

Issues: Workplace harassment, retaliation; Hearing Date: 06/03/08; Decision Issued: 08/04/08; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8814, 8831, 8832; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 08/18/08; Reconsideration Decision issued 09/12/08; Outcome: Original decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8814 / 8831 / 8832**

Hearing Date: June 3, 2008  
Decision Issued: August 4, 2008

**PROCEDURAL HISTORY**

On October 10, 2006, Grievant filed a grievance alleging harassment by another employee at the Facility. On April 20, 2007, Grievant filed a grievance alleging retaliation and workplace harassment. On May 29, 2007, Grievant filed a grievance challenging a Group II Written Notice given to her. The Agency rescinded the Group II Written Notice but other issues remained. The outcomes of the Third Resolution Step responses for these grievances was not satisfactory to the Grievant and she requested a hearing. On February 8, 2008, the EDR Director issued EDR Ruling No. 2007-1661, 2008-1774, 2008-1886 qualifying these grievances for hearing. On March 19, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 3, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUES**

1. Whether the Agency complied with State policy?

2. Whether the relief Grievant seeks should be granted?

### **BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. 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 Juvenile Justice employs Grievant as a Correctional Sergeant at one of its Facilities. Her Employee Work Profile describes her Position Objective as:

- Directly and indirectly supervises activities and/or staff compliance in the following areas: Security, Reach Program and Phoenix overlay, Medical/Nursing, Food Services, Staff Training, Transportation, Facility Certification and Juvenile Hearings, Leave and Time and Attendance Approval and documentation.
- Performs HR functions for assigned staff.
- Serves as administrative backup in the absence of the Institutional Superintendent Senior.
- Directly and indirectly supervises activities to ensure that security coverage is provided while minimizing overtime expenditures and more fully utilizing the use of P -- 14 staff.
- Performs monitoring and reports the success of post coverage in terms of minimizing overtime and maximizing use of P-14 staff.<sup>1</sup>

Grievant has been employed by the Agency for approximately 9 years and seven months. She began working at the Facility in November 1998. In May 2006, Grievant reported to the Lieutenant D. Lieutenant D reported to the Captain who reported to the Assistant Superintendent. The Assistant Superintendent reported to the Superintendent at the Facility. Three months after Grievant filed her first grievance, she began reporting to Lieutenant M.

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<sup>1</sup> Grievant Exhibit 1.

The Facility had had problems with its radios breaking. New radios had been ordered and received but not yet distributed. The Superintendent was not aware that new radios had been received but not yet distributed. During a May 23, 2006 staff meeting, the Superintendent complained about staff failing to report broken radios. Grievant inquired about when the new radios would be distributed. As a result of Grievant's comment, the Superintendent realized that new radios had been received by the Facility but not yet been distributed. He was displeased that the Assistant Superintendent and Captain had not yet distributed the radios.

On June 9, 2006, Lieutenant D walked into the dining hall where Grievant was sitting at a table. Lieutenant D sat down and said to Grievant "you better shut-up in those sergeant's meetings. You gonna find yourself working at another facility." Grievant verbally notified the Superintendent of Lieutenant D's statement shortly thereafter and notified him again in writing on October 13, 2006.

On September 11, 2006, Lieutenant D gave Grievant a counseling letter for failing to report to work as scheduled on August 23, 2006, not calling to inform the shift commander of her status on that day, and securing coverage for that day without her immediate supervisor's authorization.

On October 1, 2006 at approximately 8:20 a.m., Grievant told Lieutenant D that she was sick and needed to go see her doctor. Lieutenant D asked her what was wrong. She again informed him that she was sick. Lieutenant D insisted that she tell him her medical condition. After the fourth and fifth time Lieutenant D asked, Grievant reminded him of her privacy rights. Lieutenant D again asked her about her medical condition. Grievant informed him of her right to privacy. Lieutenant D said that he would send someone to relieve her of her post. He said he would get an officer to drive her to the hospital. Grievant said she could drive herself to her doctor's office and that she did not need to get to the hospital. Lieutenant D repeated again that he would get an officer to drive her to the doctor. At approximately 8:45 a.m., Lieutenant D told Grievant that Officer W would drive her to the doctor in a State vehicle. Grievant told him again that she was capable of driving herself to the doctor and that she did not need a State vehicle. Lieutenant D told Officer W to follow a Grievant to her car. Lieutenant D told Officer B to follow Grievant to her doctor's office.

On October 9, 2006, Grievant was given a written counseling for failing to follow her supervisor's instruction.

On October 10, 2006, Grievant filed a grievance to challenge the action of Lieutenant D. On February 5, 2007, the Third Step Respondent, the Assistant Director, advised Grievant that:

After review of your grievance at our meeting on January 31, 2007, I have informed [the Superintendent] to instruct [Lieutenant D] and all other Shift Commanders that they are not authorized to have any employee under

their supervision followed for any set of circumstances. If a supervisor believes that an employee is attempting to leave work feigning illness or otherwise abusing sick leave, they are to immediately bring [that] to the attention of their immediate supervisor who will in turn discussed the situation with institutional management for an assessment of the circumstances and any corrective action if needed. I have also instructed [the Superintendent] to discuss your general concerns of harassment by [Lieutenant D] with him. I fully expect your concerns to be addressed in this situation corrected immediately

In response to the Assistant Director's response, the Superintendent met with the Captain, Lieutenant G, and Lieutenant D. He advised them that Grievant's complaint was a serious matter and that he expected them to comply with the instruction of the Assistant Director.

On April 20, 2007, Grievant filed a grievance alleging retaliatory and harassing behavior by Agency management. Grievant asserts that she has been "approached several times with due process," "falsely accused of not allowing [Lieutenant D] to review her [disciplinary reports]," and excessively assigned to supervise the wards thereby interfering with her ability to perform her duties as a supervisor. A second step meeting with the facility Superintendent was held on May 2, 2007 regarding the April 20, 2007 grievance. The Superintendent wrote in his response, "Her grievance caused a review of her concerns which did not reveal any blatant examples to support her concerns." The Assistant Director wrote in his Third Step Response:

After review of your grievance I have concluded that you have not provided any information that would indicate you are not being treated fairly. Further, the Superintendent has conducted a review of your concerns as outlined in your grievance. Based on that review, it has been determined that no information was revealed that would support your claim of retaliation or workplace harassment. Therefore, no further action is warranted.

On May 3, 2007, Grievant received a Group II Written Notice for failure to follow a supervisor's instruction, perform assigned work, or otherwise comply with established written policy on February 28, 2007.<sup>2</sup> Grievant filed a grievance on May 29, 2007 challenging the Group II Written Notice received on May 3, 2007 as retaliatory and harassing. In addition, Grievant claimed that the Agency breached her confidentiality and degraded her by allowing someone outside her chain of command to attend the meeting in which Grievant was presented with the Written Notice.<sup>3</sup>

As part of his Second Step response, the Superintendent stated:

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<sup>2</sup> The Written Notice was issued by Lieutenant M.

<sup>3</sup> Grievant did not present any policy prohibiting the Agency from determining who would attend the meeting.

After meeting with [Grievant] on June 7th and again on June 19th, 2007, I have offered removal of the Group II and the opportunity to have direct access to Captain and/or Assistant Superintendent. It is her decision to proceed.

As part of his Third Step response, the Assistant Director stated:

After review of your grievance, I have decided to instruct the Superintendent to remove the Group II -- Written Notice for failure to Follow Policy dated February 28, 2007 from your record, effective immediately. You have also asked that an apology be offered, however you do not indicate from whom this apology should be made. Apologies are not a recognized remedy within the grievance procedure. Therefore, this part of your grievance is denied.

One of the Grievant's job duties was to speak in public on occasion. She was informed that she would have to speak in public at a particular event. She presented a doctor's excuse to the Agency. On June 1, 2007, the Superintendent sent Grievant a memorandum informing her that he had received the doctor's excuse and asked her to clarify what other responsibilities she was unable to perform in light of her restriction.<sup>4</sup> Grievant was not forced to speak at the public event.

On September 21, 2007, Lieutenant J approached Grievant and said "so [Grievant] you will be coming to us B-Break Nights." Grievant did not know that her schedule had been changed so that she would begin working nights. She felt that the matter had been mishandled. She asked the Captain not to be removed to the night shift due to health reasons. On September 24, 2007, the Assistant Superintendent sent Grievant a memorandum indicating his belief that the matter had not been mishandled. He reminded her that a condition of her employment was that essential personnel would be willing to work a shift and post. Grievant was not moved to the night shift.

## CONCLUSIONS OF POLICY

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>5</sup> (2) suffered a materially adverse action<sup>6</sup>; and (3) a causal link exists between the adverse action and

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<sup>4</sup> Grievant Exhibit 11.

