

Issues: Group I Written Notice (disruptive behavior), Retaliation and Harassment;
Hearing Date: 11/14/08; Decision Issued: 12/01/08; Agency: DOC; AHO: John V.
Robinson, Esq.; Case No. 8964; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8964

Hearing Officer Appointment: October 24, 2008

Hearing Date: November 14, 2008

Decision Issued: December 1, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge a Group I Written Notice: disruptive behavior, issued on May 14, 2008 by Management of the Department of Corrections (the “Department” or “Agency”), as described in the Grievance Form A of May 28, 2008.

The hearing officer was appointed on October 24, 2008. The hearing officer scheduled a pre-hearing telephone conference call at 1:15 p.m. on October 30, 2008. The Grievant, the Agency’s advocate (the “Advocate”) and the hearing officer participated in the pre-hearing conference call. The Grievant is challenging the issuance of the above referenced Group I Written Notice for the reasons provided in her Grievance Form A and is seeking certain relief requested in her Grievance Form A. Concerning the relief requested by the Grievant, 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 ordering an apology from the Deputy Warden and the Grievant understood this. Following the pre-hearing conference, the hearing officer issued a Scheduling Order entered on October 31, 2008, which is incorporated herein by this reference.

In this proceeding other than pertaining to the Grievant’s claim of retaliatory harassment/hostile work environment where Grievant bears the burden of proof, 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 by the Advocate. The Grievant represented herself. 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 Agency exhibits A-J and Grievant exhibits A-H.¹

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. For the period relevant to this proceeding (the “Period”), the Grievant was the Food Operations Director B in charge of food operations at a high security level 3 facility (the “Facility”).
2. The Grievant was so employed on April 30, 2008.
3. On April 30, 2008, a food operations management associate B (the “FOMB”) was standing in the kitchen discussing the preparation of the diet and transportation bags with Inmate W.
4. During this discussion, the Grievant approached and an altercation between the Grievant and Inmate W ensued with both insisting on respect from the other. AE D.
5. The Grievant and Inmate W raised their voices and the Grievant stomped her feet, shook her hand and pointed her finger at Inmate W. The Grievant admits raising her voice.
6. When the voices of the Grievant and Inmate W became “real loud,” the unrefuted testimony of the FOMB was that to try and diffuse the situation, the FOMB stood between the Grievant and Inmate W.
7. Inmates working in the kitchen stopped what they were doing and watched the altercation.
8. The Chief of Security approached and found Inmate W very upset and the Grievant confrontational.

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.

9. The altercation was disruptive to the operations of the kitchen and to the other inmates and staff.
10. The kitchen area is a sensitive area in the Facility for numerous reasons, including the presence of food, many inmates and potential weapons.
11. In a later fact-finding meeting in an office at the back of the kitchen, Inmate W alleged that in a previous incident with the Grievant, the Grievant had pulled open the pocket of Inmate W's apron which he was wearing.
12. Present in the meeting at the time of this allegation, which was the first time management was informed of the previous incident, were the Grievant, Inmate W, the FOMB, Administrative Assistant W, the Chief of Security and the Deputy Warden.
13. The Deputy Warden asked the Grievant what happened and the Grievant demonstrated how she pulled Inmate W's apron open to look inside for contraband. The pulling of the apron incident occurred at least weeks before April 30, 2008.
14. The Grievant was escorted to the Administration Building to eliminate the risk of any further disturbance or any potential security breach.
15. The Grievant worked at full day at the Facility.
16. The Grievant received significant in-service education and training concerning the need to "exercise a high level of professional conduct when dealing with offenders to ensure the security and integrity of the correctional process." Agency Operating Procedure No. 130.1(IV). *See, e.g., AE J.*
17. The Grievant was aware that food complaints and perceived mistreatment of one or more inmates are some primary contributing factors to disturbances and that in potential disturbance scenarios, security should be summoned.
18. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant. This finding is discussed in greater detail below.
19. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.
20. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

21. The Grievant asserted that the Written Notice of which she complains in this proceeding and two (2) other Written Notices issued by Management of the Facility which she did not grieve, were retaliatory responses from Management, specifically the Chief of Security, because she tried to discipline a food operations worker under her supervision (“FOMA W”) who is a cousin of the Chief of Security. However, the hearing officer finds that the Grievant has failed to prove that the Agency’s actions concerning Grievant were retaliatory or otherwise improper. This finding is discussed in more detail below.
22. 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. While there were, as Grievant correctly asserted in the hearing, some discrepancies in the accounts and reports of the six (6) Agency witnesses who testified at the hearing, these discrepancies related to peripheral matters such as whether the Grievant was sent home from work and the like but did not materially detract from the Agency’s main case that the Grievant engaged in disruptive behavior and that the Agency did not engage in retaliatory harassment against the Grievant.

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. 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 infraction could clearly constitute either a Group I or Group II offense, as asserted by the Department.

FIRST GROUP OFFENSES (GROUP I)

- A. First group offenses include types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed work force.
- B. *Group I* offenses include, but are not limited to:
 - ...
 - 5. disruptive behavior; . . .

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;
 - 2. violating safety rules where there is not a threat of bodily harm; . . .

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 clearly 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 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 severity of the Grievant's infraction in the context of a high security facility, precludes a lesser sanction. The hearing officer agrees.

As discussed above, the Grievant had made a claim of retaliatory harassment/hostile work environment. The hearing officer adopts and incorporates herein the analysis of the Director of the Virginia Department of Employment Dispute Resolution ("EDR") contained in Ruling Numbers 2007-1577 and 2008-1957 concerning the elements and evidence necessary to prove a claim of retaliatory harassment/hostile work environment. *See, also* Decision of Hearing Officer, Case No. 7917. After looking at all the circumstances, the hearing officer finds that the Grievant failed to prove the Agency's actions concerning the Grievant were retaliatory or otherwise improper.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the Group I Written Notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. The Grievant has failed to prove her case of retaliatory harassment. 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).