Issues: Discrimination, Retaliation, Hostile Work Environment, Harassment; Hearing Date: 02/25/09; Decision Issued: 03/11/09; Agency: DCE; AHO: William S. Davidson, Esq.; Case No. 9024; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9024

Hearing Date: February 25, 2009
Decision Issued: March 11, 2009

PROCEDURAL HISTORY

The Grievant filed against the Agency an Employee Grievance on October 21, 2008 and in that Grievance alleged that the Agency had committed: (I) Reverse discrimination by immediate supervisor, (ii) Retaliation by immediate supervisor, (iii) A hostile work environment, and (iv) Harassment. [1]

The Agency qualified this matter for a hearing on December 17, 2008. On January 29, 2009, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. On February 25, 2009, a hearing was held at the Agency's location.

APPEARANCES

Counsel for Agency
Agency Party
Grievant
Witnesses

ISSUE

1. Did the immediate Supervisor of the Grievant commit reverse discrimination against the Grievant?

2. Did the immediate Supervisor of the Grievant commit retaliation against the Grievant?

3. Did the Agency create a hostile work environment?

4. Was the Grievant harassed?

AUTHORITY OF HEARING OFFICER

[1] Grievant Exhibit 1, Tab 1, Page 1

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

The burden of proof is on the Grievant to prove her claims against the Agency by a preponderance of the evidence. 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 Agency provided the Hearing Officer with a notebook containing eight (8) tabbed sections and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing eight (8) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The evidence presented to the Hearing Officer established that the Grievant is a teacher for the Agency and that she teaches in two (2) separate school buildings. The one where the issues pertinent to this grievance arose is known as the "Annex." The principal for the Annex is Dr. A.

The Grievant's first witness was a student data technician. After teachers entered their grades into the computer system, this person then took those grades and completed the necessary steps so that those grades would be properly attributed throughout the system to the students. The Grievant had no permanent room nor a permanent computer of her own to use in her teaching capacity. The witness testified that on one occasion, she asked the Grievant to use the computer in the her office in order to facilitate having the grades entered. Upon seeing the Grievant there, Dr. A came into that office, and simply told her to "get out." Neither the Grievant nor this witness were given the opportunity to explain that the witness had invited the Grievant into the office in order to facilitate the witness doing her job. This witness tried to talk to Dr A after this event, but was told that it was unimportant as to why the Grievant was in her office. This witness testified that Dr. A cut her off before she could explain. Dr. A is African American and the Grievant is Caucasian. This witness also testified that when Dr. A told the Grievant to "get out" of her office, she was pointing her finger at the Grievant. This witness further testified that she has heard of other occasions where Dr. A has been equally rude and demeaning to both black and white employees of this Agency. This witness testified that the occasion in her office with the Grievant was ugly, and she was flabbergasted by it.

Grievant's next witness testified that sometime in September of 2008, staff were told that they could not have drinks in the classroom with students. The witness recalled that on September 17, 2008, the Grievant came to him upset because she had been told by Dr. A that she could not finish her drink in the hallway, even though there were no students present. She was told that she had to finish her drink elsewhere. This witness testified that it had been his personal observation that Dr. A does not treat all employees equally. This witness, whose classroom was directly across from the Grievant's classroom, testified that he observed Dr. A passing through the Grievant's classroom almost on a daily basis. This witness also testified that he had seen many teachers with drinks in the hallways when there were not students present. He testified that he had seen Dr. A be very abrupt with staff during meetings. He had seen her be non-responsive to complaints and he had seen her be abrupt and rude to everyone.

Another witness for the Grievant was Dr. T, the principal of the second school at which Grievant worked. This witness was responsible for Grievant's teaching in this second building. On September 26, 2008, or shortly thereafter, she received a letter from Dr. A that was addressed to the Grievant. This letter was dated September 26, 2008 and the first full paragraph of the letter stated in part as follows:

> ...Each resident presented the same concern: unfair treatment believing that you were racist. [2]

This letter was copied to the Deputy Superintendent Youth Schools Operations and to an assistant principal. When Dr. A testified on behalf of the Agency, she stated that this letter was not by way of discipline but was more in the form of a corrective memo. Accordingly, when this document was copied to the assistant principal and the Deputy Superintendent Youth Schools

[2] Grievant Exhibit 1, Tab 2, Page 1

Operations, it would appear that it violated Standards of Conduct Policy 1.60(B)(1)(b) wherein that policy states as follows:

> ...A copy of the letter of memorandum must be given to the employee. Counseling documentation should be retained in the supervisor's files...

There would appear to be no reason to send this letter to anyone other than the other principal who had supervisory duties over this Grievant other than to either harass or embarrass the Grievant.

When Dr. T questioned the Grievant about the letter of September 26, 2008, the Grievant was stunned as she had not yet received her original of the letter. The Grievant told Dr. T that she was having difficulty with Dr. A and that Dr. A was harassing her. The Grievant told Dr. A that this harassment was causing her to be sick with stomach problems. Dr. T told the Grievant to simply talk to Dr. A about this matter. Dr. T stated that she was concerned about the statement that the students felt that the Grievant was a racist as there was nothing in the letter of September 26, 2008 to definitively say that Dr. A did not believe that the Grievant was a racist. Dr. T testified that she can think of no reason why this letter would have been copied to other administrators other than to cause them to think that the Grievant was in fact racist. Dr. T testified that when she received her copy of this letter, she was immediately concerned that she had an employee, the Grievant, who was in fact racist. Dr. T also testified that all of the teachers that worked at both of the schools communicated to her that Dr. A was difficult to work with. Several of them stated that she had been rude to them and they felt that they were given more difficult assignments than those teachers who were permanently located in the Annex. Many of them asked Dr. T if there was any way that she could get them into her building on a full time basis.

On October 17, 2008, Dr. A summonsed the Grievant to her office for a follow-up meeting to the meeting of September 24, 2008 which was referenced in her letter of September 26, 2008, to the Grievant and others. Dr. A believes that is when she first gave to the Grievant her original of the September 26, 2008 letter in which there was an allegation from the students that the Grievant was a racist. Dr. A concedes that it is possible that she may have placed that letter in the Grievant's school box. If she placed it in the Grievant's school box, this would be contrary to the language that she had in that letter that stated in part as follows:

> ...I also explained my reluctance in putting such communication in an open mailbox readily accessible by any staff member... [3]

This letter was copied to Dr. T, the Deputy Superintendent of Youth School Operations, the Human Resource Director another assistant principal, and the Grievant's personnel file. Again, this is in violation of Policy 1.60.

[3] Grievant Exhibit 1, Tab 2, Page 8

The Grievant called as her witness the Director of Human Resources for the Agency. This witness was a recipient of the September 26, 2008 letter which was in violation of Policy 1.60. He testified that it is State policy that he should not have received such a letter and that it is State policy that the letter could not be placed into the personnel file of the Grievant. Pursuant to his own investigation, he determined that no such copy was placed in the Grievant's personnel file. Therefore it appears that Dr. A indicated in the letter that she violated State policy by placing a copy in the Grievant's personnel file and perhaps violated other regulations by indicating that she had done so when in fact she had not. The Director of Human Resources testified that the letter should not have been sent to the Deputy Superintendent of Youth Schools Operations or to the Assistant Principal. He could conceive of no reason for it being sent to those parties.

The Grievant's next witness was another Caucasian teacher who worked in both schools. She testified that she felt that Dr. A treated her differently than she treated other teachers in the building. She testified that her own students had said to her that **"Dr. A is going to get you the same way she got [the Grievant]."** (Emphasis added) She testified that Dr. A's rules apply to some teachers and not to others. She further testified that the rules seem to change every day. She testified that she had had other African American teachers tell her that Dr. A treated her differently because she was white. She testified that Dr. A asked her why she was not teaching African American art as opposed to the art lessons that she was teaching. She was told to not have a drink in the hall while an African American teacher, who was standing directly in front of her, had a drink in the hall.

Finally, the Grievant testified. The Grievant testified that just prior to what she perceived to be the harassment and retaliation that she was experiencing from Dr. A, she told Dr. A that she had reported a former principal for having sex with a student and he was no longer employed at this school. Further, she reported that a local politician was using his class to prepare campaign posters. The Grievant testified that when she informed Dr. A of these two facts, that is when the alleged incidents commenced. She pointed out that there were several errors in Dr. A's letter of September 26, 2008. First, September 26, 2008 is a Sunday and even Dr. A, when she testified for the Agency, conceded that was not likely to be the date that she prepared this letter. Further, Dr. A implies that she spoke with three different residents who all alleged that the Grievant was racist. Upon Dr. A's direct examination, she admitted that she only spoke to two residents and a guard who told her what a third resident told him. The Grievant testified that Dr. A admonished her in front of her class thereby diminishing her authority with her students and thereby placed her in a dangerous situation. Thereafter, on several occasions, when she attempted to discipline a student, that student would say to her that he wanted Dr. A to come to the class because he knew that Dr. A would back the student and not the Grievant.

Regarding the September 26, 2008 letter, the Grievant testified that she did in fact receive it in her school mailbox on October 15, 2008. This was nearly three weeks after that letter was disseminated to the recipients of the copy of the letter. Because she received that letter on October 15, 2008, the Grievant was reluctant to meet with Dr. A on October 17, 2008, when her only notice of that meeting was when someone came to her classroom and told her that Dr. A wished to meet with her now. That is why she requested a neutral third party to be present.

The Grievant testified that Dr. A would always ask her, "Are you arguing with me," whenever anyone would question Dr. A. She would often say to someone, "Are you listening to

me?" The Grievant rested and the Agency called Dr. A to testify. The Grievant also testified that Dr. A passed in and out of her room on numerous occasions and appeared to be taking no notes and rarely spoke to the Grievant or to the Grievant's class. It appeared to the Grievant that Dr. A was coming into her classroom or standing in the door for the sole purpose of checking on her and for no purpose that would be classified as helping her to be a better teacher.

Regarding the allegation that the local politician was using classroom time to prepare things for his campaign, Dr. A remembers questioning him about that and that he denied using them for his campaign. He stated that he was using them for community work. Dr. A testified that she thought this was permissible but that she did not know how that worked and she did not know who this employee of hers reported to. She testified that she did pass through teacher's rooms often and particularly the Grievant's room often but that was while she was making observations. She further testified that she had no notes regarding those observations and she did not use the form that was available for such observations. She testified that the observations at her school dropped below the minimum requirements because of a lack of staff. She testified that in direct contravention to all of the Grievant's witnesses that the rule about drinks in classrooms was a Department of Juvenile Justice rule and not her own. She said that she has no rule that you can't drink in front of students. She thinks that she told the Grievant not to have a drink in front of students, but she couldn't remember. She did not remember the name of the correctional officer who told her that the third student felt that he had been discriminated against. She did not remember the name of one of the two students that she spoke to about the Grievant allegedly being racist. The Hearing Officer notes that Dr. A prefaced nearly all of her answers with one of the following modifiers: **"If I recall correctly..." or "I think..." or "To the best of my recollection..." or "I believe I recall..."** (Emphasis added) Dr. A stated that she did not intend to allege that the Grievant was racist and she also testified that she did not think that racist was an inflammatory term. She stated that she did not think that the Grievant was racist. Dr. A testified several times that she relied upon other people to tell her if what she had done was wrong and inasmuch as she never heard from anyone that it was wrong to copy the two letters in question to the people she sent them to, then she felt that she must be right. The Hearing Officer found that Dr. A's testimony was not particularly candid.

The Grievant claims that she was subject to a hostile work environment because of her race and her previous protected activity. This protected activity includes making a claim that a fellow employee was violating the law by having sex with a student and violating the law by creating campaign documents while at work. For purposes of the Grievance procedure, protected activity includes "participating in the Grievance process, complying with an law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline or exercising any right otherwise protected by law. [4]

For a claim of racial harassment to be qualified for hearing, the Grievant must present evidence raising a sufficient question as to whether the conduct in question was (1) unwelcome; (2) based on her race; (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the Agency. Similarly, for a claim of retaliatory harassment to be qualified, the Grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on her prior protected activity; (3) sufficiently severe or pervasive

[4] Grievance Procedure Manual Section 4.1(b)

so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on such factual basis to the Agency. [5]

In this case, the Grievant has presented evidence showing that the conduct she experienced was unwelcome, thus satisfying the first element of both her racial and retaliatory harassment claims. She has also presented evidence that the conduct she experienced was sufficiently severe or pervasive so as to alter her conditions of employment and create an abusive or hostile work environment. Specifically, the Grievant has presented evidence that she was subjected to verbal abuse and humiliation; that this conduct occurred in front of her students, creating a heightened risk of harm to her; that she was accused of treating her students differently, raising questions about her motivation towards them; that her African American co-workers cautioned her that she was being treated differently because she was white; and that she was thereby treated differently such as to make her job less desirable than it should have been in response to her complaints of disparate treatment and harassment and notifying her superiors of the violations of a former supervisor and a current colleague.

The Grievance Procedure Manual at Section 9 defines the following:

> **Adverse Employment Action** - Any employment action resulting in an adverse effect on the terms, conditions, or benefits of employment.
>
> **Discrimination** - Different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin, or sex.
>
> **Harass** - Action taken with the intent or purpose of impeding the operations of the agency.
>
> **Retaliation** - Adverse employment actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. "whistleblowing").

The Hearing Officer finds that in this matter the Grievant has bourne her burden of proof and has established that she was discriminated against because of her race, that she was retaliated against because of her prior reporting of a supervisor having a sexual relationship with one of the students and for reporting a colleague in his use of the Agency's time and facilities to prepare for his pending political campaign and that both of these result in harassment. Further, while there has been no adverse employment action in that the Grievant was demoted or suspended or terminated, the discrimination and retaliation and harassment have surely led to an adverse employment environment.

The totality of the evidence presented in this matter, including that from the Agency witness, clearly indicate to the Hearing Officer that Dr. A has exceptionally poor management skills, is rude and abrupt to many of her employees and has created an environment where her Caucasian employees feel that they're being discriminated against and her African American employees acknowledge to the Caucasian employees that they are being discriminated against.

MITIGATION

[5] See Qualification Ruling of Director 2004-750

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..." [6] 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, the Hearing Officer finds that the Grievant carried her burden of proof in proving that the Agency's employee committed reverse discrimination against the Grievant, committed retaliation against the Grievant, created a hostile work environment for the Grievant and harassed the Grievant.

The problem before the Hearing Officer is how to craft a Decision that will be meaningful to the Grievant and will assist the Agency in seeing to it that it creates a proper work environment for all of its employees. The Hearing Officer orders that the Agency comply with all applicable law and policy, both State and Federal, regarding discrimination, harassment and retaliation. To the extent that he has the authority to so order and well-recognizing that he may not have such authority, the Hearing Officer orders that the Grievant's annual evaluations be performed by someone other than Dr. A or anyone who reports to Dr. A. Further, the Hearing Officer suggests that Dr. A be given either a different position or that she be provided substantial management skills and interpersonal skills training.

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:

[6] Va. Code § 2.2-3005

Director
Department of Human Resource Management
101 North 14th Street, 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
600 East Main Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[7] 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.[8]

[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]

_____
William S. Davidson
Hearing Officer

[7]An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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