Issues: Group III Written Notice (conduct that undermines the Agency's effectiveness) and Transfer; Hearing Date: 08/30/12; Decision Issued: 10/11/12; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 9827; Outcome: No Relief – Agency Upheld; **Administrative Review: DHRM Ruling Request received 10/22/12; DHRM Ruling issued 11/02/12; Outcome: AHO's decision affirmed.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9827

Hearing Date: August 30, 2012
Decision Issued: October 11, 2012

PROCEDURAL HISTORY

On March 1, 2012, Grievant was issued a Group III Written Notice of disciplinary action with disciplinary transfer for engaging in conduct that undermined the effectiveness of the Department's activities. The Agency did not impose a disciplinary pay reduction.

On March 28, 2012, 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 he requested a hearing. On May 16, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On August 30, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's 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 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 Department of State Police employs Grievant as a Sergeant in one of its Area Offices. He began working for the Agency in 1998. Grievant received overall ratings of "Major Contributor" for prior annual performance evaluations. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was promoted from the position of Trooper to Sergeant on December 29, 2009. Grievant attended first line supervisor's school and received work place harassment training from the Agency. After being promoted, Grievant did not distance himself from the troopers he had worked with. He continued to have the same conversations, using the same language he used when he was a trooper.

The Agency took disciplinary action against Grievant for the time period from January 1, 2011 until September 27, 2011.

Grievant used profanity on a daily basis. One witness testified that Grievant's favorite word seemed to be "f—k". His behavior was consistent with the level of profanity used by many other employees. Supervisors in the Area Office were aware of his cursing and took no action to correct his behavior prior to this disciplinary action.

Grievant referred to Ms. D as "Choco DelTaco". It was a nickname someone else wrote on a picture Ms. D displayed on her desk. Grievant assumed that Ms. D did not object to the nickname since she displayed the picture on her desk for everyone in the office to see. The comment did not relate to her ethnicity. Ms. D also called Grievant nicknames.

Grievant referred to the Sergeant as "Split Screen."[1] Grievant called the Sergeant this name because when the Sergeant looked at Grievant, Grievant noticed that one of the Sergeant's eyes looked to the side rather than directly at Grievant. The Office Service Assistant asked Grievant why he called the Sergeant by that name. After Grievant explained, the Officer Service Assistant asked Grievant to stop because she found the name offensive because she felt it was inappropriate to make fun of the Sergeant's physical appearance. Grievant continued calling the Sergeant "Split Screen" in front of other employees but did not do so in front of the Office Service Assistant. Grievant communicated with troopers using the Agency's Mobile Data Terminal and referred to the Sergeant as "Split Screen."

Trooper M began dating a woman who worked in a business selling bagels. He later married the woman in April 2011 and Grievant attended the wedding. On two or three occasions while speaking to Trooper M, Grievant referred to Trooper M's girlfriend and wife as the "Bagel Bitch". Grievant upset and angered Trooper M. Trooper M felt Grievant's comment about his girlfriend and wife were inappropriate. Trooper M did not ask Grievant to stop making the comments because Grievant was his superior and he feared Grievant would punish him. After Grievant made his offensive comments, Trooper M would try to avoid contact with Grievant for the rest of the day. Grievant referred to Trooper M's girlfriend and wife as "Bagel Bitch" in front of other employees at the Area Office.

Trooper S was involved in two shooting incidents. For one of those incidents, Trooper S's actions were criticized by the Agency. Most of the Troopers in the Area Office began making fun of Trooper S by calling him "Shooter Mc-----". Grievant also called Trooper S "Shooter Mc-----". He began calling Trooper S by that name before he became a Sergeant and after he became a Sergeant.

Trooper E arrested a local police officer who was operating a motor vehicle while having a blood alcohol content of .25, well past the .08 limit. Grievant believed that Troopers should not arrest local law enforcement officers. Grievant told Trooper E that Grievant had a problem with Troopers arresting local police officers and had "heart burn" over the arrest. Grievant gave Trooper E the "silent treatment." After the arrest,

[1] The Sergeant was a peer in Grievant's Area Office and was not Grievant's subordinate.

Trooper E was treated differently by law enforcement officers in the locality. He felt it necessary to request a transfer to another area in part because he felt he was not receiving any support from Grievant. Grievant's supervisor shared Grievant's view.

In September 2011, First Sergeant P met with Grievant.[2] Following their conversation, Grievant understood First Sergeant P to have concerns about Grievant's use of offensive language and nick names. Grievant considered the matter closed and he stopped his behavior.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order 19(12)(a). Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." General Order 19(13)(a). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." General Order 19(14)(a).

Group III offenses include:

> Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees.[3]

Under the Agency's Code of Ethics, Grievant was obligated to, "Treat all persons in an evenhanded, respectful, and courteous manner."

Although some of the allegations against Grievant were not substantiated during the hearing, when Grievant's behavior is considered as a whole, Grievant undermined the effectiveness or efficiency of the Department's activities because he undermined his relationship with his co-workers in the Area Office.

Grievant's regular use of profanity does not form a basis for disciplinary action. Use of profanity was a regular occurrence in the Area Office. Grievant's behavior was known and tolerated by Grievant's supervisors.

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[2] Grievant's supervisor was First Sergeant T who was later replaced by First Sergeant P when First Sergeant T began working in another position with the Agency.

[3] See, General Order ADM 12,.02.

Grievant's reference to Ms. D as "Choco Deltaco" does not support a basis for disciplinary action. Ms. D encouraged use of the phrase by displaying it on her desk. The phrase did not related to her ethnicity or national origin as alleged by the Agency. Ms. D called Grievant nicknames as well.

Grievant referred to another supervisor, the Sergeant, as "Split Screen." Grievant's comment was inappropriate because he was attempting to make fun of one of the Sergeant's physical characteristics. Although the Sergeant ignored Grievant's comments, the Sergeant's co-workers heard Grievant's comments thereby helping to undermine the Sergeant's standing with his co-workers. When one supervisor is disrespectful and demeaning to another supervisor in front of subordinate staff, it creates the risk that subordinate staff may change their view of the supervisor.

Grievant's comments to Trooper M about his girlfriend and wife as being the "Bagel Bitch" were inappropriate because they are similar to "fighting words."[4] Grievant's statements to Trooper M about Trooper M's wife greatly increased the risk of violence in the workplace. No credible evidence was presented showing that it was common practice for employees to insult the girlfriends and spouses of other employees in the Area Office. No credible evidence was presented to show that Trooper M believed that Grievant's comments were acceptable or that Trooper M took any action that Grievant could have interpreted as inviting his comments. Grievant used his position as a supervisor to abuse Trooper M knowing that Trooper M could not respond to him because Trooper M held a lower rank.

Grievant's reference to Trooper S as "Shooter Mc-----" does not provide a basis for disciplinary action. Employees in the Area Office routinely referred to Trooper S as "Shooter Mc-----." Supervisors in the Area Office were aware of the comments and took little action to stop them.

Grievant incorrectly instructed his staff to refrain from arresting local police officers. Grievant should have instructed his staff to treat local police officers in the same manner as they would treat any other person arrested. For example, if a Trooper would warn but not arrest a citizen under certain circumstances, then the Trooper could also warn but not arrest the local police officer. A Trooper should arrest a local law enforcement officer in those circumstances where the Trooper would arrest a citizen. Although Grievant's actions were inappropriate, they do not form a basis to take disciplinary action in this case. Grievant's Supervisor, First Sergeant T, shared the same incorrect view as did Grievant and communicated that view as an expectation for Grievant to follow. When First Sergeant T learned of Trooper E's arrest of a local police officer, he told Grievant that that was a "f—ked up thing to do."

The Agency alleged but did not establish that Grievant referred to troopers working the midnight-shift by offensive names for making DUI arrests.

[4] "Fighting words" are personally abusive epithets that are inherently likely to induce the ordinary person to react violently.

The Agency established that Grievant inappropriately used the Mobile Data Terminal. Grievant used the Mobile Data Terminal to engage in several non-business related conversations including one in which he used the works "Split Screen."

The Agency is a para-military organization with employees sworn to uphold the laws of Virginia, holding rank, and expected to uphold the orders of employees holding higher rank. The role of a supervisor in the Virginia Department of State Police engenders a higher scrutiny and expectation for performance than in many other State agencies.

Grievant argued that his comments were often intended as "office humor" and intended to make people laugh and smile in order to relieve stress. Although it is likely that some of his comments accomplished that goal, it is also likely that many of his comments created unnecessary stress and served to insult his co-workers. Grievant's comments about the Sergeant and Trooper M exceeded what would be an appropriate level of "office humor".

Grievant argued that he had already been disciplined before he received the Group III Written Notice because he was counseled by First Sergeant P. There is no State or Agency policy that insulates an employee from disciplinary action simply because the employee has been counseled for inappropriate behavior.

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 argued that the Agency inconsistently applied disciplinary action. When an employee claims an agency has inconsistently disciplined its employees, the question become whether the Agency has singled out the employee for disciplinary action. Examples of discipline given to other employees become less significant the greater the time since the other disciplinary actions were taken. This is because Agency policies, practices, and philosophies sometimes change over time. The most

[5] Va. Code § 2.2-3005.

recent case cited by Grievant occurred in 2008, approximately four years prior to Grievant's disciplinary action.

In case 11 in 1998, the "First Sergeant on at least 9 occasions in verbal or written form, referred to troopers in his area as thick headed, stupid, liars, bone heads, and used other inappropriate language." The First Sergeant received a Group II Written Notice. Grievant's behavior differed from the First Sergeant's in that Grievant's comments were about a supervisor's physical condition and served to insult a trooper's wife. In case 39 in 2007, a "Sergeant used obscene language in the work place by referring to sex offenders as dick beaters and routinely using the F word and other obscene and offensive four letter words while talking to subordinates. Sergeant admitted to allegation." The Sergeant received "counseling for a Group I offense." The Hearing Officer finds that Grievant's use of obscene language in the workplace does not rise to the level of disciplinary action because of the widespread acceptance of such language in the Area Office. This finding is consistent with how the Agency treated the Sergeant in case 39. In case 31 in 2008, a "Trooper made derogatory comments about another trooper. Trooper received a Group III Written Notice (mitigating … prior written notices within the current year)." This case is consistent with the level of discipline given to Grievant who also received a Group III Written Notice. In case 04 A & C in 2008, "Trooper brought in an inappropriate e-mail to the area office which contained a racial slur and abusive language." The trooper was counseled. This case differs from Grievant's case in that the employee was not a supervisor and the employee's comments were not directed at co-worker's family member. In addition, "Sergeant told a story to a trooper of conducting a traffic stop on an individual wearing a turban on his head. He advised that trooper he told the individual, 'I know you're not from around here, because we wear sheets over our heads and hang people like you.'" The Sergeant was counseled. Although the lack of discipline in this case raises questions, it is not sufficient to mitigate Grievant's discipline because of the age of the case and Grievant's behavior was directed at his co-workers not a private citizen.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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

[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.

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 argued that the Agency took action against him was a continuation of the retaliatory action taken by Trooper P. Grievant counseled Trooper P for failing to report to work as directed by Grievant. Trooper P complained to First Sergeant P who initiated an investigation against Grievant. The investigation was unfounded. Although First Sergeant P initiated the investigation, no credible evidence was presented to establish that First Sergeant P was involved in controlling the decision to take disciplinary action and what level of discipline was appropriate. The Agency did not retaliate against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with disciplinary transfer 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

[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).

or, send by fax to (804) 371-7401, or e-mail.

3. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

    Office of Employment Dispute Resolution
    Department of Human Resource Management
    101 North 14th St., 12th Floor
    Richmond, VA 23219

    or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.[9]

[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

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT
In the Matter of
The Department of Virginia State Police

November 2, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9827. For the reasons stated below, the Department of Human Resource Management (DHRM) will not interfere with the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer's summary of this case as follows:

> On March 1, 2012, Grievant was issued a Group III Written Notice of disciplinary action with disciplinary transfer for engaging in conduct that undermined the effectiveness of the Department's activities. The Agency did not impose a disciplinary pay reduction.
>
> On March 28, 2012, 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 he requested a hearing. On May 16, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On August 30, 2012, a hearing was held at the Agency's office.

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The relevant **ISSUES** in this case are as follows:

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 retaliated against Grievant?

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The **FINDINGS OF FACT**, as per the hearing officer, are as follows:

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

The Virginia Department of State Police employs Grievant as a Sergeant in one of its Area Offices. He began working for the Agency in 1998. Grievant received overall ratings of "Major Contributor" for prior annual performance evaluations. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was promoted from the position of Trooper to Sergeant on December 29, 2009. Grievant attended first line supervisor's school and received work place harassment training from the Agency. After being promoted, Grievant did not distance himself from the troopers he had worked with. He continued to have the same conversations, using the same language he used when he was a trooper.

The Agency took disciplinary action against Grievant for the time period from January 1, 2011 until September 27, 2011.

Grievant used profanity on a daily basis. One witness testified that Grievant's favorite word seemed to be "f—k". His behavior was consistent with the level of profanity used by many other employees. Supervisors in the Area Office were aware of his cursing and took no action to correct his behavior prior to this disciplinary action.

Grievant referred to Ms. D as "Choco DelTaco". It was a nickname someone else wrote on a picture Ms. D displayed on her desk. Grievant assumed that Ms. D did not object to the nickname since she displayed the picture on her desk for everyone in the office to see. The comment did not relate to her ethnicity. Ms. D also called Grievant nicknames.

Grievant referred to the Sergeant as "Split Screen." Grievant called the Sergeant this name because when the Sergeant looked at Grievant, Grievant noticed that one of the Sergeant's eyes looked to the side rather than directly at Grievant. The Office Service Assistant asked Grievant why he called the Sergeant by that name. After Grievant explained, the Officer Service Assistant asked Grievant to stop because she found the name offensive because she felt it was inappropriate to make fun of the Sergeant's physical appearance. Grievant continued calling the Sergeant "Split Screen" in front of other employees but did not do so in front of the Office Service Assistant. Grievant communicated with troopers using the Agency's Mobile Data Terminal and referred to the Sergeant as "Split Screen."

Trooper M began dating a woman who worked in a business selling bagels. He later married the woman in April 2011 and Grievant attended the wedding. On two or three occasions while speaking to Trooper M, Grievant referred to Trooper M's girlfriend and wife as the "Bagel Bitch". Grievant upset and angered Trooper M. Trooper M felt Grievant's comment about his girlfriend and wife was inappropriate. Trooper M did not ask Grievant to stop making the comments because Grievant was his superior and he feared Grievant would punish him. After Grievant made his offensive comments, Trooper M would try to avoid contact with Grievant for the rest of the day. Grievant referred to Trooper M's girlfriend and wife as "Bagel Bitch" in front of other employees at the Area Office.

Trooper S was involved in two shooting incidents. For one of those incidents, Trooper S's actions were criticized by the Agency. Most of the Troopers in the Area Office began making fun of Trooper S by calling him "Shooter Mc----." Grievant also called Trooper S "Shooter Mc-----." He began calling Trooper S by that name before he became a Sergeant and after he became a Sergeant.

Trooper E arrested a local police officer who was operating a motor vehicle while having a blood alcohol content of .25, well past the .08 limit. Grievant believed that Troopers should not arrest local law enforcement officers. Grievant told Trooper E that Grievant had a problem with Troopers arresting local police officers and had "heart burn" over the arrest. Grievant gave Trooper E the "silent treatment." After the arrest, Trooper E was treated differently by law enforcement officers in the locality. He felt it necessary to request a transfer to another area in part because he felt he was not receiving any support from Grievant. Grievant's supervisor shared Grievant's view.

In September 2011, First Sergeant P met with Grievant. Following their conversation, Grievant understood First Sergeant P to have concerns about Grievant's use of offensive language and nick names. Grievant considered the matter closed and he stopped his behavior.

The hearing officer listed his **CONCLUSIONS** as the following:

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order 19(12)(a). Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." General Order 19(13)(a). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." General Order 19(14)(a).

Group III offenses include:

Engaging in conduct, whether on or off the job, that undermines the effectiveness or efficiency of the Department's activities. This includes actions which might impair the Department's reputation as well as the reputation or performance of its employees."

Under the Agency's Code of Ethics, Grievant was obligated to, "Treat all persons in an evenhanded, respectful, and courteous manner."

Although some of the allegations against Grievant were not substantiated during the hearing, when Grievant's behavior is considered as a whole, Grievant undermined the effectiveness or efficiency of the Department's activities because he undermined his relationship with his co-workers in the Area Office.

Grievant's regular use of profanity does not form a basis for disciplinary action. Use of profanity was a regular occurrence in the Area Office. Grievant's behavior was known and tolerated by Grievant's supervisors. Grievant's reference to Ms. D. as "Choco DelTaco" does not support a basis for disciplinary action. Ms. D.

encouraged use of the phrase by displaying it on her desk. The phrase did not relate to her ethnicity or national origin as alleged by the Agency. Ms. D called Grievant nicknames as well.

Grievant referred to another supervisor, the Sergeant, as "Split Screen." Grievant's comment was inappropriate because he was attempting to make fun of one of the Sergeant's physical characteristics. Although the Sergeant ignored Grievant's comments, the Sergeant's co-workers heard Grievant's comments thereby helping to undermine the Sergeant's standing with his co-workers. When one supervisor is disrespectful and demeaning to another supervisor in front of subordinate staff, it creates the risk that subordinate staff may change their view of the supervisor.

Grievant's comments to Trooper M about his girlfriend and wife as being the "Bagel Bitch" were inappropriate because they are similar to "fighting words." Grievant's statements to Trooper M about Trooper M's wife greatly increased the risk of violence in the workplace. No credible evidence was presented showing that it was common practice for employees to insult the girlfriends and spouses of other employees in the Area Office. No credible evidence was presented to show that Trooper M believed that Grievant's comments were acceptable or that Trooper M took any action that Grievant could have interpreted as inviting his comments. Grievant used his position as a supervisor to abuse Trooper M knowing that Trooper M could not respond to him because Trooper M held a lower rank.

Grievant's reference to Trooper S as "Shooter Mc-----" does not provide a basis for disciplinary action. Employees in the Area Office routinely referred to Trooper S as "Shooter Mc-----." Supervisors in the Area Office were aware of the comments and took little action to stop them.

Grievant incorrectly instructed his staff to refrain from arresting local police officers. Grievant should have instructed his staff to treat local police officers in the same manner as they would treat any other person arrested. For example, if a Trooper would warn but not arrest a citizen under certain circumstances, then the Trooper could also warn but not arrest the local police officer. A Trooper should arrest a local law enforcement officer in those circumstances where the Trooper would arrest a citizen. Although Grievant's actions were inappropriate, they do not form a basis to take disciplinary action in this case. Grievant's Supervisor, First Sergeant T, shared the same incorrect view as did Grievant and communicated that view as an expectation for Grievant to follow. When First Sergeant T learned of Trooper E's arrest of a local police officer, he told Grievant that that was a "f--ked up thing to do."

The Agency alleged but did not establish that Grievant referred to troopers working the midnight shift by offensive names for making DUI arrests.

The Agency established that Grievant inappropriately used the Mobile Data Terminal. Grievant used the Mobile Data Terminal to engage in several non-business related conversations including one in which he used the words "Split Screen."

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Police engenders a higher scrutiny and expectation for performance than in many other State agencies.

Grievant argued that his comments were often intended as "office humor" and were intended to make people laugh and smile in order to relieve stress. Although it is likely that some of his comments accomplished that goal, it is also likely that many of his comments created unnecessary stress and served to insult his co-workers. Grievant's comments about the Sergeant and Trooper M exceeded what would be an appropriate level of "office humor".

Grievant argued that he had already been disciplined before he received the Group III Written Notice because he was counseled by First Sergeant P. There is no State or Agency policy that insulates an employee from disciplinary action simply because the employee has been counseled for inappropriate behavior.

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Grievant argued that the Agency inconsistently applied disciplinary action. When an employee claims an agency has inconsistently disciplined its employees, the question become whether the Agency has singled out the employee for disciplinary action. Examples of discipline given to other employees become less significant the greater the time since the other disciplinary actions were taken. This is because Agency policies, practices, and philosophies sometimes change over time. The most recent case cited by Grievant occurred in 2008, approximately four years prior to Grievant's disciplinary action.

In case 11 in 1998, the "First Sergeant on at least 9 occasions in verbal or written form, referred to troopers in his area as thick headed, stupid, liars, bone heads, and used other inappropriate language." The First Sergeant received a Group II Written Notice. Grievant's behavior differed from the First Sergeant's in that Grievant's comments were about a supervisor's physical condition and served to insult a trooper's wife. In case 39 in 2007, a "Sergeant used obscene language in the work place by referring to sex offenders as dick beaters and routinely using the F word and other obscene and offensive four letter words while talking to subordinates. Sergeant admitted to allegation." The Sergeant received "counseling for a Group I offense." The Hearing Officer finds that Grievant's use of obscene language in the workplace does not rise to the level of disciplinary action because of the widespread

acceptance of such language in the Area Office. This finding is consistent with how the Agency treated the Sergeant in case 39. In case 31 in 2008, a "Trooper made derogatory comments about another trooper. Trooper received a Group III Written Notice (mitigating ... prior written notices within the current year)." This case is consistent with the level of discipline given to Grievant who also received a Group III Written Notice. In case 04 A & C in 2008, "Trooper brought in an inappropriate e-mail to the area office which contained a racial slur and abusive language." The trooper was counseled. This case differs from Grievant's case in that the employee was not a supervisor and the employee's comments were not directed at co-worker's family member. In addition, "Sergeant told a story to a trooper of conducting a traffic stop on an individual wearing a turban on his head. He advised that trooper he told the individual, "I know you're not from around here, because we wear sheets over our heads and hang people like you." The Sergeant was counseled. Although the lack of discipline in this case raises questions, it is not sufficient to mitigate Grievant's discipline because of the age of the case and Grievant's behavior was directed at his co-workers not a private citizen.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; 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 non retaliatory 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 there from may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant argued that the Agency took action against him was a continuation of the retaliatory action taken by Trooper P. Grievant counseled Trooper P for failing to report to work as directed by Grievant. Trooper P complained to First Sergeant P who initiated an investigation against Grievant. The investigation was unfounded. Although First Sergeant P initiated the investigation, no credible evidence was presented to establish that First Sergeant P was involved in controlling the decision to take disciplinary action and what level of discipline was appropriate. The Agency did not retaliate against Grievant.

Based on his assessment of the evidence, the hearing officer upheld the agency's issuance of the Group III Written Notice with disciplinary transfer.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, as related to policy, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority regarding

policy issues, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In his appeal to the DHRM, the grievant states, in part, the following:

> "Mr. Schmidt is correct that there is no state policy that insulates an employee from disciplinary action simply because the employee has been counseled for inappropriate behavior. However, General Order ADM 12.02 paragraph 6.b. states "corrective action may be accomplished through the use of informal **or** formal means." There is no policy in this General Order that states both, only that such counseling is not a perquisite to taking formal disciplinary action. This is essentially the reason for my grievance. Had Lieutenant [H] and Captain [P] had this information at the time of their endorsements, they would not have recommended a Group III written notice. This is simply not progressive discipline."

The grievant's argument fails for the following reason. DHRM Policy 1.60 defines as its purpose the following:

> The purpose of this policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness.

While General Order ADM 12.02, paragraph 6.b., states that corrective action may be accomplished through the use of informal or formal means, it is the opinion of this Department that the agency is not restricted from issuing a formal written notice solely because it engaged in verbal counseling with the grievant. That same principle holds for DHRM Policy No. 1.60. Therefore, it is the opinion of this Department that the hearing officer's ruling is consistent with the DHRM Policy 1.60 and the General Order ADM 12.02.

As such, we have no basis to interfere with this decision.

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Ernest G. Spratley,
Assistant Director, Office of Equal Employment Services