

Issue: Group II Written Notice (creating hostile work environment); Hearing Date: 07/10/06; Decision Issued: 07/12/06; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8368; Outcome: Employee granted partial relief; **Judicial Review: Appealed to Circuit Court in Greenville County; Outcome pending**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8368**

Hearing Date: July 10, 2006  
Decision Issued: July 12, 2006

**PROCEDURAL HISTORY**

On March 21, 2006, Grievant was issued a Group II Written Notice of disciplinary action for creating a hostile work environment for a female employee.<sup>1</sup> On March 24, 2006, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On June 7, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 10, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

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<sup>1</sup> Grievant received a Notice of Improvement Needed/Substandard Performance. This Notice was not part of the matter before the Hearing Officer because Grievant did not list it as an issue for which he sought relief.

## **ISSUE**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

## **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 Department of Corrections employs Grievant as a Captain at one of its Facilities. He also serves as watch commander as needed by the Agency. No evidence of prior disciplinary action against Grievant was presented during the hearing.

One of Grievant's responsibilities is to ensure that staff come to work as scheduled. When corrections officers do not arrive for their shifts, other staff must rearrange their plans and work in the place of the absent corrections officers. This is inconvenient for the Agency and employees having to work additional hours.

On February 5, 2006 at approximately 4:30 a.m., a call was placed from one of two switchboards at the Facility to Officer S's cell phone. The caller at the Facility did not realize that Officer S's voice mail activated and began recording. The caller did not conclude the cell phone call. The result was that Officer S's voice mail recorder began recording the conversations between Grievant and other staff at the Facility without their knowledge. Grievant and Captain W and another supervisor were in and about the

watch commander's office while they discussed Officer S's attendance problem. Officer S was a probationary employee. Grievant perceived Officer S as having an unacceptable pattern of reliable attendance. The conversation was as follows:

Grievant: Yea, I'm gonna give her something, you know, cause she ain't been here, she done called in to damn much, you know what I'm saying.

Other Supervisor: Um hum.

Grievant: I'm going to deal with her.

Other Supervisor: You got to get them on quick boy, I got no problem with that.

Grievant: OK

Grievant: And when she called in, I need to look back in that damn book. She didn't call in, in that two (2) hours prior to the shift.

Capt. W: That day I told her she was setting a pattern, that girl stared at me for two (2) days.

Grievant: Yea, you done talked to her once before too.

Capt. W: Yea, I know.

Grievant: Yea, right.

Capt. W: I just wanted her to know she was setting a pattern.

Capt. W: That chick came in the next day, she was standing in line looking at me and stared me down man. I don't even know you but you are setting a pattern by calling in as a new officer. She said she hadn't call in but twice (Capt. W continues to laugh)

Grievant: I'm gonna call her right now, I'm gonna deal with her.

Capt. W: (Laughing) She looked at me like she wanted to fight me, boy. (Laughing)

Grievant: You know what I'm saying, she is just too much!

**Interference with unidentifiable statements.**

Grievant: I'm damn sure gonna deal with her, man. F--k this! I've been to damn nice this year, f--k that.

Other Supervisor: Which one is that?

Grievant: That little small skinny one, with the eyeglasses. She look like a fool for real. She look half damn crazy. You know.

Other Supervisor: Light skinned girl?

Grievant: No, pecan brown. Not really dark. You know. she ain't redbone, you know. She ain't been, she ain't been here .....

Other Supervisor: She normally work 7.

Grievant: That is where I put her in seven all the time. You know. [Corrections Officer K], she the same way. She still a one stripe. But you know she done claimed now you know I'm not gonna say nothing between you and me, but she claimed that her son done got stabbed death, damn near dead. Daughter-in-law just called her and got stabbed three (3) times in the chest area and they are rushing him, and I can work with that. I can work with that, you know what I am saying.

Grievant: (Phone rings) This is [Grievant]. No not [Sergeant K]. No man. This is little female, [Officer S]. [Officer S]. I will take care of it. Yea. Dial her back. You got her number? [telephone number]. Yea, that is the one I want to talk to. Alright. (Hangs phone up)

Grievant: I ain't gonna let her have a joyful day off. I'm gonna put something on her damn mind. You know what I'm saying [Captain W]?

Capt. W: Yea

Grievant: She ain't gonna walk around like she thinks she got it made, you know what I'm saying? Like she thinks she got it made and I know about it.

Capt W: ????????

Grievant: Yea.

Grievant: (Phone rings) [Grievant]. Hello, [Grievant]. Hello, Hello. This is [Grievant]. Can I speak to [Officer S]?

Grievant: [Officer S?] What is going on? OK. [Officer S], I'm just calling to let you know -----

Grievant spoke in a professional manner during the remainder of his telephone conversation with Officer S about her coming to work. Officer S later listened to her voice mail and learned of the Grievant's comments about her. She became upset and expressed her concern<sup>2</sup> to Agency managers.<sup>3</sup> During the Agency's fact finding, Grievant refused to answer questions because he believed his conversation had been recorded illegally.<sup>4</sup>

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>5</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>6</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>7</sup>

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, natural origin, age, sex, religion, disability, marital status or pregnancy." Workplace Harassment is defined as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person **on the basis** of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work

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<sup>2</sup> In an incident report, Officer S wrote, "I am appalled that my supervisor would feel the way he does or even speak about me in my absence the way he did." Agency Exhibit 3.

<sup>3</sup> Agency managers testified that Officer S told them that Grievant had advised her of a meeting she was to attend involving Grievant and two other managers. No meeting was actually scheduled thereby suggesting Grievant was deceitful towards Officer S. Officer S did not testify at the hearing. Grievant testified that he did not tell Officer S she was to come to work for a meeting. He testified that he advised Officer S she may be involved in reports with the managers. Grievant's testimony was credible and, thus, there is no basis for disciplining Grievant for being untruthful to Officer S.

<sup>4</sup> The Agency did not discipline Grievant for failing to answer questions as part of its investigation. Thus, Grievant's failure to respond is not a factor in this appeal.

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>6</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>7</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

performance; or (3) affects an employee's employment opportunities or compensation.<sup>8</sup> (Emphasis added).

Grievant's comments denigrated Officer S but Grievant's comments were not motivated by or the result of Officer S's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability.<sup>9</sup> Grievant's comments resulted from his perception that Officer S was a poorly performing employee. Grievant did not engage in workplace harassment with respect to Officer S. Grievant did not act contrary to DHRM Policy 2.30. The Agency has not established that Grievant acted contrary to written policy and, thus, has not justified its issuance of a Group II Written Notice.

"[I]nadequate or unsatisfactory job performance" is a Group I offense.<sup>10</sup> In order to prove inadequate or unsatisfactory job performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was obligated to perform his work duties in a professional manner with respect for his co-workers. As a supervisor and watch commander he was obligated to set a positive example for other supervisors and employees. Stating that Officer S looked like a fool and was "half damn crazy" is not appropriate discourse for a supervisor holding the rank of Captain. The fact that Grievant believed he was speaking privately with other supervisors does not render his comments appropriate. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant contends the disciplinary action should be mitigated.<sup>11</sup> *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."<sup>12</sup> Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters.

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<sup>8</sup> DHRM Policy 2.30.

<sup>9</sup> When Grievant described Officer S's race, he did so in response to a question of the other supervisor who wanted to know which officer Grievant was talking about.

<sup>10</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(B)(4).

<sup>11</sup> Grievant's assertion that the conversation was illegally recorded is unfounded. Officer S did not intentionally record the conversation. It recorded because of an error by someone working at the Facility.

<sup>12</sup> *Va. Code § 2.2-3005.*

The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### DECISION

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

### 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 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 all of your appeals to the other party and to the EDR Director. 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. 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>13</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.