

Issues: Group II Written Notice (workplace harassment) and Suspension; Hearing Date: 09/03/08; Decision Issued: 09/08/08; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 8927; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: DHRM Admin Review request received 09/22/08; DHRM ruling issued 11/25/08; Outcome: Hearing Decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8927

Hearing Officer Appointment: August 4, 2008

Hearing Date: September 3, 2008

Decision Issued: September 8, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group II Written Notice issued by Management of the Department of Corrections (the “Department” or “Agency”), as described in the Grievance Form A dated June 27, 2008. The hearing officer was appointed on August 4, 2008.

The hearing officer scheduled a pre-hearing telephone conference call at 9:00 a.m. on August 6, 2008. The Grievant, the Department’s advocate (the “Advocate”) and the hearing officer participated in the pre-hearing conference call. During the call, the Grievant confirmed that he is challenging the issuance of the Group II Written Notice for the reasons provided in his Grievance Form A and is seeking the following relief: the Group II written notice rescinded and the five (5) days suspension reinstated with restoration of any lost pay and benefits. The hearing officer explained to the Grievant during the conference call that certain relief requested by the Grievant is beyond the hearing officer’s power such as injunctive relief and the Grievant understood this. Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on August 6, 2008, which is incorporated herein by this reference.

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.

At the hearing, the Agency was represented the Advocate. The Grievant represented himself. 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 except #8 in the Agency’s binder (1-7 and 9) and Grievant exhibits 1, 3, 12 and 13 in the Grievant’s exhibit binder.¹

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.

Neither party requested any order for production of documents or any orders for witnesses. Accordingly, no open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

During the hearing the Grievant disclosed that the Agency had produced an outdated, inoperative version of the Agency's Standards of Conduct in its exhibit binder (AE 8). Pursuant to the Scheduling Order, the parties had agreed that they would exchange between them and deliver to the hearing officer their proposed exhibits for the hearing by the deadline of 5:00 p.m. on Wednesday, August 27, 2008.

The Advocate argued that the Department should be allowed (and had in the past been allowed) to substitute the operative Standards of Conduct. While the hearing officer was expressing his intent to dismiss the proceeding as premature, with his supporting reasons, the Grievant stated that he waived his right to have the hearing so dismissed by the hearing officer and instead elected to proceed with the hearing with the substituted, operative Standards of Conduct, effective April 15, 2008 (AE 9). The Grievant made his waiver knowingly, voluntarily and intentionally. Accordingly, the hearing proceeded on this basis.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant is an Internal Auditor – Senior with the Internal Auditing Unit of the Agency.
2. Monday, May 12, 2008, was the first day of an audit by Grievant's unit of a particular correctional center (the "Facility"). After a female staff worker in the Human Resources Department ("D") with whom Grievant had been working left for the evening, Grievant made a comment to another female staff worker in the Human Resources Department ("M") to the effect, "Oh she left me what am I going to do now?" AE 2.
3. On the morning of Tuesday, May 13, 2008, Grievant went to the office of M and D for the second day of the audit. When he entered, M jokingly asked Grievant whether he had brought them breakfast. Grievant responded that he didn't bring in breakfast but that he had dessert. When M asked what the dessert was,

Grievant said words to the effect that he was dessert and that he would be there all day. AE 2.

4. On Wednesday, May 14, 2008, M came into a conference room in the Facility to eat breakfast with a breakfast egg roll and was talking to D. Grievant said words to the effect of "Don't you have to have slanted eyes to eat one of those?" Grievant also pulled up his eyes to imitate what D perceived as a Chinese expression. AE 2.
5. During the Facility week beginning May 19, 2008, the Operations Officer at the Facility ("H"), who is a fairly senior officer reporting to the Warden or Assistant Warden, encountered Grievant while making her Sanitation Rounds. Grievant was checking on the paperwork for an AC unit. Grievant needed to go to the main compound for his work and H said they would make sure that Grievant would be able to get into the unit and that, if needed, H would escort him herself. Grievant replied, "You would like that wouldn't you."
6. While H did not find the comment to be offensive at the time, H did inform the Assistant Warden of the comment because the comment struck her as odd. AE 2.
7. Throughout the proceeding and at the hearing, Grievant has not denied that he made the comments but, rather, has stated his position that he was misunderstood, that the comments were taken out of context, and that the comments were not intended to be of a sexual or racial nature.
8. Grievant admits that at the time he made the comments, the women to whom they were made did not know him.
9. Grievant admitted at the hearing that in hindsight he can see how certain of the comments could have been construed as sexual in nature and Grievant wishes he could pull the words back.
10. Grievant also admitted during the hearing that Management's case has "some merit."
11. On May 14, 2008, D reported to the Human Resource Manager ("C") at the Facility that Grievant had made the inappropriate comments to M.
12. On May 14, 2008, C asked M to provide a written report of the incidents and C reported the incidents verbally to the Assistant Warden. AE 2.
13. M, D and H subsequently provided signed, written reports of the incidents with the Grievant. AE 2.

14. G is a Senior Internal Auditor with the Grievant's unit and was the team leader in charge of the audit at the Facility on which Grievant was working. Both Grievant and G report to the Assistant Inspector General for Audit, their supervisor.
15. Grievant testified that he has great respect for both the Assistant Inspector General for Audit and the Inspector General.
16. On May 23, 2008, the Assistant Warden contacted G and told G about the complaints from the staff in the Human Resources Office of the Facility where Grievant had been working on the audit.
17. Grievant testified at the hearing that he understood why Management had to act on the complaints.
18. Grievant's verbal comments were unwelcome, either denigrated or showed hostility or aversion toward a person on the basis of race, sex or national origin and had the purpose or effect of creating an offensive work environment. Accordingly, such conduct meets the definition of "workplace harassment" under DHRM Policy Number 2.30 – Workplace Harassment. AE 4.
19. At the time of the disciplinary infraction which is the subject of this proceeding, Grievant had an active Group I Written Notice, also for violation of DHRM Policy Number 2.30. AE 6.
20. Grievant has received numerous formal and informal counselings from Management concerning appropriate and inappropriate behavior in the workplace. AE 7.
21. Grievant has also received significant training from the Agency concerning such issues. AE 5.
22. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.
23. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
24. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
25. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. Grievant supported major assertions made by the Department in its case. Elements of this finding are discussed further below.

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.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 135.1 (AE 9). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infractions can clearly constitute a Group II offense, as asserted by the Department.

SECOND GROUP OFFENSES (GROUP II).

- A. These include acts and behavior that are more severe in nature and are such that an accumulation of two *Group II* offenses normally should warrant removal.

- B. *Group II* offenses include, but are not limited to:
1. failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy; . . .
 8. violation of DHRM Policy 2.30 Workplace Harassment (considered a *Group II* offense, depending upon the nature of the violation); . . .

Department Operating Procedure Number 135.1.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The Agency decided not to call any of the three (3) complainants D, M or H as witnesses. During the hearing, Grievant objected to this, having assumed that the Agency would call such witnesses. Of course, the Agency was not bound to call such witnesses but for tactical or other reasons, elected not to do so. After all, the Grievant has not disputed that he made the comments but rather asserted that he was misunderstood by persons who do not know him well. In this regard, the testimony of the Assistant Inspector General for Audit and the Inspector General was compelling when they spoke of the need for members of the auditing unit to exhibit a high level of integrity and professionalism while subjecting the Agency offices to their audits. Essentially, internal auditors like the Grievant are the "integrity officers" for the Department and are especially responsible in their jobs for policy and procedural compliance within the Department.

As the Inspector General stressed, as such, the internal auditors need to exhibit an objective manner, integrity and professionalism and should set an example for the field when conducting their audits in the field.

The Grievant challenged the credibility of the investigation and asserted that it should have been conducted by the special unit of investigators under the authority of the Office of the Inspector General. However, the Assistant Inspector General for Audit is certified to conduct fraud and criminal investigations and the hearing officer finds that while the investigation may not have been perfect, it was adequate for purposes of this proceeding, especially where the Grievant does not deny the comments, admits he did not know the complainants at the time the comments were made, etc.

Management of the Department consulted with their Human Resources Department, objectively examined the complaints, followed up with the Grievant concerning his version of events and interpretations and made credible findings. Management then in a coordinated and collaborative effort with the Human Resources Department, determined upon the appropriate corrective action.

The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The Grievant's active Group I Written Notice for violation of the same policy and Grievant's apparent refusal to recognize and accept the seriousness of his violations of Agency policy and procedures preclude a lesser sanction. The hearing officer agrees.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the Group II Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Virginia Department of Corrections

November 25, 2008

The grievant has requested an administrative review of the hearing officer's decision in Case No. 8927. The grievant is challenging the decision because he feels that the hearing decision is inconsistent with state policy, decisions by the Supreme Court and contrary to the Law of Virginia. For the reasons stated below, this Agency will not disturb the hearing decision. The agency head of the Department of Human Resource Management has requested that I respond to this appeal.

FACTS

The Virginia Department of Corrections (DOC) employs the grievant as an Internal Auditor Senior. His job duties require him to travel to various institutions throughout the Department of Corrections to conduct audits. Grievant was issued a Group II Written Notice with a five-day suspension for "violation of DHRM Policy 2.30 Workplace Harassment – Harassing behavior in the workplace, including jokes of a sexual and racial nature by [grievant]. The evidence was provided by the Human Relations Unit Staff of James River CC (JRCC) and in verbal interviews with the HR staff members of JRCC and in interview with [grievant]. (See attachments for further information)." The grievant filed a grievance to have the disciplinary action rescinded. When he did not get the relief he was seeking through the management steps, he asked to have his grievance heard by a hearing officer.

According to the hearing officer's Findings of Fact, the following occurred:

1. The Grievant is an Internal Auditor – Senior with the Internal Auditing unit of the Agency.
2. Monday, May 12, 2008, was the first day of an audit by Grievant's unit of a particular correctional center ("the Facility"). After a female staff worker in the Human Resource Department ("D") with whom Grievant had been working left for the evening, Grievant made a comment to another female staff worker in the Human Resources Department ("M") to the effect, "Oh she left me what am I going to do now?"
3. On the morning of Tuesday, May 13, 2008, Grievant went to the office of M and D for the second day of the audit. When he entered, M jokingly asked Grievant whether he had brought them breakfast. Grievant responded that he didn't bring in breakfast but

he had dessert. When M asked what the dessert was, Grievant said words to the effect that he was dessert and that he would be there all day.

4. On Wednesday, May 14, 2008, M came into a conference room in the Facility to eat breakfast with a breakfast egg roll and was talking to D. Grievant said words to the effect of “Don’t you have to have slanted eyes to eat one of those?” Grievant also pulled up his eyes to imitate what D perceived as a Chinese expression.
5. During the Facility week beginning May 19, 2008, the Operations Officer at the Facility (“H”), who is a fairly senior officer reporting to the Warden or Assistant Warden, encountered Grievant while making her Sanitation Rounds. Grievant was checking on the paperwork for an AC unit. Grievant needed to go to the main compound for his work and H said they would make sure that Grievant would be able to get into the unit and that, if needed, H would escort him herself. Grievant replied, “You would like that wouldn’t you.”
6. While H did not find the comment to be offensive at the time, H did inform the Assistant Warden of the comment because the comment struck her as odd.
7. Throughout the proceeding and at the hearing, Grievant has not denied that he made the comments but, rather, has stated his position that he was misunderstood, that the comments were taken out of context, and that the comments were not intended to be of a sexual or racial nature.
8. Grievant admits that at the time he made the comments, the women to whom they
9. Grievant admitted at the hearing that in hindsight he can see how certain of the comments could have been construed as sexual in nature and Grievant wishes he could pull the words back.
10. Grievant also admitted during the hearing that Management’s case has “some merit.”
11. On May 14, 2008, D reported to the Human Resource Manager (“C”) at the Facility that Grievant had made the inappropriate comments to M.
12. On May 14, 2008, C asked M to provide a written report of the incidents and C reported the incidents verbally to the Assistant Warden.
13. M, D and H subsequently provided signed, written reports of the incidents with the Grievant.
14. G is a Senior Internal Auditor with the Grievant’s unit and was the team leader in charge of the audit at the Facility on which Grievant was working. Both Grievant and G report to the Assistant Inspector General for Audit, their supervisor.

15. Grievant testified that he has great respect for both the Assistant Inspector General and the Inspector General.
16. On May 23, 2008, the Assistant Warden contacted G and told G about the complaints from the staff in the Human Resources Office of the Facility where Grievant had been working on the audit.
17. Grievant testified at the hearing that he understood why Management had to act on the complaints.
18. Grievant's verbal comments were unwelcome, either denigrated or showed hostility or aversion toward a person on the basis race, sex or national origin and had the purpose or effect of creating an offensive work environment. Accordingly, such conduct meets the definition of "workplace harassment" under DHRM Policy Number 2.30.
19. At the time of the disciplinary infraction which is the subject of this proceeding, Grievant had an active Group I Written Notice, also for violation of DHRM Policy Number 2.30.
20. Grievant has received numerous formal and informal counselings from Management concerning appropriate and inappropriate behavior in the workplace.
21. Grievant has also received significant training from the Agency concerning such issues.
22. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.
23. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
24. The Department's actions concerning this grievance were reasonable and consistent with law and policy.
25. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. Grievant supported major assertions made by the Department in its case. Elements of this finding are discussed further below.

Summarily, based on the evidence, the hearing officer determined that Grievant committed the violations for which he was disciplined. There was no conflict in the evidence. Therefore, he upheld the disciplinary action against the Grievant.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In the case of discipline, the hearing officer may reduce the severity of the disciplinary action by restoring the employee to the status he occupied before the disciplinary action was taken. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, it is indisputable that Grievant committed the infractions for which he was disciplined. As a matter of fact, at the hearing the Grievant stated that he understood that management had to take some action and that the case management put forth had some merit. In addition, he stated that he wished that he could take back his words. The issue before DHRM, therefore, is whether the hearing officer violated Policy Number 1.60 and Policy Number 2.30 when he upheld the disciplinary action.

The Department of Human Resource Policy Number 1.60 – Standards of Conduct-has as its objective “to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. Accordingly, this policy sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. That policy provides guidance as to the level of disciplinary action the agency may impose. DHRM Policy 2.30 – Workplace Harassment – provides guidance related to the recognition and prevention of illegal workplace harassment and provides an effective means of eliminating such harassment from the workplace.

In the case at hand, it was clear that the Grievant committed acts that were prohibited by DHRM Policy Number 2.30. Violations of that policy are punishable under the provisions of DHRM Policy Number 1.60, and may be either a Group I, Group II or Group III offense, depending on the egregiousness of the violation. Based on the evidence, written and verbal, the hearing officer concurred with the disciplinary action taken by the agency management personnel. Our review of the hearing decision did not find that the decision was inconsistent with the relevant human resource management policies. Rather, it appears that the Grievant is challenging the manner in which the hearing officer conducted the hearing, how he evaluated the evidence, and the conclusion he drew based on his assessment of the evidence. Therefore, we have no basis to interfere with the application of this decision.

Referring to your concern that the decision was in violation of state law and Supreme Court decisions, please note that this Agency authority's is limited to reviewing whether a

decision is compliant with policy. If you feel the hearing decision violates a body of law, your appeal should be put before the circuit court.

Ernest G. Spratley