

Issues: Group III Written Notice with suspension (conduct unbecoming a supervisor), Discrimination and Harassment; Hearing Date: 03/09/06; Decision Issued: 03/15/06; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8292; Outcome: Agency upheld in full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8292

Hearing Date: March 9, 2006  
Decision Issued: March 15, 2006

**APPEARANCES**

Grievant  
Representative for Grievant  
Warden  
Advocate for Agency  
Six witnesses for Agency

## ISSUE

Did 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? Was the grievant harassed or discriminated against?

## FINDINGS OF FACT

Grievant filed a timely grievance from a Group III Written Notice for conduct unbecoming a supervisor.<sup>1</sup> As part of the disciplinary action, grievant was suspended for 15 days. The grievance proceeded through the resolution steps; when the parties failed to resolve the grievance at the third step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant for 20 years. He is currently a security officer (sergeant).<sup>3</sup> Grievant's brother and sister-in-law are employed as corrections officers (C/O) at the same correctional center as grievant.

On July 5, 2005, grievant's brother encountered C/O A in town and asked whether he was having an affair with his wife; C/O A denied any involvement.<sup>4</sup> C/O A was living with a female C/O (C/O B) at this time. When he went home he related the conversation with grievant's brother to C/O B. She told C/O A that grievant's brother had called her three days earlier and said that he believed C/O A was having an affair with his wife. C/O B also stated that grievant had encountered her on roving patrol at the facility and told her that C/O A was having an affair with his sister-in-law.<sup>5</sup> On or about the same date, grievant encountered at work a female C/O (C/O C) who happened to be a friend of his sister-in-law. Grievant told her that his sister-in-law was having an affair and that he had heard it was with C/O A.<sup>6</sup> C/O C said she had no knowledge of such an affair. At some point in early July 2005, grievant also told a captain that he heard a rumor that his sister-in-law was involved in an affair with C/O A.<sup>7</sup> The captain said he would keep an eye on the situation but he did not observe anything unusual at work among the involved parties. Grievant's brother confronted his wife in August and she admitted to having an affair with C/O A.

On September 11, 2005, grievant's brother and C/O A had a verbal confrontation at the sally port gate. C/O A allegedly lunged at grievant's brother and made a confrontational statement. Grievant's brother told him not to attempt to intimidate him either on the job or on the street. Because of the heated nature

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<sup>1</sup> Agency Exhibit 1. Written Notice, issued September 21, 2005.

<sup>2</sup> Agency Exhibit 1. Grievance Form A, filed October 4, 2005.

<sup>3</sup> Agency Exhibit 4. Employee Work Profile Work Description, cycle ending October 31, 2005.

<sup>4</sup> Agency Exhibit 3. C/O A's Incident Report Form, September 14, 2005.

<sup>5</sup> Agency Exhibit 3. C/O B's Incident Report Form, September 14, 2005. C/O A corroborated this statement in his incident report form.

<sup>6</sup> Agency Exhibit 3. C/O C's Incident Report Form, September 14, 2005.

<sup>7</sup> Agency Exhibit 3. Captain's Incident Report Form, September 14, 2005.

of the confrontation, it was reported to a captain and subsequently investigated by the Chief of Security.<sup>8</sup> The Chief of Security concluded that the grievant had a significant role in stirring this situation up because of his questioning of corrections officers.

### 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:

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. In all other actions, such as claims of harassment or discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.<sup>9</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. 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 of Policy

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<sup>8</sup> Agency Exhibit 2. Major's Incident Report Form, September 14, 2005.

<sup>9</sup> § 5.8, EDR *Grievance Procedure Manual*, Effective August 30, 2004.

No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.<sup>10</sup> 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. Section 5-10.17 of the DOC *Standards of Conduct* addresses Group III offenses, which are defined identically to the DHRM *Standards of Conduct*.<sup>11</sup>

The agency has demonstrated, by a preponderance of evidence, that grievant discussed with at least three other employees, an allegation that his sister-in-law had been having an affair. Grievant brought the affair to the attention of a superior officer (captain), the inference being that something should be done. The captain properly concluded that the personal lives of employees were not of interest as long as they did not impact the ability of employees to perform their jobs as expected. Grievant then told two correctional officers that he had heard rumors of the affair and questioned them about their knowledge. Because grievant is a sergeant, his questioning of these subordinate officers in the workplace about a personal matter involving three other corrections officers made it appear that grievant was conducting an investigation of his own. Moreover, his comments to and questioning of involved people (brother, C/O A, and C/O B) was to some extent a catalyst that may have intensified the negative feelings these employees already had. Such conduct is not appropriate for a supervisory employee such as grievant.

### Racial discrimination

An employee may demonstrate racial discrimination in promotions by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact. Grievant has not presented evidence of any specific remarks or practices, statistical evidence, or evidence of disparate impact. Instead, grievant points to a meeting he had with the warden, chief of security, and a lieutenant.<sup>12</sup> Grievant concludes that the meeting was discriminatory because he was the only non-white person in the meeting. There is more to proving racial discrimination than merely assuming that the racial makeup of a meeting will automatically produce a discriminatory result.

Grievant also objected to a statement made by the Chief of Security. The Major said that grievant was not going to be demoted, transferred or removed from employment because of the region the facility is located in. Grievant believed this remark was racial because the regional director is the same race as grievant. The Major testified that his remark referred to the regional director's preference for less severe discipline in cases such as this; he denied any racial connotation to the remark. Finally, it must be noted that the regional director

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<sup>10</sup> DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>11</sup> Agency Exhibit 6. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

<sup>12</sup> Agency Exhibit 3. Lieutenant's Incident Report Form, September 16, 2005.

approved the disciplinary action in this case. If the regional director, who is the same race as grievant, had seen any evidence of racial discrimination, he would not have approved the discipline. Grievant has not borne the burden of proof and therefore, it is concluded that there is no evidence of discrimination in this case.

#### Hostile work environment harassment

To establish a claim for racial harassment, grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on race; (iii) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (iv) there is some basis for imposing liability on the employer. The grievant has not presented evidence that there was any unwelcome conduct. Grievant complains because the Major investigated the matter in depth. Whenever an on-the-job altercation occurs, the agency is obligated to investigate fully in order to resolve the problem and prevent further recurrences. While grievant may not have liked the investigation, it was unquestionably necessary. Grievant has also not shown that the investigation was based on race. The investigation resulted in interviewing all those with knowledge of the situation regardless of race.

Grievant also alleged that the Major coerced employees into writing statements. However, grievant offered no proof of any such coercion. In fact, grievant did not ask any of the witnesses who testified in the hearing whether they had been coerced. The evidence supports a conclusion that, as the Major stated in his report, he first interviewed employees and then asked each to document their verbal statement in writing.

Grievant suggests that the Major harassed him because grievant had balked at being assigned as an alternate hearing officer for inmate grievances.<sup>13</sup> Sergeants are sometimes assigned various duties related to the responsibilities listed in their work description. In grievant's Employee Work Profile work description, a required responsibility is to "Address and resolve problems with staff and inmates/offenders."<sup>14</sup> Such a responsibility may include assignment as an alternate hearing officer. It is clear from a review of grievant's written response to the Major that grievant does not understand that various assignments, such as an alternate hearing officer or to a strike force, are part of his work description. Grievant also does not understand that superior officers have a duty and obligation to ask questions about work-related issues, and that such legitimate questioning is not harassment.<sup>15</sup> Grievant failed to prove the first two prongs of the test for racial harassment and therefore, has not established a claim for hostile work environment harassment.

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<sup>13</sup> Agency Exhibit 5. E-mail string from February 7-18, 2005.

<sup>14</sup> Agency Exhibit 4. Section C, Measures for Core Responsibilities, Employee Work Profile work description, cycle ending October 31, 2005.

<sup>15</sup> Agency Exhibit 5. E-mail from grievant to Major, February 16, 2005.

## Mitigation

The normal disciplinary action for a Group III offense is removal from employment. The policy provides for the reduction of discipline if there are mitigating circumstances such as (1) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or (2) an employee's long service or otherwise satisfactory work performance. In this case grievant has long service (20 years) with the agency and his performance has otherwise been satisfactory. The agency considered these factors and suspended grievant for 15 days in lieu of terminating his employment. Thus, the agency applied mitigation to reduce the discipline from what it might otherwise have been. Based on the totality of the evidence, the hearing officer has no basis to change the agency's application of the mitigation provision.

## DECISION

The decision of the agency is affirmed.

The Group III Written Notice and 15-day suspension issued on September 21, 2005 are hereby UPHELD.

Grievant has not borne the burden of proof to establish his claim either of discrimination or hostile work environment harassment.

## APPEAL RIGHTS

You may file an administrative review request within **15 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E Main St, Suite 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.<sup>16</sup> You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>17</sup>

[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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David J. Latham, Esq.  
Hearing Officer

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<sup>16</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>17</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.