Issue: Group III Written Notice with Suspension (workplace harassment); Hearing Date: 09/19/11; Decision Issued: 09/21/11; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9651; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 10/04/11; EDR Ruling No. 2012-3126 issued 12/19/11; Outcome: Remanded to AHO; Remand Decision issued 03/19/12; Outcome: Original decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9651

Hearing Date: September 19, 2011
Decision Issued: September 21, 2011

PROCEDURAL HISTORY

Grievant is a corrections officer for the Department of Corrections ("the Agency"), with 9 years of service. On January 10, 2011, the Grievant was charged with a Group III Written Notice for violation of Agency Policy 2.30, Workplace Harassment. The associated discipline was suspension for 24 hours. The Grievant had no other active Written 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 July 18, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. From efforts to conduct a pre-hearing conference, the hearing ultimately was scheduled for the first date available between the parties and the hearing officer, August 31, 2011. However, the Grievant retained an advocate who could not attend the hearing on August 31, 2011, and it was rescheduled, by agreement, to September 19, 2011, on which date the grievance hearing was held, at the Agency's facility. For these reasons, the prescribed time for completing the grievance was extended for good cause.

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

APPEARANCES

Grievant
Advocate for Grievant
Representative and Witnesses for Agency
Advocate for Agency

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 III Written Notice.

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, Operating Procedure 135.1, defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 6. An example of a Group III offense is violation of DHRM Policy 2.30, Workplace Harassment, but depending on the nature of the violation. Examples of Group I and Group II offenses also include violation of Policy 2.30, depending on the nature of the violation.

The Agency's Policy 2.30, Workplace Harassment, 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, 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 policy also provides that Agency managers

- stop any workplace harassment of which they are aware, whether or not a complaint has been made;
- express strong disapproval of all forms of workplace harassment;
- intervene when they observe any acts that may be considered workplace harassment;
- take immediate action to prevent retaliation towards the complaining party or any participant in an investigation; and
- take immediate action to eliminate any hostile work environment where there has been a complaint of workplace harassment.

The Offense

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 corrections officer, with 9 years of service. The Grievant has no other active disciplinary actions, with a performance review history establishing an exceeds contributor rating. Agency Exh. 4. The Written Notice charged violation of DHRM Policy 2.30, Workplace Harassment, and described events that took place on December 12, 2010. The Written Notice recounted the Grievant's dissatisfaction with a post reassignment and her derogatory comments made to her lieutenant about the warden and assistant warden, stating, "I can't stand them motherfucking crackers, they don't like me and I don't like them either."

At hearing, the lieutenant testified that he considered the Grievant's comments to be racially offensive, and he described them as part of the Grievant's venting over a post reassignment with which she was dissatisfied. Other employees in the area, while aware of the Grievant's dissatisfaction over the post assignment, did not overhear the inflammatory and racial

comments. The lieutenant testified specifically and unequivocally about the Grievant's utterance. Among the grievance materials and prior grievance steps, the Grievant did not express denial of her statements as charged.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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).

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."

As referenced above, the offense under Policy 2.30 can be classified as either Group I, II or III. The Agency, however, has the burden of proving the appropriate level of offense. The discipline was based on the unequivocal evidence from the lieutenant of the Grievant's spoken rant. The lieutenant testified that the Grievant never denied she made the comments. The Grievant, during her grievance hearing testimony, denied she actually made the racially vulgar comments about the warden and assistant warden. Because the evidence preponderates in establishing that the Grievant, heretofore, had not expressly denied the statements, I find the lieutenant's testimony more persuasive and find that the Grievant made the comments as charged.

It is reasonable for the Agency to discipline an employee who makes racially biased, vulgar and offensive statements. I find that the statements at issue here are intended to be covered and prohibited by the workplace harassment policy forbiding such verbal conduct that either denigrates or shows hostility or aversion towards a person based on race, with the purpose of creating an intimidating, hostile or offensive work environment. It matters not that neither the warden nor the assistant warden heard the comments directly. By uttering such expletives to the lieutenant, the Grievant invoked the lieutenant's responsibilities under Policy 2.30 to respond to the harassing remarks.

I find that the Agency has borne its burden of proving the misconduct under Policy 2.30. The next issue is the level of discipline. Violation of Policy 2.30 can be anywhere along the continuum of discipline, and the Agency has the burden of proving the offense rose to the level of a Group III. Group I offenses include use of obscene or abusive language, disruptive behavior, and unsatisfactory work performance. Group II offenses include violating safety rules, misuse of state property, and failure to follow supervisor's instructions.

The Agency has presented insufficient evidence to support the issuance of the highest level of misconduct, a Group III Written Notice. The evidence shows that the Grievant was guilty of a solitary act of misconduct that is not shown to be of the most severe nature of potential workplace harassment. Accordingly, the disciplinary action must be reduced. In viewing similar levels of misconduct, I find that this offense is on par in severity with the Group I offenses such as disruptive behavior or using obscene or abusive language. Given the relatively limited publication of the offensive remarks, the context of the expression coming in a moment of venting, and the apparent solitary instance of the conduct, I find that the appropriate level of discipline is a Group I Written Notice.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of the Written Notice of disciplinary action is **upheld but reduced from a Group III to a Group I Written Notice**. A Group I Written Notice does not support any suspension, thus, the suspension is reversed.

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 shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9651

Hearing Date: September 19, 2011
Decision Issued: September 21, 2011
Remand Dec. Issued: March 19, 2012

PROCEDURAL HISTORY

The Director of EDR remanded the decision for clarification of the basis of the reduction from a Group III offense to a Group I. For clarification, the hearing officer considered the applicable policy, Agency Policy 2.30, Workplace Harassment, which anticipates that violations may be considered Group I, II or III offenses.

The questions considered by the hearing officer:

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 hearing officer found the Agency satisfied its proof for questions 1 and 2. The next question addresses whether the misconduct is properly characterized as a Group I, II or III offense. The hearing officer found the violation to be a Group I offense, and reduced the discipline accordingly. Thus, the issue of mitigation was not specifically reached. For clarification, the hearing officer finds that no circumstances or facts exist to mitigate the Group I offense.

In its administrative decision, the EDR Director noted that the Agency is a paramilitary agency, and that the agency reasonably contends that respect for the chain of command is a paramount concern. The EDR Director further stated:

> uttering a racial slur can reasonably be viewed as a far more serious offense than the mere use of obscene language. While the latter, depending on the particular obscenity and context can be quite inflammatory, few, if any forms of speech have a more incendiary effect than racial slurs. Moreover, while a single utterance of a racial slur may not be sufficient to establish liability in a race

> discrimination claim, a single utterance of a racial epithet in a workplace, particularly the sort in which the grievant works, can be extremely disruptive, extraordinarily inflammatory, and has the potential to incite.

While the hearing officer agrees with the EDR Director's viewpoint, the Agency did not characterize the discipline as insubordination, defiance, or disobedience of the chain of command. The offense was violation of Policy 2.30. Further, there was no evidence that the Grievant's misconduct rose to the level of being extremely disruptive, extraordinarily inflammatory, or having the potential to incite. Had the Agency shown that the Grievant's utterance was extremely disruptive, extraordinarily inflammatory, or potentially inciting, then the Agency may have shown a Group III offense. It did not. Accordingly, I find the Agency failed to prove the offense was of the most severe level.

DECISION

For the reasons stated herein, on remand, the Agency's issuance to the Grievant of the Written Notice of disciplinary action is **upheld but reduced from a Group III to a Group I Written Notice**. A Group I Written Notice does not support any suspension, thus, the suspension is reversed.

APPEAL RIGHTS

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,
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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 shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer