

Issues: Group III Written Notice with Suspension (jeopardizing safe operation of facility), Group II Written Notice with Termination (failure to follow instructions), Retaliation (grievance activity), and Discrimination (gender); Hearing Date: 12/30/08; Decision Issued: 03/27/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8986, 8992, 8993; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: DHRM Ruling Request received; DHRM Ruling issued 05/29/09; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8986 / 8992 / 8993

Hearing Date: December 30, 2008
Decision Issued: March 27, 2009

PROCEDURAL HISTORY

On May 21, 2008, Grievant filed a grievance alleging discrimination and harassment by the Agency. On May 27, 2008, Grievant was issued a Group III Written Notice of disciplinary action with a fifteen workday suspension for jeopardizing the safe and orderly operations of the institution. On May 30, 2008, Grievant was issued a Group II Written Notice of disciplinary action with removal effective May 30, 2008 for failure to follow a supervisor's instructions.

Grievant filed several grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. The EDR Director issued Rulings 2009-2127, 2129, and 2130 qualifying and consolidating the grievances for hearing. On October 27, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 30, 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 Notices?
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 retaliated, harassed, or discriminated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievant has the burden of proof with respect to her claim of retaliation and discrimination. 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 Corrections employed Grievant as a Corrections Officer at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Many of the inmates at the Facility reside in dorm-style housing units and not in cells. Approximately one third of the inmates at the Facility are at Level I, and one third are at Level II.¹ The inmates at Grievant's Facility are less violent than those at other facilities and remain at the Facility for an average of 24 months before being released into society. The Assistant Warden described the inmate population as mostly passive and willing to go along with authority and instruction.

¹ The Agency has Level I through Level VI facilities. The most dangerous inmates reside in Level VI facilities. The least dangerous inmates reside at Level I facilities.

Grievant worked in Building 4 at the Facility. She had difficulty working with several co-workers. Several inmates in Building 4 complained to Agency managers about Grievant. On March 13, 2008, Grievant was counseled by Lieutenant W, the Captain, and Lieutenant M. She was informed of the complaints the Agency has received from various inmates in Building 4 concerning unprofessional and disruptive behavior by Grievant towards the inmates. Grievant rejected the criticism. As a result of these complaints, Agency managers felt it would be better for Grievant to work in another building and she was transferred to Building 1.

On May 16, 2008, inmates in Building 1 were involved in a treatment program which included using a karaoke machine and singing. Grievant believed the music was too loud and she told them to turn down the music. The inmates did not do so immediately, so Grievant entered the day area of the building where the inmates were located and removed the karaoke machine. Grievant's comments, gestures, and demeanor were offensive to most of the inmates as she removed the machine.

The Counselor called Lieutenant W and asked that a supervisor immediately come to the dorm. The Counselor was concerned about her safety and the safety of others because Grievant was yelling at the inmates and the inmates were yelling at Grievant. Lieutenant W called Lieutenant M and they both went to the dorm. When they arrived they observed the Counselor huddled her in office. They observed more than 40 inmates many of whom were yelling and screaming at Grievant and banging on the glass to the control booth where Grievant was inside. The inmates noticed the Lieutenants and attempted to get their attention to express their complaints about Grievant. Several of the inmates said that Grievant told them the music was too loud and that Grievant was yelling at them and calling them names. They said Grievant had intentionally bumped into one inmate as she entered the dorm and removed the karaoke machine. Lieutenant W asked Grievant to gather her belongings and come with him to the Watch office. While in the Watch office, Grievant told Lieutenant W that the inmates were making a lot of noise, calling her names so she took the karaoke machine. Later on, Grievant spoke with the Major who then instructed Lieutenant W to keep Grievant out of the housing unit.

On May 17, 2008, Lieutenant W met with Grievant and placed Grievant in "rover patrol" so that she would be away from the housing unit. Lieutenant W instructed Grievant not to enter Building 1 unit until an investigation could be completed. Grievant acknowledged Lieutenant W's instruction.

On May 18, 2008, Grievant entered Building 1 and talked to Officer S. When Lieutenant W learned Grievant had entered the housing unit, he asked Grievant why she entered the building after being instructed not to do so. Grievant said she entered the building to get her medicine. Lieutenant W again instructed Grievant not to enter the building until the investigation was completed.

The Agency scheduled a fact finding hearing as part of its ongoing investigation. On the day before the hearing, May 21, 2008, Grievant re-entered Building 1 and began

calling inmates to meet with her in the counselor's office. She was asking questions of the inmates about the incident that occurred on May 16, 2008.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."² Group II offenses "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."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

Group III Written Notice

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

Lieutenant W testified that in his 12 years of working at the Facility, he had never encountered a situation where he was so concerned about his safety and the safety of his staff. As the Assistant Warden testified, when the Agency loses control of a Facility's inmates, the safety of the inmates and the staff are in jeopardy. Grievant's behavior provoked a response from over 40 inmates that approached destabilizing the Facility and jeopardizing the safety of the Counselor and other staff. Her actions⁵ undermined her effectiveness by rendering her unable to continue working with inmates and undermined the effectiveness of the Agency by jeopardizing the safety of inmates and staff.⁶ Grievant had been warned about how she interacted with the inmates. In the Agency's judgment, Grievant's behavior rises to the level of a Group III offense.

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁵ Grievant's removal of the karaoke machine was not itself problematic. It was how she removed the machine that created a wall of conflict between her and the building's inmates.

⁶ Although it is not unusual for a corrections officer to have conflicts with inmates, it is the number of inmates and the degree of anger they expressed towards Grievant that separates Grievant's interaction with the typical conflict between a corrections officer and an inmate.

The Agency's judgment is supported by the evidence and the Group III with suspension must be upheld.

Group II Written Notice

"[F]ailure to follow a supervisor's instructions" is a Group II offense.⁷ Grievant was instructed by a supervisor, Lieutenant W, not to enter Building 1 until she was authorized to do so. Grievant twice entered Building 1 without authorization and contrary to the instructions of her supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Under the DOC Standards of Conduct, upon the accumulation of an active Group III Written Notice and an active Group I Written Notice, the Agency may remove an employee. Upon the accumulation of two active Group II Written Notices, the Agency may remove an employee. In this case, Grievant has accumulated an active Group III Written Notice and an active Group II Written Notice. Accordingly, Grievant's removal must be upheld.

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...."⁸ 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 disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary actions.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁹ (2) suffered a

⁷ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

⁸ *Va. Code § 2.2-3005.*

⁹ 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

materially adverse action¹⁰; and (3) a causal link exists between the adverse action and 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.¹¹

Grievant engaged in protected activity because she filed a grievance challenging certain actions by the Agency. She suffered a materially adverse action because she received disciplinary action. Grievant has not presented any credible evidence showing a causal link between the protected activity and the materially adverse action she suffered. The Agency took disciplinary action against Grievant because she acted contrary to the Standards of Conduct and not for any improper purpose. Accordingly, the Agency did not retaliate against Grievant.

Discrimination

DHRM Policy 2.05, "[p]rohibits employment discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or against otherwise qualified persons with disabilities." Grievant provided few details regarding her theory of discrimination.

Grievant was moved from Building 4 to Building 1 in order to provide her with a "fresh start". Several employees and inmates had complained to the Agency about how Grievant interacted with them. At least one employee did not want to work with Grievant. Grievant was not moved for any improper purpose such as because of her race, gender, national origin, etc.

Grievant presented numbers showing that the Facility employs more females and African Americans than any other groups. Grievant presented no information about the demographics of the population surrounding the Facility from which employees can be hired. She presented no information regarding the Agency's hiring process. She presented no examples of individuals who may have been qualified for employment but rejected. The gender and race of employees working at the Facility, standing alone,

General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁰ 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 action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹¹ 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).

reveal little about whether the Agency discriminates against employees based on protected class.

Grievant alleged that some male supervisors at the Facility gave preferential treatment to female officers with whom they had relationships. The evidence showed that to the extent the Agency was aware of an improper relationships, it took disciplinary action against those employees. The Agency did not discriminate against Grievant because of her gender or create a hostile work environment¹² based on gender at the Facility.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice with removal is **upheld**. Grievant's request for relief from alleged retaliation, harassment, and discrimination 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 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:

¹² A hostile work environment is a form of discrimination based on gender. Grievant has not established that the Agency created a hostile work environment based on gender.

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
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.¹³

[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

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

May 29, 2009

RE: **Grievance of v. Department of Corrections**
Case No. 8986, 8992, 8993

Dear :

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, as advised in the Grievance Procedure Manual, §7.2(a), either party to the grievance may file for an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

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.

Concerning your request for review, you stated, "The decision contains violations of State and EDR policy and procedures due to:

- Failure to subject all testimonies to the Rule of Law
- Failure to hold witnesses who committed perjury accountable
- Failure to hold Indian Creek accountable for not producing the witnesses requested by the defending party."

You stated further, "The decision contains an incorrect legal conclusion because of:

- Lack of understanding and misrepresentation of all the facts by Mr. Schmidt
- Lack of a preponderance of evidence."

Please be advised that the Department of Human Resource Management has the authority to rule on issues related only to the application or interpretation of human resource policies promulgated by this Agency or by the agency in which the grievance is filed. In our opinion, you failed to identify any Department of Human Resource Management or Department of Corrections policy with which the hearing officer's decision is inconsistent or violates. Rather, it

appears that the issues you raised are related to how the hearing officer assessed the evidence and how much weight he placed on that evidence. In addition, you raised certain procedural issues that this Agency has no authority to address. Absent any identified, specific policy violation committed by the hearing officer in making his decision, this Agency has no basis to interfere with the application of this decision.

Sincerely,

Ernest G. Spratley, Assistant Director
Office of Equal Employment Services