

Issue: Group III Written Notice with demotion (conduct which undermines ability and effectiveness to perform duties); Hearing Date: 11/21/07; Decision Issued: 11/28/07; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 8738; Outcome: No Relief, Agency Upheld in Full; **Administrative Review:** **HO Reconsideration Request received 12/12/07; Reconsideration Decision issued 12/20/07; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 01/03/08; EDR Ruling #2008-1906 issued 01/11/08; Outcome: Request untimely – AHO’s decision affirmed; Challenge to Ruling #2008-1906 received 01/16/08; EDR Ruling #2008-1917 issued 01/17/08; Outcome: No jurisdiction – Original decision affirmed; Judicial Review: Appealed to Tazewell County Circuit Court (02/14/08); Outcome: Remanded to AHO [CL08-47] issued 08/07/08; Hearing Reopened – Rehearing Date: 01/22/09; Second Reconsideration Decision issued 02/04/09; Outcome: Original decision affirmed.**

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8738

Hearing Date: November 21, 2007

Decision Issued: November 28, 2007

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
5Witnesses for Agency
3Witnesses for Grievant

ISSUES

The parties, by counsel and representative agreed in the pre-hearing conference on November 1, 2007, that the issue for this hearing is: "Did Grievant's conduct undermine his ability and effectiveness to perform the duties of the Assistant Warden position at a new State Correctional Center?", and, "Was a Group III Notice with demotion proper?"

FINDINGS OF FACTS

On Friday, August 3, 2007, two Corrections Lieutenants and the Grievant, the facilities Assistant Warden, were discussing the placement of staff in offices at the facility, a new, soon to be opened Correctional Center. The facilities Chief of Security, a Corrections Major joined the conversation and voiced his wishes to move the Safety Officer out of the Watch Office area and place the newly appointed Intelligence Officer in the Watch Office area from which the Safety Officer would be moving. The Assistant Warden wanted to assign the new Intelligence Officer to an office in the Intake Area.

One of the Lieutenants stated that the Warden and he, with another person had discussed the matter while looking at the blueprint of the new facility and the Warden had decided on the assignment of offices. The conversation ended with the suggestion that they locate the blueprint and go from there.

Shortly after the above conversation ended, the Grievant entered the Training Lieutenants office where the above mentioned two Lieutenants were working with a Corrections Sergeant. Grievant asked the Sergeant to leave and closed the door. Grievant then stated "What I'm about to say stays in this office, understood?" Grievant went on to tell the two Lieutenants that an African American had been made the Intelligence Officer. Grievant stated "... I'm against giving the Intelligence Officer the office in the Watch Office, because it is a brother looking out for a brother." Grievant turned to leave and looked back at the two Lieutenants and stated, "If you know what I mean."

The Lieutenants separately left the facility, contacted the Warden who was on his way to his house, and insisted on seeing him immediately. The two Lieutenants met out of the facility and one followed the other to the Warden's house. They discussed the matter with the Warden and called the Regional Operation Manager for the Department of Corrections.

Since the incident occurred on late Friday morning and the Lieutenants meeting with the Warden was on Friday afternoon, the Regional Operations Manager for the Western Region told the Lieutenants to write a report and fax it to her on Monday morning after notifying her it was coming. Both Lieutenants wrote their reports at the facility. One of the Lieutenants gave the other a copy of his report to keep in a file. They contain statements almost verbatim, but at different places within the reports filed with the Operations Manager. The Lieutenants deny collaborating on their reports.

The Assistant Deputy Director of the Virginia Department of Corrections testified that he met with the Regional Director who had met with the Grievant. The Assistant Deputy Director also met with the Lieutenants. He found their reports credible and them credible.

The Assistant Deputy Director was questioned about his notes from interviews during his investigation of the Grievant's matter. His secretary sent a transcribed portion of the notes to Grievant's counsel. The matter was not pursued further at the hearing.

The Chief of Security for the new State Correctional Center and the person appointed to be Intelligence Officer are both African Americans. The Lieutenants took the remark about a "brother looking out for a brother" to be a racial slur.

Grievant denied making the "brother looking out for a brother" remark.

Grievant had criticized the Lieutenants for "snitching to Roanoke" on another matter. They denied the racial comment report was retaliatory for this criticism.

Grievant has a twenty-two year unblemished record with the Department of Corrections. Because of the remark, he was reduced from a position Grade 14 to Grade 11. He suffered a 5% pay cut and the loss of a \$5,400.00 per year housing allowance.

The Assistant Warden at the facility to which the Grievant was reassigned testified that she had worked with Grievant before and works with him in his new assignment as his Superior and finds him a “contributor” and capable of duties as an Assistant Warden.

An African American Corrections Officer who works under Grievant’s supervision in his new assignment testified that he had a good working relationship with Grievant. Grievant treated him with the utmost respect.

The Chief of Security at Grievant’s reassigned facility testified he had never seen Grievant display racial bias.

The Warden testified that he emphasized that the new facility was to be the best in the system in every area.

The Department of Corrections places emphasis on non-discrimination and has attempted to rid the agency of discriminatory acts. The Warden had emphasized this in training his staff.

APPLICABLE LAW, POLICY AND PROCEDURES

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the polices and procedures promulgated by DHRM. [DHRM Policy No. 1.60, “Standards of Conduct” (effective 9/16/93)]. Section VI of DHRM Policy No. 1.60 deals with corrective action.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

The following policy was admitted and considered as an exhibit:

- VDOC Operating Procedure No. 135.1, Standards of Conduct, Section IV, C.

CONCLUSIONS OF LAW

The Department of Corrections met the burden of proof in this matter. From the testimony presented by both sides, the Grievant, before and after the incident had an excellent record and was obviously qualified for his assignments. The “brother looking out for a brother” remark which he attempted to limit to the Lieutenants was a racial slur, which by occurring undermined his effectiveness for the position of Assistant Warden. I do not find collusion between the Lieutenants from the use of like phrases in their reports. They were reporting on the same incident from similar perspectives.

Unfortunately, good people make mistakes. The Grievant’s successful record was considered. As one witness testified, they “did not want to kill him.” He still has a job with benefits, although he has suffered a reduction in salary and the loss of his housing allowance. Certainly his ability to perform the duties of Assistant Warden and his effectiveness in that position were undermined by his unfortunate statement made at the time when the Warden and his subordinates were striving to bring a new facility on line functioning as the “best of the best”.

DECISION

From the evidence presented, the Grievant’s statement was a racial slur which he recognized at the time it was made by adding “you know what I mean.” The unfortunate remark undermined his effectiveness and his ability to perform his duties as Assistant Warden at the time the Department of Corrections was striving to bring a new State Correctional Center on line as an exemplary new facility free of discrimination. His excellent past performance was considered and he was not fired. The imposition of a Group III Notice with demotion was proper and is sustained.

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 faxes 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 the 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.

Thomas J. McCarthy, Jr.
Hearing Officer

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
RECONSIDERATION OF DECISION OF HEARING OFFICER

In re: Case Number 8738

Hearing Date: November 21, 2007
Decision Issued: November 28, 2007
Reconsideration Date: December 20, 2007

Grievant, by counsel, requested this Hearing Officer to reconsider and change the decision in the above matter on the basis of his allegations that the Department of Corrections substantially violated the grievance procedure without just cause in two respects.

First, Grievant requested all documents pertaining to the allegations against him by a FOIA request which accompanied his Grievance Form A. In the prehearing conference, the Department of Corrections was directed to provide documents in unredacted form. At the hearing, the Assistant Deputy Director testified that his notes were not provided as copies of his original notes, but in order to make them readable, his secretary transcribed them from his difficult to read handwritten notes. While this testimony was considered as questioned, it did not go to the question of whether Grievant made the grossly improper racial slur or whether his ability to serve as Assistant Warden was undermined by his remarks. The form of the evidence presented did not effect the decision.

Second, the original written notice showed the offense date to be 08/02/07. This date was subsequently corrected to be 08/03/07, after the beginning of the grievance procedure. This was considered at the hearing and in rendering my opinion. It did not go to the issues agreed upon in the prehearing conference. It was explained as a typographical mistake and corrected well before the hearing, and did not effect the opinion.

While such matters could have been considered before the hearing as compliance matters, they were not. The two matters questioned by Grievant's counsel in his letter of December 10, 2007, did not go to the issues agreed on in the prehearing conference, and while considered in the hearing and in reaching the subsequent decision, in my opinion, did not change the proof and defense of the issues considered as heard under oath from the witnesses involved.

For the above reasons, the Grievant's request after reconsideration is denied.

Thomas J. McCarthy, Jr., Esquire
Hearing Officer

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 8738

Re-Hearing Date: January 22, 2009

Decision Issued: February 4, 2009

APPEARANCES

Grievant

Grievant's Counsel

Agency Representative

5 Witnesses for Agency at First Hearing

3 Witnesses for Grievant at First Hearing

3 Witnesses for Agency at Re-Hearing

0 Witnesses for Grievant at Re-Hearing

This matter was heard as a re-hearing to give the Grievant and his counsel and opportunity to have had written notes presented and testified to.

FINDINGS OF FACTS - FIRST HEARING

On Friday, August 3, 2007, two Corrections Lieutenants and the Grievant, the facilities Assistant Warden, were discussing the placement of staff in offices at the facility, a new, soon to be opened Correctional Center. The facilities Chief of Security, a Corrections Major joined the conversation and voiced his wishes to move the Safety Officer out of the Watch Office area and place the newly appointed Intelligence Officer in the Watch Office area from which the Safety Officer would be moving. The Assistant Warden wanted to assign the new Intelligence Officer to an office in the Intake Area.

One of the Lieutenants stated that the Warden and he, with another person had discussed the matter while looking at the blueprint of the new facility and the Warden had decided on the assignment of offices. The conversation ended with the suggestion that they locate the blueprint and go from there.

Shortly after the above conversation ended, the Grievant entered the Training Lieutenants office where the above mentioned two Lieutenants were working with a

Corrections Sergeant. Grievant asked the Sergeant to leave and closed the door. Grievant then stated "What I'm about to say stays in this office, understood?" Grievant went on to tell the two Lieutenants that an African American had been made the Intelligence Officer. Grievant stated "... I'm against giving the Intelligence Officer the office in the Watch Office, because it is a brother looking out for a brother." Grievant turned to leave and looked back at the two Lieutenants and stated, "If you know what I mean."

The Lieutenants separately left the facility, contacted the Warden who was on his way to his house, and insisted on seeing him immediately. The two Lieutenants met out of the facility and one followed the other to the Warden's house. They discussed the matter with the Warden and called the Regional Operation Manager for the Western Region of the Department of Corrections.

Since the incident occurred on late Friday morning and the Lieutenants meeting with the Warden was on Friday afternoon, the Regional Operations Manager for the Western Region told the Lieutenants to write a report and fax it to her on Monday morning after notifying her it was coming. Both Lieutenants wrote their reports at the facility. One of the Lieutenants gave the other a copy of his report to keep in a file. They contain statements almost verbatim, but at different places within the reports filed with the Operations Manager. The Lieutenants deny collaborating on their reports.

The Assistant Deputy Director of the Virginia Department of Corrections testified that he met with the Regional Director who had met with the Grievant. The Assistant Deputy Director also met with the Lieutenants. He found their reports credible and them credible.

The Assistant Deputy Director was questioned about his notes from interviews during his investigation of the Grievant's matter. His secretary sent a transcribed portion of the notes to Grievant's counsel. The matter was not pursued further at the hearing.

The Chief of Security for the new State Correctional Center and the person appointed to be Intelligence Officer are both African Americans. The Lieutenants took the remark about a "brother looking out for a brother" to be a racial slur.

Grievant denied making the "brother looking out for a brother" remark.

Grievant had criticized the Lieutenants for "snitching to Roanoke" on another matter. They denied the racial comment report was retaliatory for this criticism.

Grievant has a twenty-two year unblemished record with the Department of Corrections. Because of the remark, he was reduced from a position Grade 14 to Grade 11. He suffered a 5% pay cut and the loss of a \$5,400.00 per year housing allowance.

The Assistant Warden at the facility to which the Grievant was reassigned testified that she had worked with Grievant before and works with him in his new

assignment as his Superior and finds him a “contributor” and capable of duties as an Assistant Warden.

An African American Corrections Officer who works under Grievant’s supervision in his new assignment testified that he had a good working relationship with Grievant. Grievant treated him with the utmost respect.

The Chief of Security at Grievant’s reassigned facility testified he had never seen Grievant display racial bias.

The Warden testified that he emphasized that the new facility was to be the best in the system in every area.

The Department of Corrections places emphasis on non-discrimination and has attempted to rid the agency of discriminatory acts. The Warden had emphasized this in training his staff.

FINDINGS OF FACTS - RE-HEARING

The incident occurred as staff members were getting a new corrections center ready to receive inmates.

The Warden of the Corrections Center, where the Grievant served as Assistant Warden, testified that two Lieutenants called him at home and came to his house on a Friday afternoon, very upset that the Grievant had come into a room where the two Lieutenants were meeting with a Sergeant. Grievant asked the Sergeant to leave the room. Grievant closed the door and stated, “What I’m about to say stays in this office, understood?” Grievant then told the two Lieutenants that an African-American had been made the facility’s Intelligence Officer. Grievant then voiced his opposition to assigning the Intelligence Officer office space in the Watch Office, ... “because it is brother looking after brother.”

The matter was investigated by the Regional Director of the Department of Corrections and the Assistant Director of the Department of Corrections on site. They interviewed the two Lieutenants. The Grievant was interviewed by the Regional Director. Both found the Lieutenants credible.

Counsel for Grievant questioned the Regional Director who has since retired and the Assistant Director about the bringing of racial discrimination charges against the Grievant to undermine his position. This did not shake their belief that the incident happened. The fact that the Sergeant meeting with the two Lieutenants was asked to leave the room was cited as adding to the credibility of the two Lieutenants. Also the fact was their belief that the two Lieutenants had the “most to lose” and “nothing to gain” by making the charges. Both Senior Supervisors and the Warden believed the two Lieutenants and not the Grievant that the racial slur had been made.

Counsel for Grievant noted for the record that he believed all existing written information had been provided prior to the re-hearing.

The Assistant Director of the Department of Corrections testified that he had not considered or destroyed any notes or documents after the grievance matter came up.

Subsequent to the incident, the credibility of one of the Lieutenants was questioned as to preparation of the written statements. The statements were about the same incident and it is reasonable that they be alike.

APPLICABLE LAW, POLICY AND PROCEDURES

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the polices and procedures promulgated by DHRM. [DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93)]. Section VI of DHRM Policy No. 1.60 deals with corrective action.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

The following policy was admitted and considered as an exhibit:

- VDOC Operating Procedure No. 135.1, Standards of Conduct, Section IV, C.

CONCLUSIONS OF LAW

From the testimony of the Warden, the Regional Director and the Assistant Director, all three of whom interviewed the Grievant and the two Lieutenants, after intense cross-examination on the matter, its investigation, the hand written notes produced, and the three witnesses' understandings of the standard of "preponderance of the evidence", the three very senior Correction Officials were unshaken in their beliefs that the matter happened as reported. The Agency, from the evidence presented in the two hearings, met the burden of proof substantially by a preponderance of the evidence. The Grievant made a serious error by making a racial slur.

DECISION

The incident occurred as the staff of a new corrections facility were learning to function as a team and the racial remarks made undermined the respect for the Grievant as Assistant Warden. After careful review of the matters previously presented and the evidence presented at the re-hearing, the Group III Notice with demotion was proper and is sustained.

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 faxes 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 the 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.

Thomas J. McCarthy, Jr.
Hearing Officer