Issues: Group II Written Notice with Suspension (failure to follow policy), Retaliation (other protected right) and Workplace Harassment; Hearing Date: 05/11/10; Decision Issued: 05/14/10; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9314; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 05/29/10; EDR Ruling #2010-2665 issued 06/30/10; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9314

Hearing Date: May 11, 2010
Decision Issued: May 14, 2010

PROCEDURAL HISTORY

On April 24, 2009, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for failure to follow established guidelines and policies or otherwise comply with established written policy.

On May 23, 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 April 14, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 11, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?

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?

5. Whether the Agency created acted contrary to State policy?

6. Whether the Agency retaliated against Grievant?

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 Behavioral Health and Developmental Services employs Grievant as a Forensic Mental Health Technician at one of its Facilities. She has been employed by the Agency for approximately 10 years. The purpose of Grievant's position is:

> to provide complete nursing care to an adult population ranging from ages 18 to 64 in a Forensic/civil setting to maintain a safe, clean and therapeutic environment and to participate and encourage patients to participate in their prescribed treatment programs.

Grievant had prior active disciplinary action consisting of a Group I Written Notice of disciplinary action for unsatisfactory attendance.

On March 12, 2009, the Agency posted a sign stating:

> Cell Phones are prohibited in the clinical areas.
> According to policy number A-05b.

> Use of personal communication devices is strictly prohibited in any patient area/setting while on duty.
> Camera phones are banned in all [Facility] buildings for security and HIPAA reasons.[1]

The sign was placed above the time clock, on the door of the employee's lounge, and in each nurse's station.

On or about March 25, 2009, a Client's Husband complained to a charge nurse, Ms. V, that a nurse on another ward was rude to him and screamed at him. Ms. V did not know which employee the Husband was complaining about but knew that she was supposed to notify the charge nurse on the other ward. Ms. V notified the other supervisor. Sometime later, possibly the next day, Grievant left her ward and walked to Ms. V's ward. Grievant begin to explain to Ms. V that the Husband was out of line and that she only told the Husband he should be in the visitor's room. Ms. V told Grievant that she had referred the incident to the other charge nurse. Grievant became angry and walked down the hall saying, "I should have known I wouldn't get anywhere with you". Grievant threw up her hands and began walking away saying "damn bitch". Ms. V reported the interaction to her supervisor, Ms. T, and indicated that Ms. C had heard Grievant.

Ms. C was sitting in an office next to hallway where the interaction between Grievant and Ms. V took place and overheard the conversation. Ms. T asked Ms. C to write a statement about the incident between Grievant and Ms. V. Sometime later, Grievant walked into Ms. C's office and stood behind and to the right of Ms. C. Grievant had a camera phone and took a picture of Ms. C. Ms. C saw the flash and heard a shutter sound from the camera phone. Ms. C asked Grievant why she was taking Ms. C's picture. Grievant did not respond. Grievant turned and walked out of the room. Ms. C called Ms. T to report Grievant's behavior.

Ms. T called Grievant and asked Grievant to come to Ms. T's office. When Grievant met with Ms. T, Grievant said that she took a picture with her cell phone. When asked why she did so, Grievant responded that, "I do not like people smiling in my face and talking about me behind my back." Grievant also said "It will not happen again, I need my job."

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[2] Group II offenses "include acts of misconduct of a more serious

[1] Agency Exhibit 3.

[2] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to comply with written policy is a Group II offense.[3] Facility Policy Number A-05b states, "Camera phones are banned on all [Facility] buildings for security and HIPAA reasons." Grievant brought a camera phone into the secured Facility building nearby acting contrary to Facility written policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's three work day suspension must be upheld.

Grievant denies that she brought a camera phone into the workplace and took a picture of Ms. C. There are several reasons why the Agency has established by a preponderance of the evidence that Grievant brought a camera phone into the Facility and took a picture of Ms. C. First, Ms. C's testimony was credible. She had only known Grievant for approximately two months prior to the incident. There was no history of conflict between Grievant and Ms. C. No credible motive was presented that would explain why Ms. C would falsely accuse Grievant. Second, Grievant admitted to Ms. T that she brought a camera phone into the workplace and took a picture of Ms. C. Grievant's denial during the hearing is not consistent with her admission to Ms. T. Third, Grievant asserted that she intentionally lied to Ms. T about having a camera phone in order to bring attention to the poor working circumstances at the Facility. Grievant's testimony about this claim was not credible.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[4] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the

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[3] See Attachment A, DHRM Policy 1.60.

[4] *Va. Code § 2.2-3005.*

disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.[5]

Grievant contends that the Agency engaged in workplace harassment contrary to DHRM Policy 2.30. This policy defines[6] 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.

Grievant presented evidence of circumstances she believes support workplace harassment. For example, she presented evidence that on February 26, 2009 she confronted a man she had never seen before in the ward. Grievant confronted him because he was not wearing a badge required of all employees working at the Facility. The man was a supervisor but had nothing on him to identify his status. Grievant was later reprimanded for her confrontation with the man even though she was merely performing her duties. Grievant also presented evidence of a meeting called by staff to discuss asbestos removal at the Facility. Some Facility managers were unaware of the meeting and did not believe the meeting was appropriate. Grievant and all of the other employees who attended the meeting were instructed to sign a document saying that the meeting was unauthorized. Several staff including Grievant refused to sign the document. Grievant presented evidence that she and other staff had made numerous complaints with Facility managers but managers were ineffective at resolving those complaints. Grievant testified that the inability of Facility managers to resolve numerous problems had resulted in her and many others employees experiencing unnecessary stress.

Grievant's evidence does not support the conclusion that the Agency engaged in workplace harassment. Grievant did not show that any of the Agency's actions were taken "on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability." For example, Facility managers asked all of the employees who attended the meeting to sign a document saying the meeting was unauthorized. Facility managers did not differentiate among those employees based on their race, sex, color etc. The Agency did not engage in workplace harassment as it is defined under DHRM Policy 2.30 in effect during the relevant time period.

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[5] Grievant presented evidence that she was experiencing emotional distress and was under the care of a physician as of April 2, 2009. Insufficient evidence was presented to establish how Grievant's medical condition may have affected her judgment and taking pictures of Ms. C.

[6] DHRM Policy 2.30 was later amended in February 2010.

The essence of Grievant's claim regarding workplace harassment is that she objects to how the Agency is managing the Agency's affairs. The Hearing Officer is not a "super personnel officer" who can impose his management style on the Agency. To the extent an agency engages in poor management practices, the Hearing Officer only has the authority to correct those practices if they are contrary to State policy. In this case, Grievant has not established that the Agency acted contrary to DHRM policy.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[7] (2) suffered a materially adverse action[8]; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[9]

Grievant engaged in protected activity because she complained to Facility managers regarding her safety and the Agency's operations. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between her protected activity and the materially adverse action she suffered. It is clear that the Agency issued disciplinary action against Grievant because it believed she engaged in inappropriate behavior. The Agency did not take action against Grievant as a pretext for retaliation.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**. Grievant's request for relief from retaliation and workplace harassment is **denied**.

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[7] *See* Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: 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 the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[8] On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

[9] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.[10]

[10] 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

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Carl Wilson Schmidt, Esq.
Hearing Officer