Issues: Group III Written Notice with termination (refusing to provide assistance), Retaliation (race), Workplace Harassment; Hearing Date: 12/02/11; Decision Issued: 12/05/11; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9713; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9713

Hearing Date: December 2, 2011
Decision Issued: December 5, 2011

PROCEDURAL HISTORY

On August 9, 2011, Grievant was issued a Group III Written Notice of disciplinary action with removal for refusing to provide assistant to a police officer.

On September 6, 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 November 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 2, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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?

5. Whether the Agency discriminated against Grievant based on her race and gender?

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 Virginia Community College System employed Grievant as a Police Dispatcher at one of its Facilities. She began working for the Agency in July 2007. The purpose of her position was:

> This position is responsible for performing a variety of communications and operational tasks in support of public safety, law enforcement, and security operations, linking those in need of assistance to those who render assistance.[1]

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

[1] Agency Exhibit 1.

Police dispatchers provide a "lifeline" to police officers working for the Agency. Agency police officers are trained to keep police dispatchers informed of their status and location at all times. Because police officers may encounter dangerous situations, their ability to communicate with police dispatchers may determine whether they or members of the public receive timely emergency assistance. Police dispatchers, including Grievant, receive at least 80 hours of training as well as departmental training regarding the need for a dispatcher to maintain communications with police officers at all times.

On July 14, 2011, Grievant and Dispatcher T were working in the College Communications Center. They were responsible for receiving and addressing communication from police officers working in various locations on the Agency's campus. Each employee sat in a workstation located four or five feet apart. Officer J was working in a nearby room connected by a hallway.

On July 14, 2011, Sergeant H was using radar to identify speeding vehicles. A vehicle passed Sergeant H at an excessive rate of speed. Sergeant H began a pursuit but the driver failed to stop. At approximately 9:31 a.m., Sergeant H contacted the College Communication Center using his radio. He displayed a heightened state of concern by yelling into his radio words to the effect of "failing to yield". Grievant and Dispatcher T heard the radio call. Dispatcher T intended to respond to Sergeant H but she did not know to which type of emergency Sergeant H was referring. Dispatcher T yelled down the hallway to Officer J and asked what the term "failing to yield" meant. Officer J replied that "failure to yield" meant that the vehicle was not "pulling over". Officer J heard the radio call and began walking towards the Grievant and Dispatcher T. Officer J directed that the local Sheriff's Office be contacted to provide assistance for Sergeant H. Dispatcher T began calling the Local Sheriff's Office using her telephone. Dispatcher T handed the radio to Grievant and asked Grievant to find out Sergeant H's location. Grievant took the radio from Dispatcher T's hand and placed it back on Dispatcher T's desk and stated "I'm not dealing with him" thereby refusing to respond to Sergeant H's radio call. Officer J assumed Grievant's responsibilities and maintained communication with Sergeant H while Dispatcher T spoke with the local Sheriff's Office by telephone. Sergeant H advised that the driver was not stopping the vehicle at the shopping center and requested a backup unit from the local Sheriff's Office. Sergeant H was unaware that Officer J had already started the process of obtaining a backup unit from the local Sheriff's Office. Another Agency's Police Officer heard Sergeant H's request and drove to Sergeant H's location.[2] Sergeant H radioed the College Communications Center and stated that a backup from the Local Sheriff's Office was no longer necessary.

Shortly after the incident, Officer J told Grievant that when police officers are in situations like these, the police officer's voice changes because "when you are in a situation like that your blood gets pumping and your voice sounds more amped." Grievant said that she had had issues with Sergeant H before and he should not have

[2] At some point, the driver stopped his vehicle in response to Sergeant H's pursuit.

been yelling at her. Officer J said that "the guy was running from him and you can't just not answer the radio." Officer J reminded Grievant that she is an officer's "lifeline" when officers are in the field. Grievant responded to Officer J by saying "Well, he shouldn't talk to me like that" referring to Sergeant H. [3]

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."[4] Group II offenses "include acts of misconduct of a more serious 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."

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

In the Agency's judgment, Grievant's refusal to communicate with Sergeant H during an emergency circumstance justified the issuance of a Group III Written Notice with removal. The Agency has presented sufficient evidence to support its judgment. At the moment the driver failed to yield to Sergeant H, the risk of injury to Sergeant H and the public increased dramatically. Officer J concluded it was necessary to call the local Sheriff's Office to provide backup to Sergeant H because of the danger created by the driver. By refusing to communicate with Sergeant H because he was yelling, Grievant effectively cut her "lifeline" with Sergeant H thereby forcing Officer J to assume those duties. Had Officer J not been present on July 14, 2011 and Grievant had refused to communicate with Sergeant H, she could have placed his life in danger by delaying or denying assistance to him during a police emergency. The Agency presented evidence showing that when police officers are faced with dangerous situations, they often speak in an elevated and excited tone. The Agency presented evidence showing that police dispatchers are trained to remain calm during emergencies and to maintain communication with police officers who are facing danger situations. On July 14, 2011, Grievant demonstrated behavior showing that she was willing to place the safety of a Sergeant H at risk simply because she did not like that Sergeant H was yelling on the radio. The fact that Sergeant H was yelling over the radio would not form a basis for Grievant's refusal to communicate with him. The

[3] Agency Exhibit 4.

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

Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

Grievant denied that she was offered the radio by Dispatcher T and refused to communicate with Sergeant H. The Agency has presented sufficient evidence to support its allegation that Grievant was offered the radio by Dispatcher T and then refused to communicate with Sergeant H. The Agency presented the testimony of Dispatcher T and Officer J who observed Grievant's behavior. Their testimony was credible. Grievant offered no credible evidence to establish that either Dispatcher T or Officer J had a motive to lie about her.

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…."[5] 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 because the Agency inconsistently disciplined employees. She presented evidence that in January 2011, Sergeant H responded to an emergency but failed to notify the dispatcher of his location and status. She argued that Sergeant H failed to maintain a lifeline with the dispatcher yet he was not given a Group III Written Notice with removal. Grievant's argument fails. Insufficient evidence was presented for the Hearing Officer to conclude that the Agency singled out Grievant for disciplinary action. It is unclear why Sergeant H failed to communicate with the dispatcher in January 2011. It may have been the case that he was focused on the conflict before him and overlooked contacting the dispatcher. No evidence was presented that Sergeant H was given the opportunity to contact the dispatcher and then refused to make contact with the dispatcher. Sergeant H's behavior in January 2011 may have been an oversight on his part whereas Grievant's action in July 2011 was an intentional decision to refuse communication with Sergeant H. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

[5] Va. Code § 2.2-3005.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[6] (2) suffered a materially adverse action[7]; 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.[8]

Grievant engaged in protective activity because she complained about perceived discrimination against her. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between the protective activity and a materially adverse action. The Lieutenant was the person primarily responsible for deciding to take action against Grievant and the level of disciplinary action she would receive. When the Lieutenant took disciplinary action against Grievant in August 2011, he was unaware that Grievant had complained about him to other agency employees. He did not know that an investigation would be brought against him or that disciplinary action would be taken against him based on Grievant's complaints. No credible evidence was presented to show that the Lieutenant took disciplinary action against Grievant as a form of or pretext for retaliation.

The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual's race, sex, color, national origin, religion, age, veteran status, political affiliation or disability. The Commonwealth will not tolerate any form of retaliation directed against an employee or third party who either complains about harassment or who participates in any investigation concerning harassment. Workplace harassment is defined by DHRM Policy 2.30 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

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[6] 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.

[7] 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.

[8] 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).

> 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 argued that the Agency discriminated against her based on her race. No credible evidence was presented to show the Agency took any action against Grievant based in part on her race.

Grievant argued that the Agency created a hostile work environment because several employees made sexually offensive comments. She presented evidence that on or about January 13, 2011, she overheard Sergeant O say "f—king c—t" in response to a female caller who had abruptly ended a telephone call. A day later, Grievant reported the incident to the Lieutenant who reported the incident to the Major. Less than a week following the incident, the Major conduct a staff meeting which included Sergeant O and discussed inappropriate language, sexual innuendo, and unprofessional conduct. The Major instructed Lieutenant C to counsel Sergeant O.

On September 13, 2011, Grievant alleged that the Lieutenant had engaged in sexual harassment and retaliation. On September 14, 2011, the Major assigned Lieutenant C to investigate the allegations and contacted Doctor M to schedule training for staff on the Agency's sexual harassment policy. On September 19, 2011, the Investigator informed the Lieutenant of the investigation. On September 21, 2011, the Major directed all supervisors to participate in online sexual-harassment training. On September 27, 2011, Doctor M gave training to staff regarding the Agency's policy on sexual-harassment in the workplace. On September 28, 2011, all supervisors received training regarding Labor Relations Law and Civil Lawsuits including sexual harassment. On October 20, 2011, all police command staff attended a Risk Management Training that included sexual harassment training. On November 20, 2011, the Investigator finished his investigation.[9] The Investigator concluded that the allegation of retaliation in the workplace was not sustained. He concluded that the allegation of hostile work environment (inappropriate sexual statements in the workplace) was sustained. The Investigator concluded that Grievant had been exposed to inappropriate sexual statements. For example, he concluded that Sergeant O inappropriately referred to a female caller as a "f—king c—t". He concluded that the Lieutenant and Dispatcher T had inappropriate conversations of a sexual nature. The Investigator concluded that there was a violation of the Agency's workplace harassment policies.

Grievant alleged that the Agency retaliated against her because she complained about a hostile work environment. Grievant's argument fails. When Grievant complained about Sergeant O's comments, the Agency investigated his statements, counseled him, and provided him and other employees with training regarding the Agency's prohibition against creating a hostile work environment for employees. No credible evidence was presented that the Agency treated Grievant differently because

[9] Grievant failed to respond to the Investigator's repeated requests for information.

of her complaint about Sergeant O. In September 2011 after Grievant had been removed from employment, the Agency learned of Grievant's allegations about inappropriate comments made by the Lieutenant and Dispatcher T. The Agency was not in a position to retaliate against Grievant in September 2011 and thereafter because she had been removed from employment in August 2011.

Grievant has established that she was exposed to a hostile work environment based on the Agency's findings that several employees made inappropriate comments of a sexual nature. The question becomes what action the Hearing Officer should take in response to this finding. The Hearing Officer concludes that no action is necessary under the facts of this case. Each time Grievant made her allegations known to the Agency, the Agency investigated the allegations, counseled employees against engaging inappropriate behavior, and required employees to take training regarding sexual harassment. In addition, the Agency initiated action on November 23, 2011 to issue the Lieutenant disciplinary action for failure to comply with the Major's instruction to refrain from making inappropriate comments of a sexual nature and creating a hostile work environment for Grievant. It is clear to the Hearing Officer that the Agency understands the seriousness of preventing sexual-harassment in the workplace. It is clear to the Hearing Officer that the Agency did not retaliate against Grievant for complaining about sexual harassment in the workplace. Ordering the Agency to refrain is unnecessary at this time.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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]

[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

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