

Issues: Four Group II Written Notices (creating hostile work environment, workplace harassment, discrimination, retaliation), Demotion, Transfer and Pay Reduction; Hearing Date: 02/09/10; Decision Issued: 02/16/10; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 9249; Outcome: Full Relief; **Judicial Review: Appealed to Richmond Circuit Court; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9249

Hearing Date: February 9, 2010
Decision Issued: February 16, 2010

PROCEDURAL HISTORY

On April 15, 2009, Grievant was issued four Group II Written Notices of disciplinary action for creating a hostile work environment, workplace harassment, discrimination and retaliation. As part of the disciplinary action, grievant was transferred, demoted and received a disciplinary pay reduction.

On May 14, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 12, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 9, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
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?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. 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 Correctional Education employed Grievant as a Principal until her transfer and demotion to an Assistant Principal position.

Ms. B reported directly to Grievant when Grievant was Principal. On October 21, 2008, Ms. B filed a grievance against the Agency alleging (1) reverse discrimination by her immediate supervisor, (2) retaliation by her immediate supervisor, (3) a hostile work environment, and (4) harassment. The Agency qualified the grievance for hearing on December 17, 2008. EDR assigned the case number 9024 to the grievance and appointed Hearing Officer 1 to hear the appeal. A hearing was held on February 25, 2009. Grievant was a witness during hearing 1. She was asked questions by Ms. B, the Agency's Counsel, and Hearing Officer 1. The questions asked of Grievant were directly related to the four allegations made by Ms. B against Grievant that formed the basis of Ms. B's grievance.

During hearing 1, the Agency's Counsel challenged Ms. B's allegations against the Grievant and the Agency. He argued that Ms. B had not met her burden of proof and that Grievant had not engaged in behavior supporting Ms. B's allegations.

On March 11, 2009, Hearing Officer 1 issued a decision to resolve the grievance of Ms. B. Hearing Officer 1 referred to Dr. A as one of the witnesses. Dr. A is the Grievant in this case decided today. Hearing Officer 1 ruled in favor of Ms. B on all issues and wrote:

The Hearing Officer finds that in this matter the Grievant has borne 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.

Based on the findings of Hearing Officer 1, the Agency took disciplinary action against Grievant.

CONCLUSIONS OF POLICY

The question presented in this case is whether the findings of Hearing Officer 1 are sufficient to support the issuance of disciplinary action against Grievant. There is no legal theory or theory under State policy that would justify applying the findings of fact in one grievance hearing to another grievance hearing where the parties are different.

The Agency argues that Grievant testified during hearing 1 and had the opportunity to fully and fairly defend herself against Ms. B's allegations. According to the Agency, the only reason that hearing 1 occurred was because of Grievant's behavior towards Ms. B. The Agency contends Grievant is bound by *stare decisis* and cannot now contradict her prior testimony in hearing 1.

There are at least three concepts, *stare decisis*, *res judicata*, and collateral estoppel which may permit the events of one legal proceeding to be binding on a subsequent proceeding. *Stare decisis* refers the doctrine that rules or principles of law on which a court rested a previous decision are authoritative in all future cases in which the facts are substantially the same. *Stare decisis* focuses on a court's interpretation of law and the subsequent application of that legal interpretation. It does not address subsequent application of findings of fact from one court when the parties are before another court. In this case, the Agency is attempting to apply the findings of fact made by Hearing Officer 1 to be used as facts to support the issuance of disciplinary action in this hearing. *Stare decisis* does not support such application.

To establish *res judicata*, a party must establish four elements: (1) identity of the remedy sought, (2) identity of the cause of action, (3) identity of the parties, and (4) identity of the quality of the persons for or against whom the claim is made. The doctrine of *res judicata* only applies if the cause of action a party asserts in the pending proceeding is the same as the cause of action asserted in the former proceeding.

To establish collateral estoppel, the following elements must be established: (1) the parties to the two proceedings must be the same, (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3) the issue of fact must have been essential to the prior judgment, and (4) the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied.

Res judicata and collateral estoppel are not applicable to Grievant's case because she was not a party to the grievance filed by Ms. B and decided by Hearing Officer 1. The Department of Correctional Education was the party to hearing 1. The Human Resource Director served as the Agency Party Designee. He sat next to Agency counsel during hearing 1 (as he did during this grievance hearing) and listened to the evidence presented by Ms. B and by the Agency. Although Grievant testified during the hearing, she did not hear all of the allegations made by and evidence presented by Ms. B. Grievant did not hear all of the Agency's witnesses.

In the absence of a theory of law or policy that would support the issuance of disciplinary against Grievant, that disciplinary action must be reversed.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of four Group II Written Notices of disciplinary action is **rescinded**. Grievant's demotion is **reversed**. Grievant's transfer is **reversed**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of demotion and credit for leave and seniority that the employee did not otherwise accrue.

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:

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.¹

¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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