Issues: Group I Written Notice (workplace harassment) and Termination (due to accumulation); Hearing Date: 11/01/10; Decision Date: 11/03/10; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9447; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 9447

Hearing Date: November 1, 2010
Decision Issued: November 3, 2010

PROCEDURAL HISTORY

Department of Behavioral Health and Developmental Services ("Agency") issued to the Grievant a Group I Written Notice on August 19, 2010, for violation of Department of Human Resource Management's ("DHRM") Policy 2.30, Workplace Harassment. The Grievant had two prior active Written Notices, a Group I and a Group III. The discipline for the current Group I Written Notice was termination, because of the accumulation of multiple Group Notices.

Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On October 15, 2010, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. A pre-hearing conference was held by telephone on October 18, 2010. The hearing ultimately was scheduled at the first date available between the parties and the hearing officer, Monday, November 1, 2010, on which date the grievance hearing was held, at the Agency's human resources office.

The Agency submitted documents for exhibits that were, without objection from the Grievant, admitted into the grievance record, and they will be referred to as Agency's Exhibits. The Grievant's exhibits were received into the grievance record without objection, and they will be referred to as the Grievant's Exhibits. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative/Advocate for Agency
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?

The Grievant requests rescission or reduction of the Group I Written Notice and reinstatement to her position, with back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Standards of Conduct, Policy 1.60, defines Group I offenses to include acts of minor misconduct that require formal disciplinary action. Agency Exh. 7. Examples stated in the policy are tardiness; poor attendance; abuse of state time; use of obscene language; disruptive behavior. Agency Exh. 7. According to the policy, violations of Policies 1.05, *Alcohol and*

Other Drugs, 2.30, *Workplace Harassment*, or 2.05, *Equal Employment Opportunity*, may, depending on the nature of the offense, constitute a Group I, II, or III offense.

DHRM Policy 2.30, *Workplace Harassment*, states that prohibited workplace harassment is:

> 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, 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.

Agency Exh. 4.

The Offenses

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a registered nurse since 2003. The Grievant is a supervisor of up to four workers during her shifts. The Employee Work Profile ("EWP") includes the following job requirements for team work:

- Supports [the Agency's] mission by developing and maintaining positive working relationships with all employees throughout the hospital.
- Values the work of others through mutual respect and support.
- Actively works to resolve interpersonal conflicts in a direct, positive and proactive manner either individually or with a supervisor's assistance.

Agency Exh. 3.

On July 29, 2010, the Grievant, a white woman, left two recorded voice mail messages on a black co-worker's personal phone in which the Grievant vented about other co-workers that caused her distress the day before. The Grievant repeatedly referred to the other co-workers using racially insensitive slurs, including the "N-word." The co-worker was upset at hearing the messages and shared the messages with other-co-workers the morning of July 29, 2010, some of whom were referred to with the slurs. Ultimately, at a supervisor's instance, the Agency's human resources department was notified and an investigation ensued.

The Grievant, a white woman, considered the black co-worker a friend and the Grievant testified that she was only "venting" to a friend and never expected her friend to be offended or

to share her venting with other co-workers. The Grievant stressed that she was referring to behavior, not people personally.

The Grievant's two prior active Written Notices are a Group I for unsatisfactory attendance and a later Group III for verbally abusing a patient. The Group III Written Notice was mitigated down from termination. Agency Exh. 5.

The Agency's regional human resources director testified to her investigation and the co-workers' reports of being offended by the Grievant's recorded remarks. The Grievant admits the facts of the Group I Written Notice—the voice mail messages left for her friend expressing the racial slur. However, the Grievant never expected or intended for the messages to be shared with anyone. The Grievant expected the messages to be nothing more than her venting to a friend who happened to be a black co-worker. Nevertheless, the co-worker was offended by the N-word and shared the recorded messages.

The Agency's director of nursing and assistant director of nursing also testified to the staff's offensive reaction to the recording. On behalf of the Grievant, two co-workers testified, one black and one white, who testified that they had never heard any racist attitude from the Grievant. The Agency witnesses expressed that their consideration of mitigation left no room short of the Group I and termination based on the accumulation of Written Notices.

As the workplace harassment policy is stated, "workplace" is not specifically defined but the policy is not written to limit its reach to the physical work site or fixed work hours. Rather, the purpose of the policy is prohibit offensive conduct directed to employees. Limiting the policy's reach from this situation would frustrate the purpose of the policy and allow offending employees to engage in harassing conduct just outside the walls or fence of a location or to communicate harassing statements after clocking out. I cannot find that the policy would not apply because the Grievant's message and language was communicated while away from the worksite. The Grievant knowlingly made the statements on a recording device and had no control over how the recordings would be used or published. While not intended by the Grievant, her co-worker retrieved the messages while at the worksite. The co-worker reported offense as did several other workers upon hearing the Grievant's racially tinged rant.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions

occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The offense of vocalizing racial slurs constitutes a violation of the Workplace Harassment policy. The Agency, thus, has met its burden of proving the Group I Written notice.

The Grievant argues, reasonably, that the Agency could have exercised discipline along the continuum short of termination. The Agency had the discretion to elect less severe discipline. 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…." Va. Code § 2.2-3005. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution."

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 disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. Grievant contends her voice message was intended for an audience of one—someone she considered a friend and whom she did not intend to offend. The Grievant did not expect her rant to go any further than her co-worker friend. This is a mitigating circumstance. The co-worker who published the recording to the greater workforce population is not without responsibility for spreading it. The co-worker had no recognized business interest in publishing the recorded message for others to hear. While this is perhaps a mitigating factor, the Grievant committed a thoughtless act with obviously offensive content directed to a co-worker about other co-workers.

The Agency could have, but did not discharge the Grievant after the earlier Group III Written Notice issued on June 24, 2010. At that point, the Grievant was subject to suspension of up to 30 days or discharge, yet the Agency did not impose the normal sanction for the accumulation of Group Notices justifying termination. While there are mitigating circumstances, considering the disciplinary record of active Written Notices, the discharge is within the bounds of reasonableness. The hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances, and the hearing officer is permitted to mitigate a disciplinary action if it exceeds the limits of reasonableness. Although the Grievant did not anticipate her recorded rant to have the far reaching effect it did, this mitigating circumstance does not mandate a finding that the Agency's termination exceeds the bounds of reasonableness.

In light of the standard set forth above in the *Rules*, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. Accordingly, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action. Here, when viewing the prior Group I and Group III Written Notices, discharge falls within the bounds of reasonableness and no further mitigation is warranted.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the Group I Written Notice of disciplinary action with job termination (based on the accumulation of active Written Notices) is **upheld**.

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 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** 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 the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 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 Street, 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.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **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; the day following the issuance of the decision is the first of the 15 days). 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 agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer