

Issues: Written Counseling, Disciplinary Transfer, Workplace Harassment; Hearing Date: 02/26/10; Decision Issued: 03/01/10; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9257; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9257

Hearing Date: February 26, 2010
Decision Issued: March 1, 2010

PROCEDURAL HISTORY

On February 26, 2009, Grievant filed a grievance alleging unfair, arbitrary or capricious actions in the workplace based in part on racial profiling that created an intimidating in a hostile work environment, one-sided investigations that did not consider all evidence, and a tarnished image that diminished future promotional opportunities. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On December 9, 2009, the EDR Director issued Ruling Number 2010-2397 qualifying the matter for hearing. On February 1, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 26, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether the Grievant's reassignment was primarily to punish or correct the Grievant's behavior?
2. Whether the Grievant's reassignment was adverse and disciplinary?

3. Whether the Agency created an intimidating and hostile work environment for Grievant.

BURDEN OF PROOF

The burden of proof is on the Grievant to show that the reassignment was adverse and disciplinary. If the Hearing Officer finds that it was, the Agency will have the burden of proving that the action was nevertheless warranted and appropriate. The burden of proof is on the Grievant to show that the Agency created an intimidating and hostile work environment for him. 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 employs grievant as a Lieutenant at one of its Facilities. The purpose of his position when he was the Institution Training Lieutenant was:

The Institution Training Lieutenant position must effectively organize the mandated training of all employees-volunteers, contractors and interns for [the Facility]. The mandated training is the dictated by the Virginia Department of Corrections policies and procedures, Virginia Department of Criminal Justice Services and standards established by the Virginia Board of Corrections and the American Correctional Association.¹

The OIT presented Grievant with a doctor's note indicating that the OIT had been seen by the doctor. The note was inadequate under the Agency's policy because it did not state the days during which the OIT was under the doctor's care and did not state a date the OIT was permitted to return to work. Grievant instructed the OIT to get a corrected note from the doctor's office. The OIT attempted to do so and returned with corrected notes. Each time the notes were presented to the Grievant he consider them to be inadequate because they continued to lack the dates under which the OIT was under the doctor's care and lacked a return to work date. The OIT became frustrated and filed a complaint against Grievant alleging workplace harassment. The Agency investigated the OIT's complaint and concluded that the allegation was founded. The Agency believed that Grievant should have accepted the doctor's note but deny the request for sick leave because the note was inadequate. The Agency believed that

¹ Agency Exhibit 2.

Grievant did not have the authority to instruct the OIT to continue to return to the doctor's office to obtain a corrected note.

On January 30, 2009, the Warden drafted a memorandum to Grievant regarding "Harassment Complaint". The memo stated:

As you know, a harassment complaint was filed against you in November 2008. The investigation has been completed and several components of the claim have been concluded as founded. As a result, appropriate discipline will be issued as outlined under the Standards of Conduct.

Please know that any acts of retaliation towards the complainant are strictly prohibited. In addition, the complaint and the conclusion of this case should be held in the strictest of confidence and should not be discussed.

As of today, January 30, 2009, this case is considered closed.

On February 3, 2009, the Warden issued to Grievant a Written Counseling stating:

On January 30, 2009 we met to discuss the results of the workplace harassment complaint that was filed against you. Because the complaint was concluded as founded, we reviewed the policy on workplace harassment (Policy 2.30) and the policy regarding employee medical records (Policy 057.2). Copies of both policies are attached for your reference.

As a result of the findings of the complaint, please be informed that you will be transferred as a Lieutenant to Security Operations effective February 9, 2009.

Let this written counseling serve as a reminder that we take these matters seriously. Any further complaints of this nature will result in discipline under the Standards of Conduct.²

As a result of the February 3, 2009 memorandum, Grievant was transferred within the Facility to work as a Lieutenant for a Housing Unit. Although Grievant's salary and rank did not change with the transfer, his duties as a Housing Unit Lieutenant were significantly different. As a Housing Unit Lieutenant, Grievant no longer had his own office, he no longer had contact with outside agencies, and every other week his work hours changed from the shift of 8 a.m. to 4:30 p.m. to the shift of 2 p.m. to 10 p.m. Grievant and his coworkers perceived Grievant as holding a less prestigious position when he began working as a Housing Unit Lieutenant.

² Agency Exhibit 9.

CONCLUSIONS OF POLICY

Grievant's transfer had an adverse effect on the conditions of his employment. Although his rank and pay did not change, Grievant's duties were changed from highly desirable and respected duties to less desirable and less respected duties.

The Agency transferred Grievant in order to punish him because of its findings that Grievant engaged in workplace harassment.³ An OIT filed a complaint against Grievant alleging Grievant had engaged in workplace harassment. The Agency concluded the complaint was founded. The Warden wrote, "[a]s a result of the findings of the complaint, please be informed that you will be transferred"

DHRM Policy 2.30 defines Workplace Harassment as:

Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

The Agency has not established that Grievant engaged in workplace harassment. The Agency did not show that Grievant's actions were based upon "race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability". At most, the Agency has established that Grievant's management style was abrasive and confrontational.

The Agency has not established that Grievant acted contrary to Agency Policy 057.2 governing employee medical records. Grievant testified that this policy was not in effect at the time of his actions and the Agency has not rebutted that testimony. The Agency presented evidence that Grievant asked the OIT to get a revised doctor's note an excessive number of times. This concern is not clearly or adequately articulated in the Written Counseling of February 3, 2009.⁴ An important purpose of a written counseling is to place an employee on notice of behavior the employee should avoid in the future. Because the Written Counseling of February 3, 2009 does not accomplish that task, it must be rescinded.

³ The Agency should have issued a Written Notice if it desired to punish Grievant.

⁴ The Agency presented evidence suggesting that Grievant acted contrary to Local Operating Procedure 213 because Grievant retained doctor's notes from the OIT instead of delivering those notes to the timekeeper. The Written Counseling does not mention Local Operating Procedure 213 and does not describe what behavior by Grievant was inappropriate.

An employee may be transferred for disciplinary reasons only upon the issuance of a second Group II Written Notice or the issuance of a Group III Written Notice. Even if the Hearing Officer were to deem the Written Counseling as the equivalent of a Written Notice, it could rise no higher than a Group II Written Notice. Standing alone a Group II Written Notice is not sufficient to support the transfer of an employee. Accordingly, the Agency has not presented sufficient evidence to justify transferring Grievant from the position of Institution Training Lieutenant to a Lieutenant in a Housing Unit (Security Operations).

Grievant argues that the Agency created a hostile work environment for him. He presented evidence of statements made by the Warden and the Human Resource Officer that involved race. When the Human Resource Officer interrupted Grievant's class, she did not do so because of his race. Although the Warden's comments about Grievant's size, gender and race were inappropriate for the situations, they were intended to help stop Grievant's abrasive interactions with coworkers and discern whether his actions with respect to coworkers were based on race. Grievant has not presented sufficient evidence to support the assertion that the Agency created a hostile work environment for him based on race. Accordingly, Grievant's request for relief must be denied.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Written Counseling on February 3, 2009 is **rescinded**. Grievant's transfer is **rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position as the Institution Training Lieutenant, or if occupied, to an objectively similar position. Grievant's request for relief regarding workplace harassment 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:

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.