of proof based on the statement of Mr. RL. Written statements are admissible in grievance hearings and the facts surrounding Mr. RL's written statement show it is the most reliable evidence of Grievant's actions. Grievant attaches an email to her request for reconsideration but that email does not reference her visit to Mr. RL's house during which she coached Mr. RL regarding what to say to investigators. Grievant argues Mr. RL had a motive to lie and was manipulated by Ms. BH. No evidence was presented suggesting this. Indeed, Ms. BH was more credible than most of the witnesses testifying. Had the Agency been able to establish more of the specifics surrounding Grievant's comments about Ms. BH, the Agency may have been able to establish its claim that Grievant used abusive language. Grievant suggests Ms. BH interfered the investigation. The evidence, however, showed that Ms. BH took measures to make sure investigators interviewed Mr. RL after learning that his original statements were untrue. Ms. BH's motives were to have Mr. RL tell the truth which he did when he spoke privately with Agency investigators at the Central Office.

Grievant argues the disciplinary action should be modified because not all of the facts alleged against her were substantiated. A written notice provides a grievant with the factual basis for supporting the agency's action against an employee. If any of the facts presented in the written notice are proven and rise to the level of a Group II Written Notice, then the notice must be upheld. The Agency met its burden of proof to show that Grievant interfered with the investigation.

The evidence is overwhelming that the former Resident Engineer did not always manage the Residency properly. One example reveals his management style.

Following the investigation, the former Resident Engineer took retaliatory action (sending threatening email and relocating staff offices) against those he perceived as making statements against him to the investigators. Grievant is not responsible for the poor management by the former Resident Engineer. When the Agency presented evidence that did not distinguish between actions by Grievant and by the former Resident Engineer, the Hearing Officer gave Grievant the benefit of the doubt and attributed that behavior to the former Resident Engineer. Although Grievant has been a valuable employee to the Agency, her closeness to the former Resident Engineer has not served him or her very well.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant's request for reconsideration is **denied.**

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 DHRM, 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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Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the Virginia Department of Transportation
January 7, 2003

The grievant is challenging the hearing officer's November 25, 2002, decision in Grievance No. 5562. The grievant has notified this Agency that she is requesting an administrative review of her case and for the hearing officer to reconsider the decision. The grievant raised concerns that evidence was not given to her until after the second step of the grievance procedure and then only two pieces of evidence were provided. In addition, the grievant alleges that she was influenced strongly to reduce her witness list by the hearing officer in a phone conference call on November 8, 2002, yet the agency was permitted to introduce a new witness at the time of the hearing. She also has requested that the Department of Employment Dispute Resolution conduct an administrative review of the decision. The agency head, Ms. Sara Redding Wilson, has requested that I conduct this review.

FACTS

The Virginia Department of Transportation (VDOT) employs the grievant as an Administrative & Program Specialist lll. The VDOT issued her a Group II Written Notice and a two-day suspension for interfering with an ongoing investigation and for creating an intimidating and hostile work environment and for using abusive and offensive language in the workplace. She filed a grievance and the hearing officer and, in his decision, upheld the agency's disciplinary action. The grievant challenged the decision by appealing to the Department of Human Resource Management (DHRM) and the Department of Employment Dispute Resolution (DEDR) for an administrative review and to the hearing officer for reconsideration. The hearing officer issued a reconsideration decision on December 9, 2002, but did not modify his original ruling.

To support her contention that the hearing officer's decision should be modified, the grievant contends that several procedural matters were not appropriate. More specifically, she contends that evidence was not given to her until after the second step of the grievance procedure and then only two pieces of evidence were provided. In addition, she contends that she was influenced strongly to reduce her witness list in a telephone conference call whereas the agency was allowed to add a witness at the time of the hearing.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case, to determine whether or not witnesses will testify based on the relevancy of their testimony,

and to determine the grievance based on the evidence. The Department of Employment Dispute Resolution administers the grievance procedure and rules on procedural matters. By statute, the Department of Human Resource Management 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. The challenge 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 issue you raised regarding VDOT officials withholding information until after the second step of the grievance procedure and then only two pieces of evidence were provided is a compliance issue and should have been addressed by the DEDR. The issue regarding the admission/rejection of witnesses occurred during the hearing and is not within the statutory authority of the DHRM to review. In summary, you have not raised an issue that this Office is authorized to review because you have not identified either a VDOT or DHRM policy that the hearing officer violated when in making his decision. Thus, we have no basis to interfere with this decision.

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

Ernest G. Spratley

Manager, Employment
Equity Services