

Issue: Group II Written Notice with Demotion (disclosing disciplinary info with staff); Hearing Date: 01/30/12; Decision Issued: 02/07/12; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9745; Outcome: Full Relief; **Administrative Review**: DHRM Ruling Request received 02/21/12; DHRM letter issued 03/08/12; Outcome: Declined to review; **Administrative Review**: EDR Ruling Request received 02/21/12; EDR Ruling No. 2012-3290 issued on 05/11/12; Outcome: Remanded to AHO; Remand Decision issued 06/06/12; **Administrative Review**: EDR Ruling Request on 06/06/12 Remand Decision received 06/19/12; EDR Ruling No. 2012-3375 issued 06/22/12; Outcome: Remanded to AHO; Second Remand Decision issued 07/06/12; Outcome: Original decision affirmed; **Administrative Review**: EDR Ruling Request on 07/06/12 Remand Decision received 07/26/12; EDR Ruling No. 2013-3396 issued 08/01/12; Outcome: Untimely – request denied.

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In re: Case Number 9745**

**Hearing Date: January 30, 2012**

**Decision Issued: February 7, 2012**

**APPEARANCES**

Grievant  
Agency Representative  
2 Witnesses for Agency  
6 Witness for Grievant

**ISSUE**

“Was the Group II Written Notice with demotion for sharing disciplinary information with staff proper?”

**FINDINGS OF FACTS**

1. Grievant was given a Group II Written Notice for sharing disciplinary information that should “in no way” have been discussed with staff under her supervision and/or others. She also alleged that a particular security supervisor was behind the discipline, thus not supporting the administrative decision but passing blame to one particular employee.

2. Grievant was not permitted to know who made the charges against her.

3. Three employees, including a security supervisor, refused to testify at the hearing, thereby preventing the right of confrontation. Written statements from the three were presented at the hearing.

4. Two security officers said they refused to testify “because they wanted to keep their jobs”. This appears to be because of intimidation by a state supervisor.

5. Grievant did not initiate the conversations in question. She was asked why she was upset. She replied that she had learned that two correction officers had been suspended without pay for two weeks for abuse of an inmate. She replied that she

and another nurse had thoroughly examined and found no signs of physical abuse to the inmate in question.

6. Grievant 's remarks were compassionate because one of the suspended parties had a wife and children who would suffer from the suspension with lack of pay which Grievant believed was unwarranted because she and another nurse examined the inmate in question and found no signs of physical abuse.

7. The security supervisor to whom Grievant had attributed the suspensions appeared at the hearing and belligerently refused to testify in this proceeding.

8. Grievant did not initiate the conversations complained of.

9. Grievant had one other Group II Written Notice within a year from the subject one.

10. From the written statement of the security supervisor without saying what was false in Grievant's accounts, he took umbrage to her comments.

11. Grievant heard a "source" saying the two officers had been given "time on the street". She replied compassionately. When question about this in the nurse's station, she did not initiate discussion of the matter.

12. From his statement, the security supervisor was intolerant of Grievant's opinion as a nurse who examined the inmate, thus not recognizing her right of freedom of speech after the topic came to her attention.

13. In contrast to the Warden's testimony on the same subject, the security supervisor's written statement, his refusal to testify and his demeanor toward the Grievant and this Hearing Officer, reflect hostility toward the Grievant and a hostile work environment for anyone who expresses an opinion contrary to the security supervisor.

14. The Grievant presented credible evidence.

15. Grievant had a property interest in her job and was denied due process.

#### **APPLICABLE LAW OR POLICY AND OPINION**

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)], and Department of Corrections Procedure 101.5, dated October 1, 2010, as amended.

Grievant's due process rights were denied by being denied information as to who complained of her activities. She further did not get to confront and to cross examine her regular supervisor. [Frank I Detweiler v. Commonwealth of Virginia Department of Rehabilitative Services, 705 F2d 557, 4<sup>th</sup> Cir 1983]

### DECISION

From the testimony and exhibits presented the Group II with demotion appears to be to severe. Upholding the actions of the agency after my observation at the hearing would further create a hostile work environment. The Grievant did not initiate the conversations complained of. She replied to questions about the discipline of two correction officers in a compassionate manner. The matter was already being discussed in the break room by staff.

Because of the due process violation, I find the Grievant to be credible in her assertions and hold the Group II with demotion to be excessive. My observation of hostility by the security supervisor both in his written statement and appearance show violation of Grievant's constitutional rights refusing to answer questions. From the evidence and appearance of staff at the hearing the Group II with demotion is not warranted or valid, and it is ORDERED removed from Grievant's file and Grievant shall be reinstated in her old job level with all benefits and salary commiserate with that position, and reimbursed for any salary or benefits lost.

### 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. 14<sup>th</sup> Street, 12<sup>th</sup> 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 DEDR. 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 DEDR Director, Main Street Centre, 600 East Main, Suite 301, Richmond, Virginia, 23219 or faxes 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 DEDR 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.

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**Thomas J. McCarthy, Jr.**  
Hearing Officer

March 8, 2012

[Parties to the Grievance]

RE: Grievance of [Grievant] v. Department of Corrections  
Case No. 9745

Dear [Parties]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to the agency's request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource management policy, either state or agency, the hearing decision is inconsistent. While the agency requested an administrative review, it did not identify any human resource management policy with which the decision is inconsistent or misapplied. Rather, it appears that the agency is disagreeing with how the hearing was conducted, what evidence was considered, how the hearing officer assessed the evidence and with the resulting decision. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**  
**RECONSIDERATION OF DECISION OF HEARING OFFICER**

**In re: Case Number 9745**

**Hearing Date: January 30, 2012**  
**Decision Issued: February 17, 2012**  
**Reconsideration Date: June 6, 2012**

The Department of Employment Dispute Resolution, requested this Hearing Officer to reconsider and amend the decision in the above matter. The demeanor of the Security Supervisor when he appeared, he glared at the Grievant and at this Hearings Officer. His appearance and belligerent demeanor were considered significant. I believe his actions would create a hostile work environment after the hearing and it did so at the hearing.

From the credible evidence presented, and the demeanor of the witnesses, the decision was proper. I respectfully decline to change my decision.

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Thomas J. McCarthy, Jr., Esquire  
Hearing Officer

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**  
**RECONSIDERATION OF DECISION OF HEARING OFFICER**

**In re: Case Number 9745**

**Hearing Date: January 30, 2012**  
**Decision Issued: February 17, 2012**  
**Reconsideration Date: June 6, 2012**  
**Second Reconsideration Date: July 6, 2012**

The Department of Employment Dispute Resolution, requested this Hearing Officer to reconsider and amend the decision in the above matter.

Reconsidering the evidence from the hearings, as a Hearing Officer, I considered and gave weight to the Agency's reluctance to provide information on circumstances surrounding the Grievant's discipline. This matter could have been cleared up at the beginning as the Agency's advocate so capably did in her rebuttal.

The Agency's Security Supervisor's demeanor exhibited toward the Grievant and this Hearing Officer gave the impression of not wanting facts to be presented. A simple answer of "I was not part of that" and, "the answer to that question is confidential" would have been sufficient.

Grievant listened to a conversation already in progress and expressed her opinion of facts pertaining to disciplinary matters. While this technically violated the standards of conduct, the Grievant was attempting to express compassion for a coworker. The "hostile work environment" comment from this hearings officer related to the intimidating work environment to which it appeared Grievant was subjected and was not intended to imply a view as to gender based harassment or discrimination.

In this case we have exhibited hostility from an Agency Security Supervisor toward the Grievant and during the hearing toward the Hearing Officer. No hostility influenced my opinion. The fact that the Agency appeared to be intentionally withholding testimony, presuming the facts to be withheld would be helpful to Grievant's case, and denying her the right of confrontation, I ruled against the Agency.

I respectfully decline to change my ruling.

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Thomas J. McCarthy, Jr., Esquire  
Hearing Officer