Issues: Group I Written Notice (unsatisfactory job performance), Arbitrary/ Capricious Performance Evaluation, Discrimination (military status), and Hostile Work Environment; Hearing Date: 03/12/10; Decision Issued: 04/07/10; Agency: VSP; AHO: Sondra K. Alan, Esq.; Case No. 9261, 9262; Outcome: Partial Relief.

DECISION OF HEARING OFFICER

IN RE: CASE NOS. 9261 & 9262

HEARING DATE: March 12, 2010
DECISION ISSUED: April 7, 2010

PROCEDURAL HISTORY

9261

On June 24, 2009, Grievant filed a grievance against the Agency alleging that the Agency had discriminated against him because of his military status and that consequently the Agency had created an unfriendly and hostile work environment.

9262

On August 25, 2009, Grievant was issued a Group I Written Notice of Disciplinary Action[1] for declining a medevac flight that he was requested to fly on April 22, 2009. The Grievant timely filed his challenge to the Agency's Group I Written Notice on September 25, 2009. Further, in this grievance, Grievant disputed a performance plan dated January 5, 2009[2] issued to him by the Agency stating that the Grievant was acting in an unprofessional manner and that Grievant was not current on flight proficiency. Also, in this grievance, Grievant takes exception with his performance evaluation dated September 9, 2009[3], which described him as a "marginal contributor".

The outcomes of the Third Resolution Steps of the aforementioned grievances were not satisfactory to the Grievant and he requested a hearing. On December 15, 2009, the EDR Director issued Ruling No. 2010-2475, 2010-2476 consolidating the two grievances for a single hearing. In a letter dated February 10, 2010 the

[1] Agency exhibit C
[2] Agency exhibit A
[3] Agency exhibit A

Hearing Officer received appointment from the Department of Employment Dispute Resolution (EDR). The matter was scheduled for hearing during a pre-telephone conference on February 18, 2010 at which time the case was set for March 12, 2010 at 9:00 am. The hearing took place in a state agency office .

APPEARANCES

Agency advocate
Agency representative
4 Agency witnesses
Grievant's attorney
Grievant
1 Grievant witness

ISSUES

1. Did the Agency commit discrimination against the Grievant?
2. Did the Agency create a hostile work environment?
3. Was the Grievant unfairly given a Group I Written Notice?
4. Was the Grievant given an unfair performance plan and performance evaluation?

BURDEN OF PROOF

Case No. 9261

The burden of proof is on the Grievant to prove his 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.

The burden of proof is on the Agency as this is a disciplinary action involving a Written Notice level Group I disciplinary action and performance issues. The agency must prove by a preponderance of the evidence that the action taken was warranted and appropriate under the circumstances.

APPLICABLE LAW

9261

§4.1(b) Actions Which May Qualify

The grievance should qualify for a hearing if (i) it claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether an adverse employment action has occurred as a result of one or more of the following:

1. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations;
2. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;
3. Arbitrary or capricious performance evaluation;
4. Retaliation for 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 Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law; or
5. Informal discipline – for example, terminations, transfers, assignments, demotions, and suspensions – which are not accompanied by formal discipline (a Written Notice) but which are taken primarily for disciplinary reasons.

9262(A)

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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

The Agency states that it issued the Group I Written notice in accordance with General Order 19, paragraph 12.b (4) of the *State Police Manual,* for "Inadequate or unsatisfactory job performance". However, no General Order 19 of the *State Police Manual* was ever presented as an exhibit by the Agency.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

9262(B)

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management.

FINDING OF FACTS

9261

Grievant believes he has been discriminated against because he has taken military assignments, which have caused him to be absent from his position. Agency never denied Griefant any military leave time. Grievant was disgruntled with Agency for Agency's repeated refusal to grant him his additional earned leave time. Agency had a policy of granting extra leave time in lieu of paying overtime wages. Agency was chronigically understaffed, which caused hardship in granting leave time at requested times.

9262(A)

Greivant was given a Group I disciplinary action for failure to complete a flight assignment.[4] The Federal Aviatiation Administration (FAA) has a policy in place that the pilot in command is the only person who can make the decision whether or not to fly an aircraft.

9262(B)

Grievant received an adverse performance plan and evaluation. The performance plan was dated January 5, 2009. The Agency felt Grievant was not flying missions he could have flown. The Agency believed Greivant was not at standard proficiency in fixed wing aircraft. The Agency believed Grievant was affecting work place morale by his repeated complaints about lack of leave time, age of their aircraft, and maintenance of aircraft. The performance evaluation was dated September 9, 2009 wherein Grievant received an overall rating of "marginal contributor".

[4] On April 22, 2009 at 11:45 p.m. [grievant] declined a medevac flight request. [Grievant] indicated that he did not carry out the flight due to high winds. The medevac flight was successfully carried out by a commercial provider with no problems. A review of the weather conditions indicated that the winds were substantially less than earlier the same day at 11:52 a.m. when [Grievant] successfully completed a medevac mission.

OPINION

9261

There was clear evidence that the Agency branch where grievant was located was chronically understaffed. This caused hardship in permitting vacation time for its pilots. The Agency created its own dilemma by offering leave, which it was virtually unable to accommodate. After using military leave time and some of his other leave for military absences, Grievant still had about seven (7) weeks of vacation left. Grievant stated when requesting leave, he was told that he had taken enough leave being gone to the military and now it was time for the other pilots to take leave. He further stated he was told if he wanted to leave to "get more military orders." Agency denies any of its officials made any of these statements. However, even if Agency had made the statement about "7 weeks of military leave" the operative part of the statement was the time taken and the need to accommodate other employees' vacations as, due to the understaffing, only one pilot at a time could be absent.

It is true that Grievant did not always get his vacation time when he wanted it and had to take days off at less convenient times. But, by the end of the year, Grievant had received his allotment or at least the portion that could not be carried over to the next year. It is pathetic that an employee be offered benefits and then have to beg for the benefits to be given. However, it appears the under staffing, not discrimination, was the reason for the dilemma. The Hearing Officer does not believe this was an issue of discrimination or active hostility.

9262(A)

Regardless of what the Agency believes its state authority to be, an employer cannot discipline behavior over which it has no authority. There was ample and uncontroverted evidence that the Federal Aviation Adminstration (FAA) rule provides that the pilot in command is the only person who can make the decision whether or not to fly. This is a sound rule that protects public safety. To be

permitted to discipline a pilot for his decision to not fly would have a decided chilling effect on air safety and override the FAA rule. This simply cannot be done.

This is not to say that a timid pilot may not be suited to a job. From crop dusters to air buses, there are varying degrees of voluntary risk taking. The employer of a pilot certainly has a right to set the standards for expected number of flights to be completed and, when a pilot is significantly over the percentage of normal refusals, he may be disciplined for obvious shirking of his duty. An employer may also set an upper standard above which its pilots may not fly their aircraft in order to limit excessive risk taking. However, as already stated, to micromanage each individual pilot's decision is simply not the employer's right. The individual flight decision, however timid, is regulated by FAA rules as the pilot in command decision right. For the above reasons, the Group I given to Grievant is rescinded.

9262(B)

As stated earlier, Agency has brought much of this issue upon itself by Agency's policy to grant leave rather than overtime pay and then be unable to permit the leave to happen in a timely fashion. Further, Agency had a policy of not hiring a temporary pilot even while one of its much needed pilots was deployed for a full year to the Mid-East. However, these were the work conditions of which Grievant was aware. There was sufficient testimomy at the hearing that Grievant's disenchantment with the situation affected his performance. There were questionable refusals to take flights, Grievant's complaints about the hiring policy (or lack thereof), complaints about mainenance of the aircraft, scheduling issues and so forth. While Grievant was repeatedly portrayed by Agency as one of the force's most able pilots, it was obvious from testimony the workplace morale was very low. No doubt, this dilemma did affect Grievant's performance. Therefore, the performance evaluation of Grievant for the period of fall 2008 through fall 2009 will not be disturbed or modified.

APPEAL RIGHTS

As the Grievance 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 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 are the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

   Director, Department of Human Resources Management
   101 N. 14th Street, 12th Floor
   Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the 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:

   Director, Department of Employment Dispute Resolution
   600 East Main Street, Suite 301
   Richmond, VA 23219

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 original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days following the issuance of the 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 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 grievance arose. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

_____

Sondra K. Alan, Hearing Officer