

Issue: Group III Written Notice with termination (workplace harassment); Hearing Date: 11/06/07; Decision Issued: 11/21/07; Agency: VDOT; AHO: John V. Robinson, Esq.; Case No. 8734; Outcome: Full Relief; **Administrative Review: HO Reconsideration Request received 12/05/07; Reconsideration Decision issued 12/20/07; Outcome: Original decision affirmed; Attorneys' Fees Addendum issued 01/04/08; Challenge to the Fees Addendum received 01/23/08; EDR Ruling #2008-1930 issued 02/12/08; Outcome: Fees Addendum affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8734

Hearing Officer Appointment: October 16, 2007

Hearing Date: November 6, 2007

Decision Issued: November 21, 2007

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment on June 28, 2007 by Management of the Department of Transportation (the "Department" or "Agency"), as described in the Grievance Form A dated July 27, 2007. The hearing officer was appointed on October 16, 2007. The hearing officer scheduled a pre-hearing telephone conference call at 12:30 p.m. on October 22, 2007. The Grievant's attorney, the Department's advocate and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant, by counsel, confirmed that she is challenging the termination for the reasons provided in her Grievance Form A and is seeking the relief requested in her Grievance Form A, including reinstatement and attorney fees. The hearing officer stated that he did not have subject matter jurisdiction to order certain relief requested by the Grievant, including ordering the Agency to institute disciplinary action against a named third party and the Grievant, by counsel, stated that she was no longer seeking such an order or such relief from the hearing officer.

The hearing was scheduled for and was duly held on November 6, 2007. At the hearing, the Agency was represented by its advocate, and the Grievant was represented by her attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency's exhibit binder and Grievant Exhibits 1 through 6.¹

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

¹ References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number, if any.

At the request of the Grievant, the hearing officer issued several orders for witnesses. No issues concerning non-attendance remained by the conclusion of the hearing.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. After a number of alleged disciplinary infractions, Management of the Agency by a letter dated June 27, 2007, informed the Grievant, in part, as follows:

This is to inform you that I am considering issuing you a Group III Written Notice Violation of Policy 2.30 Work place Harassment. The purpose of this letter is to inform you that it is our intention to terminate your employment, under the "Standards of Conduct Policy".

Before deciding what action needs to be taken, we would like to hear and review any information or written response you would like us to consider, and your reasons why we should not take action under the Standards of Conduct. We are requiring a meeting with you, Thursday, June 28, 2007, at 9:00 AM in the Human Resources Office. If you choose not to meet, we will proceed with action based on the information received according to the Standards of Conduct.

AE 2, page 10.

2. Subsequently, by an undated letter, the Agency further informed the Grievant as follows:

We met on June 28, 2007 and you offered no information that would alter the assessment of the action indicated in your Due Process Letter dated June 27, 2007; therefore, after careful consideration, we have made the decision to terminate your employment. This is to officially inform you that your employment with the Virginia Department of Transportation is terminated effective close of business, Thursday, June 28, 2007, based on the reason outlined below.

Group III Written Notice Violation of Policy 2.30 Workplace Harassment.

AE 2, page 12.

3. Agency Policy Number 2.30 – Workplace Harassment defines “workplace harassment” as follows:

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 performance; or (3) affects an employee’s employment opportunities or compensation.

GE 4, page 1.

4. At the hearing, the Agency presented no evidence of “workplace harassment” as defined in Agency Policy Number 2.30, having prepared its case to prove violations of different Agency policies.
5. The Agency did seek at the hearing to admit into evidence certain documents in which the Agency alleged that it had corrected the written notice to conform to what the Agency maintains are the applicable policies violated. Counsel for the Grievant objected to such introduction because she and the Grievant had prepared for the hearing based on the Agency’s cited workplace harassment violations. The hearing officer sustained the objection for this reason, for fundamental due process concerns and because the Scheduling Order entered on October 22, 2007 by the hearing officer concerning this hearing required the parties to exchange exhibits by the deadline of 5:00 p.m. on Wednesday, October 31, 2007.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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. *Grievance Procedure Manual*, § 5.8. The Agency has failed to present any evidence concerning the noticed, alleged violation of workplace harassment and, accordingly, has failed to sustain its burden.

DECISION

For the reasons stated herein, the disciplinary action is reversed. The Agency is directed to reinstate the Grievant and to provide the Grievant with **back pay** for the period of suspension, less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. The hearing officer hereby grants the Grievant's request for attorneys' fees provided that the Grievant's attorney ensures that each of (1) the advocate for the Agency and (2) the hearing officer *receives*, within fifteen (15) calendar days of the issuance of the original decision, counsel's petition for reasonable attorneys' fees and otherwise complies with Section VI(D) of the *Rules for Conducting Grievance Hearings*.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** 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.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

- 3. A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8734

Hearing Officer Appointment: October 16, 2007

Hearing Date: November 6, 2007

Original Decision Issued: November 21, 2007

Review Decision Issued: December 20, 2007

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of her employment on June 28, 2007 by Management of the Department of Transportation (the "Department" or "Agency"), as described in her Grievance Form A dated July 27, 2007.

In this proceeding the agency bore the burden of proof and had to show by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances.

The agency was represented by an experienced advocate and the grievant was represented by an attorney. Following a pre-hearing conference held by telephone at 12:30 p.m. on October 22, 2007, the hearing officer issued a Scheduling Order entered on October 22, 2007, which is incorporated herein by this reference. The Scheduling Order provided in part as follows:

EXCHANGE OF EXHIBITS AND WITNESS LISTS:

The parties agreed that before 5:00 p.m. on Wednesday, October 31, 2007, the parties would exchange their proposed exhibits and the names of their proposed witnesses. To clarify this direction, "exchange" as used herein means each party shall ensure that he or she delivers by hand, overnight courier or facsimile, his or her proposed exhibits and the names of his or her proposed witnesses to the other party. Each party is responsible for notifying its own witnesses and securing the attendance of their witnesses at the hearing.

The exhibits should be marked and tabbed and in a notebook for easy reference at the hearing. The parties shall ensure that copies of all their witness lists and respective exhibits are provided to the hearing officer at the beginning of the hearing, at latest. **Please remember that each party should also provide an**

extra set of witness exhibits if the party expects to question any witness concerning the exhibits.

The Department's advocate, the Grievant's attorney and the hearing officer participated in this pre-hearing conference call.

Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing.

Only after the hearing was already under way did the Agency realize that it had erred and only provided in the hearing officer's file to that time and in its exhibits for the hearing a due process letter dated June 27, 2007 (AE 2, pages 10 and 12) and an undated written notice (AE 2, page 12), which both clearly stated that the reason for the Grievant's termination of employment was "Group II Written Notice Violation of Policy 2.30 Workplace Harassment." AE 2, pages 10 and 12.

The Agency's advocate requested a break of about an hour at approximately 11:30 a.m. during the hearing to confer with the Agency. Tape 1, Side B. Upon the hearing recommencing at about 12:30 p.m., the Department's advocate said the Agency had made a mistake concerning the issuance of the Written Notice, and the advocate sought to introduce into evidence certain letters which the advocate said were sent to the Grievant on July 20, 2007, including a corrected written notice. Tape 1, Side B. None of these documents had been previously provided to the Grievant or the hearing officer pursuant to the Scheduling Order. The Grievant's attorney objected for the reasons stated at the hearing and in her brief dated December 12, 2007, concerning the Agency's request for reconsideration.

In *City of Hopewell v. County of Prince George, et als.*, 240 Va. 306, 314, 397 S.E.2d 793, 797 (1990), the Virginia Supreme Court specifically left open the question whether the trial judge in that case even had the discretion to allow a rebuttal witness to testify where Petersburg had not previously named such witness in accordance with the court's pretrial order entered January 30, 1989. In any event, the Court decided that the trial judge clearly had not abused his discretion in refusing to allow such witness to testify even under circumstances where Petersburg was arguing that there were good reasons why the witness was not named on the witness list filed by the deadline in the pretrial order. By contrast, in this proceeding the Agency advances no good reasons for its failures. Indeed, after its earlier missteps concerning the Grievant's termination, the least the Agency could have done was to have taken a few minutes to clear up and clean up the record and, at a very minimum, to have included in its file sent to the hearing officer or in its exhibits for the hearing the correct termination documents on which it relied. If the subject matter is so serious, as the Agency contends, a few minutes here and there to prevent the perpetuation of confusion and misdirection already created by the Agency is surely warranted.

The Virginia Supreme Court looks with favor upon the use of stipulations and other pre-trial (or in this proceeding, pre-hearing) techniques which are designed to narrow the issues or

settlement of litigation. *McLaughlin v. Gholson*, 210 Va. 498, 500, 171 S.E.2d 816, 817 (1970). The Scheduling Order in this proceeding and, specifically, the parties' stipulated deadline concerning exchange of witness lists and exhibits, was a set of rules which the parties agreed to live by and constituted precisely such a pre-hearing technique. To have allowed the Agency mid-stream in the hearing to have admitted into evidence entirely different documents, providing entirely different reasons and policies for the termination, would have thwarted the rules the parties themselves agreed to abide by and violated fundamental principles of fairness, notice and due process. Accordingly, the hearing officer is comfortable with his decision not to disregard the Scheduling Order and sees no reason to reverse himself on this issue. For this reason, for the reasons stated at the hearing (Tape 1, Side B), for the reasons stated in the brief of the Grievant's attorney and for the additional reasons provided below, the hearing officer denies the Agency's request.

The Rules provide that the hearing officer's decision issued on November 21, 2007 is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision (Rules, Section VII). The type of review timely raised by the Agency in its request dated December 5, 2007, to reconsider and reopen this proceeding is as follows:

1. **A request to reconsider a decision or reopen a hearing** 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.

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the EDR Director. Rules, Section VII.

The hearing officer should issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request. Rules, Section VII.

DECISION

In its request to reconsider the decision or to reopen the hearing, the grievant has not offered any probative newly discovered evidence. Similarly, the grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request. For the reasons provided herein, the hearing officer hereby denies the Agency's request for review directed to him and hereby affirms his decision that the Agency has failed to meet its burden of proving by a preponderance of the evidence that the termination of the grievant's employment was warranted and appropriate. The hearing officer also hereby grants the Grievant's request, by counsel, to amend the Grievant's attorneys' fees petition to include the cost for this response provided that the Grievant's attorney ensures that each of (1) the Agency and (2) the hearing officer *receives*, within eight (8) calendar days of the date hereof, counsel's petition for reasonable attorneys' fees and otherwise complies with Section VI(D) of the *Rules for Conducting Grievance Hearings*.

APPEAL RIGHTS

The hearing officer incorporates herein Section VII of the Rules.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

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

DIVISION OF HEARINGS

**ADDENDUM TO
DECISION OF HEARING OFFICER**

In the matter of: Case No. 8734

Hearing Officer Appointment: October 16, 2007
Hearing Date: November 6, 2007
Original Decision Issued: November 21, 2007
Review Decision Issued: December 20, 2007
Addendum Issued: January 4, 2008

**DECISION OF HEARING OFFICER ON
AWARD OF ATTORNEYS' FEES**

In the matter of: Case No. 8734

APPLICABLE LAW AND PROCEDURE

Applicable law provides that an employee who is represented by an attorney and who substantially prevails on the merits of a grievance challenging her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust.² Accordingly, a 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.³ 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. *Id.*

² Rules for Conducting Grievance Hearings, effective August 30, 2004 (the "Rules"), Section VI(D); Va. Code § 2.2-3005.1.A.

³ § 7.2(e) Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004; the Rules, Section VI(D).

FINDINGS AND DISCUSSION

The decision rescinded the discipline and reinstated the grievant. Accordingly, the hearing officer finds that grievant substantially prevailed in this case. The hearing officer also finds that there are no special circumstances which would make an award of attorneys' fees unjust and that the attorneys' fees requested in the grievant's amended fee petition provided, by counsel, to the hearing officer on December 21, 2007, are reasonable and warranted. No agency response to the petition or amended fee petition, following the hearing officer's review decision, was received by the hearing officer. Upon review of the attorney hours indicated, and the issues involved in the matter, I approve 40.70 hours of attorney time.

AWARD

The grievant is awarded attorneys' fees incurred from August 9, 2007 through December 21, 2007, in the amount of \$5,168.90 (40.70 hours x \$127.00 per hour).

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within ten (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.

ENTER:

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).