<sup>5</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>6</sup> On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse

the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>7</sup>

Grievant has engaged in several protected activities. First, she questioned whether the Agency at timely distributed new radios. The distribution of new radios would have enhanced the Facility's security by enabling effective communication in the event of an emergency. Second, Grievant filed several grievances challenging the actions of the Agency and some of its employees against her.

Grievant has suffered materially adverse actions. Lieutenant D threatened to remove her from the Facility. Grievant's work performance has been scrutinized and questioned and she received a Group II Written Notice which was withdrawn.

Grievant has not established that her protected activities caused her to suffer materially adverse actions. Lieutenant D is the source of many of Grievant's concerns about her work at the Facility. Lieutenant D's management style is sometimes abrasive, caustic, and confrontational. Juvenile Corrections Officer J overheard Lieutenant D's comment to Grievant about being sent to another institution. She interpreted Lieutenant D's comment to be made in a joking manner. Lieutenant D's insistence that Grievant be driven to the hospital was in response to his concern about Grievant's health and the potential liability to the Agency. The Agency acted appropriately by instructing Lieutenant D not to repeat his behavior with respect to escorting Grievant when she was ill. The Agency also acted appropriately by making Lieutenant M responsible for conducting her evaluations.

Grievant contends that Facility managers scheduled her to work "in coverage" instead of performing supervisory duties as a form of harassment. When Grievant worked "in coverage", she performed the duties of a juvenile corrections officer instead of a Sergeant and manager. The Agency argued that the Facility is often short-staffed thus requiring Grievant to perform non-supervisory duties. Grievant has the burden proof on this matter, but she has not established this allegation.<sup>8</sup> It is just as likely that the Agency experienced staffing shortages requiring Grievant to work in coverage, as it is that the Agency's actions were intended to harass Grievant.

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action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

<sup>7</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

<sup>8</sup> Grievant did not present any contemporaneous notes or calendars to establish her assertion that she spent 90% of her time in coverage.

Grievant contends that she was counseled regarding her work performance as a result of her protected activities. Insufficient evidence has been presented to support this conclusion.

Grievant contends she was given a Group II Written Notice as a result of her protected activities. Based on the evidence presented, it is clear that the Agency issued the Group II Written Notice because at the time of the issuance of the Written Notice, the Agency believed Grievant had engaged in inappropriate behavior. As part of the Step process, the Agency rescinded the Written Notice.

Grievant contends that the Superintendent told her that if she proceeded with her grievance hearing, she would not be allowed to work at the Facility. The Superintendent denied the allegation as part of his testimony and indicated he had taken numerous actions to attempt to accommodate Grievant such as counseling those with whom she had conflicts and permitting her to select the managers to whom she would report. The Superintendent's denial was credible. Grievant has not presented any corroborating evidence to support her testimony. Grievant's allegation regarding the Superintendent's threat cannot be substantiated.

DHRM Policy 2.30 prohibits Workplace Harassment. 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 performance; or (3) affects an employee's employment opportunities or compensation.

Grievant has established that Lieutenant D generated a great deal of stress for her based on his management style and confrontational interpersonal communication practices. The Agency removed Lieutenant D's responsibility for conducting Grievant's evaluations. The Agency offered to promote Grievant to report directly to a supervisor with whom she had a better working relationship. These actions were appropriate responses to Grievant's concerns. To the extent Lieutenant D continues to create conflict in the workplace based on his personality, that is a management issue, not a policy issue.

Grievant has not established that any of the actions of what she complains were based on race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. Accordingly the Agency did not engage in workplace harassment.



## DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

## 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>9</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>9</sup> 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**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8814 / 8831 / 8832-R**

Reconsideration Decision Issued: September 12, 2008

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material;
- and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant points out that the Superintendent testified that he was displeased with the behavior of the Assistant Superintendent and the Captain. She contends that Lieutenant D's comment that she had better shut up otherwise she would find herself working at another facility was a threatening comment. Grievant contends that the Agency Advocate's statement made during closing argument about the Agency's attempt to protect employees was inaccurate. If the Hearing Officer takes Grievant's statements at face value, the outcome of the grievance does not change. Grievant did not show a violation of policy. She did not show that she was discriminated against based on a protected status. She did not show retaliation.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

### **APPEAL RIGHTS**

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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer