Issues: Group III Written Notice (workplace harassment) and Termination; Hearing Date: 03/20/09; Decision Issued: 03/24/09; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 9027; Outcome: No Relief – Agency Upheld in Full.

IN THE VIRGINIA DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

IN RE: CASE NO. 9027

HEARING DATE: MARCH 20, 2009
DECISION ISSUED: MARCH 24, 2009

PROCEDURAL MATTERS

The matter arises from the grievance filed on November 10, 2008 with the Virginia Department of Corrections. I was appointed as hearing officer on January 15, 2009. I received the Notice of Appointment on January 20, 2009. I conducted a telephonic prehearing conference on January 30, 2009. During this conference the grievant requested that the hearing be conducted in Richmond where he now resides. The representative for the agency objected to this and I agreed that under the Grievance Procedure Manual the hearing had to be conducted at the facility where the grievance arose unless both parties agreed. The grievant requested that no hearing date be set until such time as he could attempt to verify his work schedule with his current employer. I consented to that arrangement and the grievant advised that he would provide available dates on the following Monday. He provided no dates. On February 9 I set the matter for hearing on March 20. My Prehearing Order dated February 9, 2009 provided written notice of the scheduling of the hearing and other matters. I chose that date with the idea of providing the grievant sufficient time to arrange his work schedule to be present for the hearing. The hearing was conducted as scheduled.

APPEARANCES

An agency advocate represented the Department of Corrections at the hearing.

Witnesses on behalf of the agency included a corrections lieutenant, an office services assistant, an electronics technician, the warden of the facility, and a human resource officer.

The grievant represented himself, testified, but presented no additional witnesses.

ISSUES

1. Whether the grievant committed the acts described in the Group III Written Notice and the supporting memorandum dated October 14, 2008?

2. Whether the actions, if proven, were sufficient to sustain a Group III offense?

2. Whether the actions, if proven, were sufficient to support the decision to terminate the grievant from employment with the agency?

FINDINGS OF FACT

On October 24, 2008, the agency issued this disciplinary action and terminated the grievant from employment. The agency took this action as result of complaints made to the warden by the office services assistant on or about September 25, 2008 regarding the use of profanity by the grievant. The warden had previously issued a counseling letter dated November 29, 2007 addressing the use of profanity and the complaints of another office services assistant. On June 16, 2008 the warden discussed with the grievant a report from the human resource officer regarding a further incident of profanity by the grievant. A memorandum dated June 20, 2008 memorializes that talk. In that memorandum the warden stated to the grievant "profanity, particularly with your staff after having been disciplined

previously for it, is not okay, regardless of the situation." The warden further directed the grievant to eliminate "profanity from your conversation in front of your staff as some are sensitive and aggrieved by it."

In her September 2008 meeting with the warden the office services assistant related to him two specific incidents of the use of profanity. I find that these incidents occurred as described by the office services assistant and corroborated by the electronics technician.

In August 2008 the grievant had referred to the office services assistant as a "fucking turd" as a result of her picking up a bottle of sand in his office and asking about the need for it. On a later date, which date is uncertain, the grievant had a discussion in the presence of the office services assistant and the electronics technician regarding another employee of the agency. The grievant indicated through a colloquialism, which he followed with an unambiguous hand gesture, that this other employee had obtained his position in the regional office of the agency by engaging in cunnilingus with a fellow regional manager. In his testimony, the grievant did not directly deny making this comment in the presence of the electronics technician. He did deny that the office services assistant was present when it was made.

At the time these comments were made to the office services assistant she was working under the supervision of the grievant. The grievant alleges that she testified against him because of her relationship with the other female employee who complained about his profanity. This assertion is contradicted by the fact that the office services assistant had been working for the grievant for some time and had otherwise a good working relationship with

him.

He further asserts that the electronics technician has a bias against him because of the unsuccessful attempt by the technician to have a close friend receive a position with the agency. No evidence supports that assertion.

The grievant also claims that the disciplinary action by the agency is in retaliation over concerns expressed by him regarding possible exposure to asbestos during and after a renovation project. He asserts that he requested copies of various emails tending to support his claim but failed to receive them from the agency. No such request for the production of these materials was made through me as part of this hearing. I find no evidence to support the retaliation claim by the grievant.

He also believes that the office services assistant has been coerced into making the statements against him. There was no evidence presented of any collaboration between the office services assistant and the electronics technician. Their testimony is entirely consistent with the scenario that each of them was present when the statement regarding the regional office employees was made. On October14, 2008 the agency disciplined the grievant and terminated his employment.

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, Chapter 29 of Title 2.2 of the Code of Virginia of 1950, as amended, sets forth the procedures and policies pertaining to employment with the

Commonwealth of Virginia. It includes, among other things, a grievance procedure for employees to challenge disciplinary and other actions taken against them. In disciplinary actions, such as the instant case, the agency must establish the appropriateness of its charge and discipline by a preponderance of the evidence.

Department of Corrections Operating Procedure 135.1 sets forth three groups of unacceptable behavior, ranked according to the severity of the offense. A different range of punishment applies to each level.

The agency issued the grievant a Group III offense. Those offenses include, "acts and behavior of such a serious nature that a first occurrence normally should warrant removal." Listed as specific examples of Group III offenses are violations of Department of Human Resource Management (DHRM) Policy 2.30 dealing with workplace harassment and Department of Corrections Operating Procedure 130.1. The agency is relying on those two policies and procedures to support its termination of the grievant.

DHRM Policy No. 2.30 proscribes illegal workplace harassment. Included as a subcategory of harassment is sexual harassment. It is defined as "any unwelcome…verbal, written, or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employee." An employee commits sexual harassment when a victim is "subjected to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work." The comments and gestures by the grievant with regard to the regional office employees were clearly of a sexual nature. I find the accusation to be of such a severe nature

that it created an offensive work environment. The grievant argued that the office services assistant had sent to him emails of a profane or sexual nature prior to his comments, the implication being that she was not intimidated or offended by his comments. I find that the assistant and the technician were offended by these comments. Even if they had not been, I find them to be of such a nature that they can support the disciplinary action under an objectively offensive standard.

Without question, the August, 2008 name-calling of the assistant by the grievant violated this provision. The later comment regarding the regional office employees was not merely impolite but defamatory. The comment was clearly not made in the course of bringing a matter of legitimate concern to a supervisor but by way of idle gossip.

I find that these two incidents involving the grievant need not be individually and separately sufficient to sustain the level of discipline. When combined, each with the other and with the prior warnings given to the grievant less than eleven months prior, they are sufficient to support the issuance of a Group III Written Notice. My task is not to serve as a "super-personnel officer". Instead, I am required to give due deference to the actions of an agency when it is consistent with law and policy. Va. Dept. of Corr. v. Compton, 47 Va. App. 202, 623 S.E. 2d 397 (2005). I cannot find that the actions here were inconsistent with law and policy. The grievant has also presented no evidence that would be proper for me to consider in mitigation of the punishment imposed.

DECISION

For the reasons stated above, I hereby uphold the issuance of the Group III Written

Notice to the grievant and his termination from employment with the agency on October 14, 2008.

APPEAL RIGHTS

As the Grievant 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 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, Main Street Centre, 600 E.

Main St., Suite 301, Richmond, VA 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 the original hearing decision**. 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 court shall award reasonable attorneys= fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

SUBMITTED this March 24, 2009.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer