

Issues: Group III Written Notice (workplace harassment), Group III Written Notice (workplace harassment), Group III Written Notice (providing false information), and Termination; Hearing Date: 04/13/10; Decision Issued: 04/20/10; Agency: DOC; AHO: Thomas P. Walk, Esq.; Case No. 9308, 9309, 9310; Outcome: Full Relief.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT DISPUTE
RESOLUTION

IN RE: CASE NOS.: 9308, 9309 and 9310

DECISION OF HEARING OFFICER

PROCEDURAL BACKGROUND

The Department of Corrections (DOC) issued to the grievant three Group III Written Notices on December 15, 2009 and terminated him from employment. He timely filed grievances as to each of these disciplinary actions on January 13, 2010. At his request and without objection from the agency the Department of Employment Dispute Resolution consolidated these matters for hearing on March 10. I was appointed as hearing officer on March 15. I conducted a telephonic prehearing conference on March 25 with the agency representative and counsel for the grievant. I scheduled the hearing in these matters to be held on April 13. The hearing was conducted on that date.

APPEARANCES

Grievant

Counsel for grievant

Two additional witnesses for grievant

Agency Advocate

Agency Representative

Four witnesses for the agency (including the agency representative)

ISSUES

1. Whether the telephone call placed by the grievant on November 19, 2009 to another employee of a different agency of the Commonwealth constituted

workplace harassment in violation of Department of Human Resource Management (DHRM) Policy No. 2.30?

2. Whether the grievant violated DHRM Policy 2.30 on December 2, 2009 when he identified another employee of the agency as being responsible for a rumor for which there was no basis in fact?

3. Whether the grievant violated DOC Operating Procedure 135.1 in making a false statement to an investigator on December 2, 2009, creating a falsified state document?

4. Whether the agency was justified in terminating the grievant from employment?

FINDINGS OF FACTS

The grievant began working for the Department of Corrections as a Correctional Officer in 2004. He remained employed with the agency through December 18, 2009 when the agency terminated his employment based on the Written Notices mentioned above. At the time of his termination he held the rank of Corporal.

Beginning in October 2008 and until July 2009 an employee of the Department of the Correctional Education (DCE) had an office at the facility of the Department of Corrections at which the grievant was stationed. She tested and evaluated the detainees. She met the grievant in December, 2008 and became friends with him after he was assigned to the day shift. She socialized with the grievant and his girlfriend on more than one occasion. The grievant and his girlfriend had arranged one blind date for the evaluator.

The office of the evaluator at the facility was in the basement of a building along a hallway with other offices. This facility holds only male detainees. Detainees were properly only in the office of the evaluator when their there to perform custodial duties. She met with detainees in a classroom at the facility. In July 2009 the evaluator became uncomfortable with leaking pipes running overhead in her office. She requested that her office be moved outside the facility. The DCE granted the request and she ceased to have an office at the facility in July. Subsequent to the evaluator relocating her office she and the grievant continued to remain friends and spoke by telephone on a regular and frequent basis.

On November 19, 2009 the grievant was working the night shift. He left work at 10:30 p.m. due to an illness. At approximately 11:28 p.m. he called the evaluator. He spoke with her about problems he was experiencing at the facility. The grievant went on to tell the evaluator that other officers at the facility were saying that she was forced to change her office because of her having had inappropriate contact with a detainee, being alone in her office with him. She repeatedly asked the grievant who was making this false statement and he refused to tell her. He refused to identify the officer because that person was a friend of his. He did tell her that it was not a Corporal specifically identified by her. He assured her that he had told the source of the statement that the report was not true, that she was not that type of person. The evaluator informed him that it was not up to him to vouch for her character. He told her that he would deny talking to her if she reported this rumor to anyone.

The following day the evaluator contacted a major at the facility and reported the statement to him. The matter was referred to the DCE for investigation. The Director of

Legal and Internal affairs of the DCE interviewed the grievant on December 2. The grievant, during the course of the interview, reluctantly identified another Corporal at the facility as being the source of the rumor about the evaluator. The grievant signed a written statement with the name of this Corporal. The statement did not identify any other individuals who may have discussed the evaluator and her reason for leaving the facility. The grievant had not discussed this rumor with any individual other than the single Corporal.

On December 15, 2009 the agency issued to the grievant three Group III Written Notices. One (hereinafter Notice No. 2) dealt with the comment by the grievant to the evaluator, citing him for workplace harassment. Another Notice (hereinafter Notice No. 3) cited the grievant for workplace harassment based on his accusation of the other corporal. The final Notice (hereinafter Notice No. 4) cited the grievant for making a false statement resulting in a falsified state document. For each of these Notices the grievant was terminated from employment December 18, 2009.

APPLICABLE LAW AND OPINION

Chapter 30 of Title 2.2 of the Code of Virginia of 1950, as amended, provides certain protections to employees of the Commonwealth. One of those protections is the right to grieve termination from employment for disciplinary reasons. Under Section 5.8 of the Grievance Procedural Manual promulgated by the Department of Employment Dispute Resolution, in disciplinary grievances the agency has the burden of going forward with the evidence and the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. In a disciplinary grievance a hearing officer “reviews the facts de novo...to determine: (i) whether the employee

engaged in the behavior described in the written notice; (ii) whether the behavior constituted misconduct; (iii) whether the agency's discipline was consistent with law...and policy; and, (iv) 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." Rules for Conducting Grievance Hearings Section V(B).

Because the three disciplinary actions against the grievant involved distinct issues, I will discuss them separately.

WRITTEN NOTICE NO. 2

This Notice alleges that the grievant committed workplace harassment against the evaluator. Policy No. 2.30 of the DHRM defines workplace harassment as:

"any unwelcome verbal...conduct that denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation...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 opportunities or compensation"

The agency has alleged that the telephone call from the grievant to the evaluator on November 19 constituted workplace harassment. I disagree. No question exists that the information provided by the grievant to the evaluator regarding the rumor about her was unwelcome news. I accept and agree with the argument of the grievant that a distinction must be made between the rumor itself and the disclosure of the information by the grievant to the evaluator. The false information was clearly denigrating to the

evaluator. I fail to see how the disclosure by the grievant of the existence of the rumor further denigrated her. That action merely acknowledged the existence of the rumor and opened the door for the evaluator to address the matter directly.

Similarly, the rumor existed: the hostile or offensive work environment for the evaluator on those occasions when she returned to the facility was already in existence. The action of the grievant did not have the purpose or effect of creating such an environment.

The evaluator testified that she knew of no way in which her work performance had been impacted by the disclosure by the grievant. She remained employed by the DCE and has suffered no adverse employment consequences as a result of the call and subsequent investigation. The agency presented no evidence to show that any hostility toward the evaluator was created as a result of the action of the grievant. In fact, he attempted to contact the evaluator subsequent to December 2. The evaluator declined to return his calls.

WRITTEN NOTICE NO. 3

This notice also accuses the grievant of violating DHRM Policy No. 2.30. The allegation is that the grievant jeopardized the future employment opportunities for the Corporal named by him as being the source of the unfounded rumor against the evaluator. In an interview with the DCE investigator the Corporal denied knowing prior to December 2 that the evaluator had moved her office from the facility. He indicated that he had infrequent contact with the evaluator and had never discussed with the grievant the reasons for her leaving. His testimony at the hearing was consistent with his earlier statement to the investigator.

The evidence and version of events given by the Corporal and the grievant are in direct conflict. The Corporal testified that he considered the grievant to be a friend and that he enjoyed working with him. The grievant does not dispute that fact. Their relationship raises the obvious question of why would the grievant blame the Corporal for something he did not do. The agency presented no satisfactory explanation for that question.

The Corporal testified that he and the evaluator was always picking at one another when they had contact. Yet, he indicated that they had little contact. The demeanor of the evaluator while testifying did not seem to be that of a person who would freely joke with a person with whom she was not very well acquainted. I find that inconsistency curious but do not assign significant weight to it.

The demeanor of the Corporal while testifying was more problematic. He exhibited poor eye contact. He curiously volunteered at the end of his testimony that "I would help anyone I could." In the context of the hearing to determine the employment future of his friend, a hearing in which he testified in direct contradiction to the version of events relied upon by his friend, this comment could reasonably be viewed as an implicit apology to the evaluator while at the same time being an instance of his "protesting to much."

The investigator from DCE chose to find the Corporal more credible than the grievant. The Superintendent of the DOC facility based his decisions regarding the grievant on the investigator's findings. I cannot make that same determination as to credibility based on the evidence presented to me. Accordingly, I do not find that this Written Notice was proper.

WRITTEN NOTICE NO. 4

This charge is that the grievant made a false statement to the investigator thus creating a falsified state document. This disciplinary action is taken under Agency Operating Procedure No. 135.1, commonly known as the Standards of Conduct. The offense is charged as a Group III offense. Those offenses include behavior “of such a serious nature that a first occurrence should warrant removal.” Among the specific acts listed under this category of offense is the falsification of any records.

As was true regarding Written Notice No. 3, the investigator made the determination that the corporal was to be believed and that the grievant was not. He concluded that the statement given by the grievant was a falsified document. For the reasons stated in my discussion of Written Notice No. 3, I disagree with this assessment. Accordingly, I find that the subject Notice should not have been issued.

DECISION

For the reasons stated above, I order that each of the three subject Written Notices against the grievant be dismissed. He shall be reinstated to his former position or, if occupied, to an objectively similar position. I further award full back pay, subject to a deduction for interim earnings by the grievant. He shall be restored to full benefits and seniority. Counsel for the grievant may submit his request for attorneys fees as provided by §7.2 (e) of the Grievance Procedural Manual.

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 East 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.

RENDERED this April 20, 2010.

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