Issues: Group II Written Notice (failure to follow policy), Group III Written Notice (creating hostile work environment), and Termination; Hearing Date: 05/29/07; Decision Issued: 06/19/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8555, 8556; Outcome: Partial Relief (Group II upheld, Group III rescinded, Termination rescinded – employee reinstated); **Fee Addendum issued 07/10/07.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8555 / 8556

Hearing Date: May 29, 2007
Decision Issued: June 19, 2007

PROCEDURAL HISTORY

On September 25, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. On September 25, 2006 Grievant was issued a Group III Written Notice of disciplinary action with removal for the appearance of creating a hostile work environment for the administration.

Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 19, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 29, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 employed Grievant as a Corrections Lieutenant at one of its facilities until his removal of effective September 25, 2006. Grievant has been employed by the Agency since 1993. He joined the Facility in 2002. The purpose of his position was, "Provide supervision to Correctional Sergeants and Correctional Officers."[1] No evidence of prior active disciplinary action against Grievant was introduced during the hearing. Grievant received favorable evaluations from the Agency.

Grievant had a second job while working at the Agency. He had been in business for several years. He knew he was obligated to obtain written approval from the Agency annually to continue his employment. Before the Warden joined the Facility in March 2006, Grievant sought written approval from an interim warden. The interim warden did not sign the form to approve Grievant's outside employment and then return

[1] Agency Exhibit 4.

the form to Grievant. Grievant failed to follow up with the interim warden. Grievant continued to work his second job without the Agency's written approval.

On August 28, 2006, Grievant received an email informing him that he was being moved from the day shift to the night shift. The decision to move Grievant was made by the Assistant Warden. Grievant did not agree with that decision because it would significantly interfere with his family obligations, second job, and educational opportunities.

Grievant believed that the Agency's decision to change his shift resulted from discrimination against him because of his race. Grievant complained about the transfer to his immediate supervisor, Captain M. Grievant informed Captain M that Grievant was being discriminated against because of his race. Captain M told Grievant that the Assistant Warden made the decision to move Grievant and that Grievant should talk to the Assistant Warden.[2]

Grievant spoke with the Assistant Warden and stated he believed his move was because of racial discrimination. The Assistant Warden denied the allegations and told Grievant to return to his office in five work days. The Assistant Warden intended to research Grievant's history of absences from work in order to show Grievant why he was moved to the night shift. Grievant did not return to speak with the Assistant Warden in five days.[3]

Grievant went to an interview room at the facility as an inmate disciplinary hearing was about to begin. Grievant began speaking with the Inmate Hearings Officer who was a friend of his. She asked Grievant what was wrong. He told her he believed he was being discriminated against because all of the lieutenants of his race on his shift were being moved to the night shift. Lieutenant H, Lieutenant G, and Lieutenant S were also in the room. Lieutenant H overheard the discussion and asked a question. Grievant stepped out of the room so that Lieutenant H could not hear the remainder of the conversation.

Grievant did not mention the Warden's name as the person engaging in racial discrimination. He did not call the Warden a racist.[4]

CONCLUSIONS OF POLICY

[2] Captain M and the Assistant Warden were within Grievant's chain of command.

[3] Grievant's conclusion was erroneous. The Agency did not discriminate against Grievant because of his race. The Assistant Warden decided to move Grievant from the day shift to the night shift because the Assistant Warden believed that Grievant was less likely than other supervisors to come to work. The Assistant Warden did not consider Grievant's race when deciding whether to move Grievant to the night shift.

[4] An inmate had informed the Warden that Grievant had called her a racist and was out to get her.

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."[5] 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."[6] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[7]

Outside Employment

Department of Corrections Procedure Number 5-4.17 states,

> A. No employee shall engage in any other employment or activity that is prejudicial to the Department's operations either in another agency or outside of state service, or in any private business, or in the conduct of a profession during the hours for which he or she is employed to work, or outside such hours in a manner to an extent that affects or is deemed by the employing agency is likely to affect their usefulness as an employee or that is likely to be in violation of the State and Local Government Conflict of Interests Act.
>
> B. Employees may not accept payment for services from any of person(s) or organization other than the Department of Corrections without written approval of the organizational unit head.
>
> C. The written approval shall only be made for a maximum of one year or a specified period less than one year. If conditions change with the employee's employment with the Department which require a withdrawal of the outside employment authorization, the Department will give the employee two weeks notice in writing.
>
> D. Failure to obtain permission for outside employment may result in disciplinary action under the Standards of Conduct.

"[F]ailure to … comply with applicable established written policy" is a Group II offense.[8] Grievant was employed in a job outside of the Agency. He did not have written permission from a warden to engage in outside employment. Thus, Grievant's

[5] Virginia Department of Corrections Operating Procedure 135.1(X)(A).

[6] Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

[7] Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

[8] Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

behavior was contrary to Department of Corrections Procedure Number 5-4.17 thereby justifying the issuance of a Group II Written Notice.

Grievant argues that he submitted a written request for approval to an interim warden but that warden left the facility without signing the form. Grievant argues this is a mere oversight not justifying disciplinary action. Grievant's argument fails. Grievant's prior written approvals for outside employment were valid for only one year at a time. Grievant's submission of a written request did not mean that the interim warden reviewed and approved the request. Grievant should have followed up with the interim warden to determine the status of his request or stopped engaging in outside employment. When Grievant continued to work his second job, he did so at his own risk.

Appearance of Creating a Hostile Work Environment for the Administration

Title VII of the Civil Rights Act of 1964 states that, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees … because he has opposed any practice made an unlawful employment practice."[9] The provision thus guarantees employees "the right to complain to their superiors about suspected violations of Title VII."[10] When Grievant met with the Captain and the Major, he stated that he believed[11] he was being discriminated against because of his race. His statements were protected and not subject to disciplinary action. His speech was protected even though his allegations of racial discrimination were untrue.[12]

"Opposition activity encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities."[13] Grievant voiced his opinion to his coworkers including the three Lieutenants and the Inmate Hearings Officer. Whether this activity was protected depends on the application of a balancing test.[14] The balancing test

[9] 42 U.S.C.S. § 2000e-3 (LexisNexis 2007).

[10] *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543-44 (4th Cir. 2003) (citing *Thompson v. Potomac Elec. Power. Co.*, 312 F.3d 645, 650 (4th Cir. 2002)).

[11] Grievant's complaint was made in good faith.

[12] *See, e.g., Dea v. Wash. Suburban Sanitary Comm'n*, 11 Fed. Appx. 352, 357 (4th Cir. 2001) ("A Title VII plaintiff bringing a claim for retaliation need not establish that the employment practice he opposed in fact violated Title VII.")

[13] *Id.* Other circuits also use the balancing test when analyzing whether oppositional activity is protected. *See, e.g.*, *Rollins*, 868 F.2d at 401; *Booker*, 879 F.2d at 1312; *Jones v. Flagship Int'l.*, 793 F.2d 714, 728 (5th Cir. 1986) (holding in favor of employer where plaintiff failed to show that the alleged sexually harassing conduct met the level of sexually abusive or a hostile work environment); *Pendleton v. Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980) (holding that employer rightfully dismissed employees who participated in a disruptive demonstration at their job); *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 230 (1st Cir. 1976).

[14] EEOC Compliance Manual, Section 8(II)(B)(3)(a).

requires an employee's opposition to the alleged discriminatory practice to be "reasonable,"[15] and does not provide absolute protection to employees whose oppositional actions disrupt the work environment.[16]

Under the facts of this case, Grievant directed his comments to coworkers who were either friends and/or fellow supervisors. His behavior did not disrupt the Agency's operations. He did not undermine the morale of his unit. Grievant did not affect his ability to work for the Agency or create dissension or distrust among his coworkers. Accordingly, the comments Grievant made to coworkers outside of his chain of command were also protected and not subject to disciplinary action. The Agency's Group III Written Notice must be reversed.

Procedural Due Process

Grievant contends the Agency failed to comply with the Grievance Procedure Manual by failing to timely request the appointment of a Hearing Officer. To the extent the Agency failed to comply with the Grievance Procedure Manual prior to the appointment of a Hearing Officer, Grievant's request for relief should have been made to the EDR Director. With the appointment of a Hearing Officer, the issue is moot.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

Mitigation

Grievant contends the Group II Written Notice of disciplinary action should be mitigated. *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

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[15] *Rollins v. Florida Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989).

[16] *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1009 (7th Cir. 2000) (Although employees may engage in protected activity without fear of retaliation, they are not insulated from being fired for saying something obviously inappropriate. The plaintiff in *Miller* lawfully was fired for calling her supervisor incompetent and a political hack.). *See also Rollins*, 868 F.2d at 400-01 (holding that complaints cannot be so disruptive that they antagonize supervisors and colleagues and impair the morale of co-workers).

Dispute Resolution…."[17] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. 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 **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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 14th St., 12th Floor
   Richmond, VA 23219

[17] *Va. Code § 2.2-3005.*

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.[18]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

[18] 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

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 8555 / 8556-A

Addendum Issued: July 10, 2007

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[19] For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.[20]

Grievant's counsel submitted a petition with affidavit identifying 21.5 hours of time devoted to representing Grievant in his hearing. The current hourly rate for reimbursement of attorney's fees is $127.[21]

AWARD

The grievant is awarded attorneys' fees in the amount of $2,730.50.

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[19] Va. Code § 2.2-3005.1.A.

[20] § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) EDR *Rules for Conducting Grievance Hearings*, effective August 30, 2004.

[21] Grievant's petition reflects an inaccurate hourly rate. In August 2006, the EDR Director increased the hourly rate to $127 which represents an increase consistent with the cost of living adjustment adopted by the Virginia Retirement System. According, Grievant's is awarded fees at the rate of $127 per hour.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer