

Issue: Group III Written Notice with Suspension (violation of Workplace Violence and EEO policy); Hearing Date: 10/13/11; Decision Issued: 10/24/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9697; Outcome: Partial Relief;
Administrative Review: EDR Ruling Request received 11/08/11; EDR Ruling No. 2012-3175 issued 12/11/11; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9697

Hearing Date: October 13, 2011
Decision Issued: October 24, 2011

PROCEDURAL HISTORY

On May 23, 2011, Grievant was issued a Group III Written Notice of disciplinary action with a two workday suspension for workplace violence and violating an Equal Employment Opportunity policy.

On June 17, 2011, 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 September 26, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 13, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant Counsel
Agency Party Designee
Agency Representative
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?

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 Corrections employs Grievant as a Corrections Officer at one of its Facilities. She has been employed by the Agency for approximately 22 years. Grievant had prior active disciplinary action consisting of a Group III Written Notice issued March 7, 2011. Grievant received an overall rating of Contributor on her October 24, 2010 annual performance evaluation.

Grievant is African American. Officer S is African American. Officer R is white.

On April 17, 2011, Grievant was standing by the Sergeant's office in Building B. Grievant was supervising two African American inmates who were cleaning the Sergeant's office. Officer S looked into the Sergeant's office and noticed that the inmates were doing a good job of cleaning the office. He complimented the inmates on the quality of their work. Grievant heard Officer S's compliment and stated "we ni--ers have to clean, if you want something to look nice." Officer S was offended by Grievant's comment. He believed Grievant's comments were unprofessional especially with the inmates being present.

Officer S mentioned the possibility of having the two inmates clean the Unit Manager's office. Grievant responded that the inmates were not going to clean that office because "they don't want no ni--ers working here." Grievant said, "If anything gets stolen, you know who they gonna blame? - me, the negro." Officer S was offended

by Grievant's comments. Officer R also heard Grievant's comments and was offended by them.

CONCLUSIONS OF POLICY

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."¹ 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."² Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."³

Operating Procedure 101.2 governs Equal Employment Opportunity. The purpose of this policy is:

This operating procedure provides for equal employment opportunity within the Department of Corrections in regard to all employment practices, to educate employees in the recognition and prevention of discriminatory practices and workplace harassment, and to provide an effective means of eliminating such discrimination and harassment from the work place.⁴

Workplace Harassment is defined as:

Any unwelcome formal, written or physical conduct that either denigrates or shows hostility or a version towards a person that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of on reasonably interfering with an employee's work performance; or (3) affects an employee's employment or opportunities or compensation. Workplace arrest and on the basis of age, color, disability, gender (including sexual harassment, pregnancy, and marital status), national origin, political affiliation, race, genetics, veteran status, or religion is illegal. Workplace harassment not involving protected areas is in violation of DOC operating procedures.

Grievant acted contrary to Operating Procedure 101.2. "Ni--er" is a word used to described an African American in a demeaning and insulting manner. It is a pejorative

¹ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

² Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁴ Agency Exhibit 3.

term used to describe African Americans based on their race. Grievant engaged in unwelcome verbal conduct that denigrated and showed hostility towards the two African American inmates who were involved in cleaning the Sergeant's office and also toward Grievant herself. Grievant's use of the word "ni--er" created a hostile and offensive work environment for Officer R and Officer S. Based on an objective and subjective standard, Grievant's comments constituted workplace harassment contrary to Operating Procedure 101.2.

Group III offenses include, "Violation of DHRM Policy 2.30 Workplace Harassment (considered a Group III offense, depending upon the nature of the violation)". Operating Procedure 101.2 is consistent with DHRM Policy 2.30 which "forbids harassment of any employee ... on the basis of an individual's race"

Operating Procedure 130.3 governs Workplace Violence. Workplace Violence is defined as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to beating, stabbing, suicide, shooting, rape, attempted suicide, attempted rape, psychological trauma such as threats, an intimidating presence, and harassment of any nature such as stalking, shouting, or abusive language.⁵

Based on the facts of this case, Grievant did not engage in workplace violence. Although Grievant's comments were offensive to Officer R and Officer S, her comments were not abusive to Officer R and Officer S. Grievant's comments were not directed at Officer R and Officer S in order to insult them or provoke a violent response. Although Grievant's reference to the two inmates as "ni--ers" could have provoked a violent response from them, no credible evidence was presented to show that they had an adverse reaction to Grievant's comments. The Agency has not presented sufficient evidence to show that Grievant's behavior was a material violation of the Agency's policy against workplace violence.

Grievant argued that she did not say the word "ni--er". She admitted to using the term "negro" but felt that that term was not offensive. The Agency presented testimony from Officer R and Officer S who stated that Grievant used the term "ni--er". Their testimony was credible. The Agency has presented sufficient evidence to support its assertion that Grievant said "ni--er".

Grievant argued that employees at the Facility often used racial terms in the workplace. She indicated that other employees sometimes referred to her as "brown sugar" or "milk chocolate". She stated that those terms did not offend her. Grievant did not show that employees regularly used the term "ni--er" in the workplace. Although the

⁵ Agency Exhibit 4.

phrases “brown sugar” and “milk chocolate” may be offensive, their degree of offensiveness does not match the offensiveness of the word “ni--er”.

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...”⁶ 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.

The disciplinary action against Grievant must be reduced from a Group III Written Notice to a Group II Written Notice for two reasons. First, the Agency alleged the Grievant should receive a Group III Written Notice for violating two policies including the Workplace Violence policy. The Agency did not establish that Grievant’s behavior was a material violation of the Workplace Violence policy. The Warden testified that if he had only considered Grievant to have violated the Equal Employment Policy and not have violated the Workplace Violence policy, he would have issued Grievant a Group II Written Notice with a two workday suspension. An agency may suspend an employee for up to 10 workdays upon the issuance of a Group II Written Notice. Accordingly, the Group III Written Notice must be mitigated to a Group II Written Notice with a two workday suspension.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with a two workday suspension is **reduced** to a Group II Written Notice of disciplinary action with a two workday suspension.

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:

⁶ Va. Code § 2.2-3005.

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.⁷

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.