Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 10/01/08; Decision Issued 10/09/08; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 8925; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8925

Hearing Date: October 1, 2008
Decision Issued: October 9, 2008

PROCEDURAL HISTORY

On March 11, 2008, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction.

On March 12, 2008, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 12, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 1, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

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

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

5. Whether the Agency created a hostile work environment based on race.

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. Grievant has the burden of proof regarding showing a hostile work environment. 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 Virginia Department of Health employs Grievant as an Environmental Health Specialist Senior at one of its Facilities. The purpose of his position is:

> Performs environmental health duties independently at the journey level in the areas such as food sanitation, on-site soils evaluation, private well inspection, rabies abatement, communicable disease investigation, migrant labor camp inspection, classification of shellfish growing areas and investigation of general environmental complaints. This level is for employees who have successfully completed training and have demonstrated independent skills.

Grievant began working for the Agency in the early 1990s. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Food inspectors must be standardized. "Standardized" means an employee has been trained by a Standardizing Officer of the State to interpret and perform inspections as part of his or her duties and that he or she has demonstrated knowledge of regulations and procedures. To be properly standardized, employees must also observe other inspectors who are not the standardizing officer.

As a part of the Trainee's training, the Agency wanted the Trainee to observe how other inspectors perform their duties. Grievant was one of those inspectors who the Agency wanted the Trainee to observe.

On February 25, 2008 at 3:31 p.m., Grievant's Supervisor sent him an email stating:

> After a discussion with [the Manager], the following are your instructions and schedule for the joint food facilities inspections with [Trainee].
>
> 1. Conduct at least three daily joint inspections with [Trainee] on the following four days on March 2008.
>
> 2. Schedule
> Wednesday, March 5, 2008
> Monday, March 10, 2008
> Friday, March 14, 2008
> Wednesday, [March] 19, 2008
> (There will be a county car available for these days.) Please verify for me your availability for these days by Friday [February] 29, 2008. If you have any questions please see [Manager]. Thank you.

On February 28, 2008 at 9:29 a.m., Grievant replied to the Supervisor as follows:

> Having gone through your audacious instructions and mandatory schedules regarding "joint inspections", I came to the conclusion that it is not appropriate for me to honor your stipulations at this time. My decision is partially based on the items listed below.
>
> 1. There is no clarification as to the logic or reason for these "joint inspections".
> 2. [Trainee] has been conducting unsupervised restaurant inspections since December 2007 without formal training.
> 3. Since he has conducted numerous, independent inspections in the past, all he needs now is "standardization".
> 4. Being the standardizing officer, it is professionally reasonable and incumbent upon you to train him by implementing standardization procedures. This approach would be greatly advantageous to him.
>
> On the basis of all [of] the above, I decline to honor these instructions due to their inappropriateness and possible violation of professional ethics. Thank you.

On February 29, 2008 at 3:03 p.m., the Supervisor sent Grievant an email stating:

> There is no further discussion on this subject. Please follow the instructions given to you on February 25, 2008. Thank you.

On February 29, 2008, Grievant responded to the Supervisor by email as follows:

> You are the training/standardizing officer; there will be no deviation from my response to you on this issue.

On February 29, 2008 at 4:28 p.m., the Supervisor sent Grievant an email stating:

> There is no extra work required of you to accomplish this; he is only to observe and ask questions about what you have been standardized to observe. [Supervisor] is not required to do this as standardizing officer and would not have time due to her Acting Supervisor responsibilities. Please give us your cooperation [in] this or we will pursue as a disciplinary matter as a failure to follow instructions.

Grievant did not permit the Trainee to accompany him on his inspections as directed by the Supervisor and the Manager. The Trainee went with another employee and observed that employee's inspections.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force."[1] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

Failure to Follow a Supervisor's Instruction

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense. Grievant reported to the Supervisor who reported to the Manager. The Supervisor and the Manager instructed Grievant to permit the Trainee to accompany him on scheduled inspections. Grievant refused to permit the Trainee to accompany him thereby acting contrary to a

[1] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

supervisor's instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instruction.[2]

Grievant listed four reasons in his email to the Supervisor indicating why it was not appropriate for him to follow the instruction. Grievant wrote:

> 1. There is no clarification as to the logic or reason for these "joint inspections".
> 2. [Trainee] has been conducting unsupervised restaurant inspections since December 2007 without formal training.
> 3. Since he has conducted numerous, independent inspections in the past, all he needs now is "standardization".
> 4. Being the standardizing officer, it is professionally reasonable and incumbent upon you to train him by implementing standardization procedures. This approach would be greatly advantageous to him.

Grievant's assertions not correct. However, if the Hearing Officer assumes for the sake of argument that Grievant's four reasons are true, Grievant remained obligated to comply with the Supervisor's instructions. State employees are obligated to comply with the instructions of their supervisors when those instructions are lawful, ethical, and consistent with the Agency's business needs. In this case, the Supervisor's instruction was lawful, ethical, and directly related to the Agency's business needs. The fact Grievant might have made a different assessment had he been the supervisor, does not undermine his obligation to comply with a supervisor's instruction.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[3] 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

[2] Grievant contends that he was not given progressive discipline. He contends he should have been counseled instead of receiving a Written Notice. The Standards of Conduct encourages progressive discipline but does not require it. Agencies may elect to take disciplinary action based on the employee's behavior without first having engaged in progressive discipline. Accordingly, there is no basis to reduce the disciplinary action given to Grievant.

[3] *Va. Code § 2.2-3005.*

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.

Discrimination Based on Race

The Governor's Executive Order on Equal Opportunity prohibits employment discrimination on the basis of race, gender, color, national origin, religion, age, or political affiliation, or against otherwise qualified persons with disabilities. State agencies must apply their employee compensation policies in accordance with the Governor's Executive Order.

DHRM Policy 2.05 prohibits employment discrimination with respect to the "application of corrective actions, including disciplinary actions …." In other words, an agency may not issue a Written Notice to an employee as part of racial discrimination against that employee. In addition, if an employee has engaged in inappropriate behavior thereby justifying the issuance of a Written Notice, an agency may not inflate the level of discipline or sanction against that employee as a part of racial discrimination against the employee.

Grievant contends the Agency issued the Written Notice to him in order to discriminate against him because of his race.

Direct and Circumstantial Evidence. Grievant may establish racial discrimination by demonstrating through direct or circumstantial evidence that race motivated the Agency's adverse treatment of him. Grievant does not need to demonstrate that race was the sole motivating factor in the Agency's actions. Grievant must merely show that race was a motivating factor.[4] In other words, Grievant can meet his burden of proof by showing the Agency acted against him for both permissible and forbidden reasons.

Direct Evidence. In this case, Grievant has not established any direct evidence that the decision to give him disciplinary action was influenced by his race. The question becomes whether there is circumstantial evidence of racial discrimination under the *McDonnell Douglas* analysis.

McDonnell Douglas Analysis. Under the *McDonnell Douglas* analysis, Grievant must show (1) he was a member of a protected class; (2) the prohibited conduct in which he was engaged was comparable in seriousness to the misconduct of employees outside the protected class; and (3) the disciplinary measures enforced against him were more severe than those enforced against those other employees. If the Agency articulates a legitimate, non-discriminatory reason[5], then Grievant must show that the stated reason was false and a pretext for discrimination.

[4] 42 U.S.C. § 2000e-2(m) provides: "an unlawful employment practice is established when the complaining party demonstrates that race … was **a motivating factor** for any employment practice, even though other factors also motivated the practice." (Emphasis added).

[5] The Agency's burden at this stage is merely a burden of production of evidence.

Grievant is a member of a protected class based on race. The prohibited conduct in which Grievant engaged was comparable in seriousness to the misconduct of employees outside the protected class. No evidence was presented to suggest that the disciplinary action against Grievant was more severe than those enforced against other employees. The Agency has presented a legitimate, non-discriminatory reason for taking disciplinary action, namely that Grievant failed to follow a supervisor's instruction. No credible evidence was presented to suggest that the Agency's reason for taking disciplinary action was false or a pretext for discrimination. Indeed, the Agency issued disciplinary action to Grievant because he failed to follow a supervisor's instruction. Grievant has not established that the Written Notice was given to him for an impermissible reason.

Grievant also alleged he was working in a hostile environment based on his race.

Hostile Work Environment. To establish a claim for a hostile environment based on race, Grievant must prove that: (i) the conduct was unwelcome; (ii) the harassment was based on race; (iii) the harassment was sufficiently severe or pervasive to create an intimidating or offensive work environment; and (iv) there is some basis for imposing liability on the employer.

Grievant testified to facts he contends support his allegation that the Agency has created a hostile work environment for him. He also presented the testimony of Ms. W and Mr. M. Grievant argued that the Agency has created a pattern and practice of racial discrimination. Much of Grievant's evidence was disputed, insignificant, or dated.

Grievant contends the Agency discriminated against him by giving him a leave slip for being late when Grievant returned to work after having been absent due to the death of his wife in 2002. Ms. W testified that the Agency's action was "dispassionate". She did not establish that was based on Grievant's race.

Ms. W testified that she was hospitalized in 1998 and when she returned to work she was supposed to be on light duty. Instead she was placed in a demanding position. She contends she was given full responsibilities because of her race. Her assertion appears speculative.

Ms. W testified that in 2002 she requested flex leave to take care of her children but was denied. At the same time, an employee of another race was granted an opportunity to take leave to train her puppies. Ms. W's supervisor left the Agency in 2003 or 2004. Insufficient facts exist to determine the facts underlying Ms. W's claim. Grievant could not be currently experiencing a hostile work environment based on the behavior of a supervisor who left four or five years earlier.

Ms. W testified that in 2003 she was falsely accused of stealing tapes from the Agency. Ms. W showed Ms. F where the tapes were located and the matter was resolved. It appears that Ms. F believed the tapes were stolen by Ms. W because Ms.

W was the person in closest proximity to the tapes when she left the work unit. These facts are insufficient to support a claim for workplace harassment.

Mr. M testified that the Manager engaged in behavior based on race. The Manager contacted individuals at the sites where Mr. M had conducted inspections and asked questions about how long Mr. M had been there and what activities he had engaged in. Approximately two years ago, Mr. M was required to commute to the motor pool to obtain a County government vehicle. In 2006 or 2007 Mr. M's laptop was confiscated. A note was left for him informing him that the laptop was being updated. Mr. M. testified that he did not know if his laptop had been confiscated because of his race. Mr. M testified that he was performing senior inspector work yet he had been demoted in December 2006.

The Manager testified that Mr. M had received a Group III Written Notice. The Manager also testified that Mr. M had been demoted because he failed the standardization test five times. He was also demoted because of poor work performance such as failing to provide necessary documents. Mr. M had been given the opportunity to work with another standardization officer located at the Central Office to enable him to pass the necessary tests to be a senior inspector. Mr. M asked for reinstatement to his former position. That request was under review.

Mr. M's assertions are not supported by the evidence. He ignored key factors while testifying to support his assertion that the Agency's actions against him were because of his race. For example, he believed the Agency mistreated him because of his race regarding his demotion and failure to reinstate him to his former position. He omitted his history of having failed the standardization exam five times and being issued a Group III Written Notice. These factors explain much of the difficulties Mr. M had experienced.

Grievant testified that the Manager refused to shake his hand when Grievant returned from a trip to Nigeria in 1995 because Grievant might have brought back AIDS with him. The Manager denies making the statement. Grievant testified that during his early years with the Agency he was given complaints to investigate in an area with a minority population. The Manager testified he did not know the racial makeup of the area and that complaints were usually assigned to investigators based on the closeness of their homes to the location of the person complaining. Grievant testified that he was denied a bonus three years ago because of his race. The Manager testified Grievant had received a Written Notice in 2003 and was not eligible for the bonus. Grievant testified that the Manager excessively scrutinizes his mileage reports and leave slips. The Manager testified that he scrutinizes these documents for all of his employees and for those employees who demonstrate a history of unreliable reporting. For example, Grievant supposedly inspected four swimming pools on a Labor Day and reported that they were closed. The Manager contacted the swimming pools and determined that all four were open on that Labor Day. The Agency now utilizes technology to track employee behavior and it is not necessary for the Manager to scrutinize Grievant's inspections. Grievant complained that the Manager would not permit him to bring his

child to work but would permit other employees to bring their children to work.[6] The Manager testified Grievant was not singled out – employees in general were discouraged from bringing their children to work. The Manager expressed concern about Grievant bringing his child to work because Grievant had used a government vehicle to transport his child to daycare. Grievant made other allegations of racial discrimination. None of these were supported by the evidence.

Grievant has established that the actions taken against him were unwelcome. He has not established that those actions taken against him or against Ms. W or Mr. M were because of race. Although it is clear that Grievant genuinely believes he is subject to a hostile work environment based on race, he has not presented sufficient evidence to establish that allegation. The Hearing Officer does not believe Grievant is currently working in a hostile work environment based on race.

DECISION

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

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

[6] On April 6, 2005, the Manager sent Grievant an email stating:

> This morning you reported to work at 8:15 a.m. accompanied by your son. At approximately 9 a.m. you left the office with your son and the county vehicle. You submitted schedule showing your first appointment at 11 a.m.
>
> Your son is not authorized to be in a county vehicle and you are not authorized nor did you request authorization to take him with you while performing state work. For insurance purposes, County policy expressly forbids unauthorized riders in County cars.
>
> Until further notice you are prohibited from use of any county vehicles. You may not bring your child to work without authorization. Failure to follow this instruction may result in further disciplinary action. Please see me about this matter immediately upon returning to the office.

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

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.[7]

[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

[7] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.