

Issue: Group III Written Notice with suspension, demotion and pay reduction; Hearing Date: 11/05/12; Decision Issued: 11/14/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9934; Outcome: No Relief – Agency Upheld;  
**Administrative Review: DHRM Ruling Request received 11/28/12; DHRM Ruling issued 12/12/12; 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: 9934**

Hearing Date: November 5, 2012  
Decision Issued: November 14, 2012

#### **PROCEDURAL HISTORY**

On June 29, 2012, Grievant was issued a Group III Written Notice of disciplinary action with a 30 workday suspension, demotion, and disciplinary pay reduction effective July 27, 2012 for workplace harassment.<sup>1</sup>

On July 11, 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 she requested a hearing. On October 2, 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 appeal due to the unavailability of a party. On November 5, 2012, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

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<sup>1</sup> Although the Written Notice does not mention transfer, the Agency transferred Grievant to a different Facility. The Hearing Officer will consider Grievant's transfer as part of the discipline because the transfer appears to have been motivated as a form of discipline.

## **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 employed Grievant as a Corrections Captain at one of its Facilities prior to her demotion to a Corrections Officer effective July 27, 2012. The purpose of her position was:

Directs the work and staff on assigned shifts, coordinates work schedules and duty rosters, and performs inspections to maintain safety, security, and sanitation of the facility.<sup>2</sup>

Grievant worked as the Watch Commander on the evening shift at the Facility. She was the highest-ranking employee at the Facility while she served as Watch Commander. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

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<sup>2</sup> Agency Exhibit 4.

Grievant supervised the Corrections Officer. The Corrections Officer is “openly gay”. The Corrections Officer’s shift was from 6 p.m. until 6 a.m.

On Sunday, March 18, 2012, Grievant was standing at the front entry with three nurses trying to get through shakedown when the Corrections Officer asked them to wait and let her get another officer through the door. While the Corrections Officer was in shakedown getting the officer’s identification, Grievant clicked on the Corrections Officer’s email icon and opened an email the Corrections Officer had received from another warden. The Corrections Officer was seeking a transfer to another facility and the warden of that facility had responded to the Corrections Officer. Grievant said “oh, you trying to transfer [I will] call down there and tell [the Warden] you just trying to get down there to f--k some bitch.” Grievant made her comments in front of the nurses. The Corrections Officer replied, “tell him what you want.”

On March 24, 2012, Grievant entered the shakedown area in the front administration part of the building. Grievant said “these f—king little ass kids are supposed to be grown [and are] getting on my f--king nerves”. The Corrections Officer asked Grievant “why do you always do that talk about people acting like kids and you up here acting like one.” Grievant responded by saying that the Corrections Officer was a showoff and a fake bitch.” The Corrections Officer told Grievant the Corrections Officer said everything she has to say to a person’s face. The Corrections Officer said that Grievant called herself a Christian but she was very vindictive. Grievant then approached the Corrections Officer in a threatening manner, pointing her finger in the Corrections Officer’s face while getting loud, fussing, and cursing as other officers into the shakedown area. Grievant told the Corrections Officer that she was a mother—king liar. After the argument, Grievant said “that’s okay [I will] fix your ass. You going right back into the building.” Grievant and the Corrections Officer “used to play and joke” when the Corrections Officer first joined her shift but then “it got out of hand.” The Corrections Officer told Grievant “from now on to keep it on a professional level.” Grievant did so for maybe a week and then resumed her prior behavior of cursing and being disrespectful to the Corrections Officer by calling her a d-ke bitch, stupid mother—ker. The Corrections Officer would tell Grievant to “chill out and not joke with her anymore”. The Corrections Officer wrote that Grievant “calls everyone a fa—ot or d-ke.”

On March 31, 2012, Grievant entered the administration area where the Corrections Officer was working. The Sergeant brought the Corrections Officer a bowl of homemade stir-fry food. Grievant walked over to the Corrections Officer and asked “what is that?” The Corrections Officer told Grievant it was stir-fry. Grievant said “oh you eat after white people now?” The Corrections Officer said “what difference does it make if he is purple?” Grievant said “oh, so you getting a piece of that white d—k now.”

On April 6, 2012, Grievant entered the front entry area while the Corrections Officer was speaking on the telephone with the Captain B. Grievant asked the Corrections Officer who she was speaking to and the Corrections Officer said to Captain B. Grievant been made the comment, “Dang you f—king her now.” Grievant said “you

like big meat now.” Grievant added “did you wash it good”. Grievant said “don’t let me come to out to the towers and ya’ll in there doing it”.

On May 26, 2012, the Corrections Officer called the Facility to explain that she would not be reporting to work due to illness. Grievant said “you f—ked up, aint nothing wrong with your motherf—king ass.” The Corrections Officer said that she went to the doctor and had a doctor’s note. Grievant said “you just want to stay home to f—k that bitch.”

On May 27, 2012, the Corrections Officer called the Facility to explain that she would be absent due to illness. As part of their conversation, Grievant told the Corrections Officer “I know you putting that dildo to work.”

On June 9, 2012, the Corrections Officer walked into the muster room and spoke with Grievant. Grievant said “damn, you broke her back didn’t you?” The Corrections Officer said “what are you talking about?” Grievant said “Officer [B] called out and said she [is] having back pains. I know you broke her back f—king her.” The Corrections Officer walked off and said “shut up.”

On June 9, 2012, after Muster was over, Grievant said she wanted to meet with all the ladies. The Corrections Officer and the other female officers walked over to Grievant. Grievant stated to the Corrections Officer “I said ladies [Corrections Officer]”. Grievant and the other female officers began laughing while the Corrections Officer shook her head.

On June 12, 2012, the Corrections Officer was exiting the shakedown area to leave the Facility. Grievant tapped on the master control’s window to get the attention of Officer T. Grievant told Officer T, “look [Officer T] her ass go home to get some pu—y” and then began laughing. Officer T told the Corrections Officer “don’t even say anything, just go home and drive safe.” Before the Corrections Officer walked out the Corrections Officer said “oh let me call [Officer B] and let her know I’m gone.” Grievant told the Corrections Officer that Officer B was in the break room. The Corrections Officer went to the break room and returned to Grievant’s area. Grievant said “I know you f—king that girl, I don’t care what you say, you get you use some of that big pu—y.”

## **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.”<sup>3</sup> 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

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<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

warrant removal.”<sup>4</sup> Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”<sup>5</sup>

DOC Operating Procedure 101.2 addresses Equal Employment Opportunity. Section VI governs Prohibited Conduct and provides:

The Department of Corrections strictly forbids discrimination or harassment of any employee ... on the basis of an individual’s ... gender (including sexual-harassment ...).

Under section VII, “any employee who engages in conduct determined to be harassment ... will be subject to corrective action under Operating Procedure 135.1, Standards of Conduct, which may include discharge from employment.

This policy defines Sexual Harassment as:

Workplace harassment that consists of any unwelcome ... verbal, written, or physical conduct of a sexual nature by a manager .... Sexual harassment is unlawful in the work environment. Examples of sexual harassment are:

Hostile Environment – a form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching or other conduct of a sexual nature that creates an intimidating or offensive place for employees to work.

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The Agency’s policy is consistent with DHRM Policy 2.30 governing Workplace Harassment.

Grievant engaged in sexual harassment of the Corrections Officer by creating a hostile work environment. Grievant’s comments to the Corrections Officer were unwelcome. The Corrections Officer told Grievant to discontinue making offensive comments but Grievant continued. Grievant made pervasive and repeated sexual comments and innuendos to the Corrections Officer such that the Corrections Officer found her work environment to be offensive. Based on an objective standard, the Corrections Officer’s perception of Grievant’s behavior and its effect on the workplace was reasonable. The Agency has presented sufficient evidence to support the issuance of disciplinary action against Grievant for creating a hostile work environment contrary to DOC Operating Procedure 101.2. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to

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<sup>4</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>5</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

30 workdays, demote, transfer, and reduce the employee's pay. Accordingly, the Agency's 30 workday suspension, demotion, transfer, and disciplinary pay reduction must be upheld.

Grievant argued that cursing was widespread at the Facility. She denied making many of the offensive comments claimed by the Corrections Officer. Although Grievant proved that cursing was widespread among employees at the Facility, she did not establish that making comments about other employees' sexual behavior was widespread at the Facility. The Corrections Officer's testimony provided a sufficient basis to support the disciplinary action because her testimony before the Hearing Officer was credible. In addition, shortly after each offensive encounter with Grievant, the Corrections Officer recorded the nature of the interaction and described in detail Grievant's comments. By recording the event shortly after it occurred, the Corrections Officer heightened the reliability of her descriptions of her interactions with Grievant.

Grievant argued that DHRM Policy 2.30 does not prohibit workplace harassment based on sexual orientation.<sup>6</sup> She points out that DHRM Policy 2.30 prohibits conduct "on the basis of an individual's race, sex, color, national origin, religion, age, veteran status, political affiliation or disability." She argues that because sexual orientation is not enumerated in the list of prohibited conduct, discrimination based on sexual orientation is not a violation of DHRM Policy 2.30.<sup>7</sup>

DOC Operating Procedure 101.2 is based on and is an extension of DHRM Policy 2.30. Although these policies do not specifically address discrimination based on sexual orientation, DOC Operating Procedure 101.2 makes it clear that comments of a sexual nature that create an offensive work environment provide a basis for disciplinary action. If the Hearing Officer disregards Grievant's comments criticizing the Correction Officer's sexual orientation, there remain sufficient comments made by Grievant relating to the Correction Officer's sexual behavior such that Grievant created a sexually hostile work environment for the Corrections Officer.

*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..."<sup>8</sup> 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

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<sup>6</sup> Grievant also denied making offensive statements regarding the Corrections Officer's sexual orientation other than when the Corrections Officer was also joking about her sexual orientation.

<sup>7</sup> The Corrections Officer described Grievant's behavior as being by an "equal opportunity offender" namely that Grievant's inappropriate comments were directed at most employees at the Facility. The Corrections Officer testified that Grievant called some employees "fa—ot or d-ke" even though those employees were not homosexuals.

<sup>8</sup> *Va. Code § 2.2-3005.*

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension, demotion, transfer, and disciplinary pay reduction 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 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

2. 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>9</sup>

[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

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<sup>9</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.



## COMMONWEALTH of VIRGINIA

SARA REDDING WILSON  
DIRECTOR

*Department of Human Resource Management*

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### POLICY RULING OF THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Corrections

December 12, 2012

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9934. For the reason stated below, we will not interfere with the application of this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed, in part, the following in the procedural history of this case:

On June 29, 2012, Grievant was issued a Group III Written Notice of disciplinary action with a 30 workday suspension, demotion, and disciplinary pay reduction effective July 27, 2012 for workplace harassment.

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The relevant facts of this case 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 Department of Corrections employed Grievant as a Corrections Captain at one of its Facilities prior to her demotion to a Corrections Officer effective July 27, 2012. The purpose of her position was:

Directs the work and staff on assigned shifts, coordinates work schedules and duty rosters, and performs inspections to maintain safety, security, and sanitation of the facility.

Grievant worked as the Watch Commander on the evening shift at the Facility. She was the highest-ranking employee at the Facility while she served as Watch Commander. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant supervised the Corrections Officer. The Corrections Officer is "openly gay." The Corrections Officer's shift was from 6 p.m. until 6 a.m.

On Sunday, March 18, 2012, Grievant was standing at the front entry with three nurses trying to get through shakedown when the Corrections Officer asked them to wait and let her get another officer through the door. While the Corrections Officer was in shakedown getting the officer's identification, Grievant clicked on the Corrections Officer's email icon and opened an email the Corrections Officer had received from another warden. The Corrections Officer was seeking a transfer to another facility and the warden of that facility had responded to the Corrections Officer. Grievant said "oh, you trying to transfer [I will] call down there and tell [the Warden] you just trying to get down there to f--k some bitch." Grievant made her comments in front of the nurses. The Corrections Officer replied, "tell him what you want."

On March 24, 2012, Grievant entered the shakedown area in the front administration part of the building. Grievant said "these f--king little ass kids are supposed to be grown [and are] getting on my f--king nerves". The Corrections Officer asked Grievant "why do you always do that talk about people acting like kids and you up here acting like one." Grievant responded by saying that the Corrections Officer was a "showoff and a fake bitch." The Corrections Officer told Grievant the Corrections Officer said everything she has to say to a person's face. The Corrections Officer said that Grievant called herself a Christian but she was very vindictive. Grievant then approached the Corrections Officer in a threatening manner, pointing her finger in the Corrections Officer's face while getting loud, fussing, and cursing as other officers into the shakedown area. Grievant told the Corrections Officer that she was a mother--king liar. After the argument, Grievant said "that's okay [I will] fix your ass. You going right back into the building." Grievant and the Corrections Officer "used to play and joke" when the Corrections Officer first joined her shift but then "it got out of hand." The Corrections Officer told Grievant "from now on to keep it on a professional level." Grievant did so for maybe a week and then resumed her prior behavior of cursing and being disrespectful to the Corrections Officer by calling her a d-ke bitch, stupid motherf---er. The Corrections Officer would tell Grievant to "chill out and not joke with her anymore". The Corrections Officer wrote that Grievant "calls everyone a fa--ot or d-ke."

On March 31, 2012, Grievant entered the administration area where the Corrections Officer was working. The Sergeant brought the Corrections Officer a bowl of homemade stir-fry food. Grievant walked over to the Corrections Officer and asked "what is that?" The Corrections Officer told Grievant it was stir-fry. Grievant said "oh you eat after white people now?" The Corrections Officer said "what difference does it make if he is purple?" Grievant said "oh, so you getting a piece of that white d-k now."

On April 6, 2012, Grievant entered the front entry area while the Corrections Officer was speaking on the telephone with the Captain B. Grievant asked the Corrections Officer who she was speaking to and the Corrections Officer said to Captain B. Grievant been made the comment, "Dang you f--king her now." Grievant said, "you like big meat now." Grievant added "did you wash it good". Grievant said "don't let me come to out to the towers and ya'll in there

doing it”.

On May 26, 2012, the Corrections Officer called the Facility to explain that she would not be reporting to work due to illness. Grievant said "you f-ked up, ain't nothing wrong with your mother---king ass." The Corrections Officer said that she went to the doctor and had a doctor's note. Grievant said "you just want to stay home to f--k that bitch."

On May 27, 2012, the Corrections Officer called the Facility to explain that she would be absent due to illness. As part of their conversation, Grievant told the Corrections Officer "I know you putting that dildo to work."

On June 9, 2012, the Corrections Officer walked into the muster room and spoke with Grievant. Grievant said "damn, you broke her back didn't you?" The Corrections Officer said "what are you talking about?" Grievant said "Officer [B] called out and said she [is] having back pains. I know you broke her back f--king her." The Corrections Officer walked off and said "shut up."

On June 9, 2012, after Muster was over, Grievant said she wanted to meet with all the ladies. The Corrections Officer and the other female officers walked over to Grievant. Grievant stated to the Corrections Officer "I said ladies [Corrections Officer]". Grievant and the other female officers began laughing while the Corrections Officer shook her head.

On June 12, 2012, the Corrections Officer was exiting the shakedown area to leave the Facility. Grievant tapped on the master control's window to get the attention of Officer T. Grievant told Officer T, "look [Officer T] her ass go home to get some pu--y" and then began laughing. Officer T told the Corrections Officer "don't even say anything. Just go home and drive safe." Before the Corrections Officer walked out the Corrections Officer said "Oh let me call [Officer B] and let her know I'm gone." Grievant told the Corrections Officer that Officer B was in the break room. The Corrections Officer went to the break room and returned to Grievant's area. Grievant said "I know you f-king that girl, I don't care what you say, you get you use some of that big pu--y."

The hearing officer made the following 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." 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."

DOC Operating Procedure 101.2 addresses Equal Employment Opportunity. Section VI governs Prohibited Conduct and provides:

The Department of Corrections strictly forbids discrimination or harassment of any employee on the basis of an individual's ... gender (including sexual-harassment...).

Under section VII, "any employee who engages in conduct determined to be harassment ... will be subject to corrective action under Operating Procedure 135.1, Standards of Conduct, which may include discharge from employment."

This policy defines Sexual Harassment as:

Workplace harassment that consists of any unwelcome ... verbal, written, or physical conduct of a sexual nature by a manager .... Sexual harassment is unlawful in the work environment. Examples of sexual harassment are:

Hostile Environment - a form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching or other conduct of a sexual nature that creates an intimidating or offensive place for employees to work.

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The Agency's policy is consistent with DHRM Policy 2.30 governing Workplace Harassment.

Grievant engaged in sexual harassment of the Corrections Officer by creating a hostile work environment. Grievant's comments to the Corrections Officer were unwelcome. The Corrections Officer told Grievant to discontinue making offensive comments but Grievant continued. Grievant made pervasive and repeated sexual comments and innuendos to the Corrections Officer such that the Corrections Officer found her work environment to be offensive. Based on an objective standard, the Corrections Officer's perception of Grievant's behavior and its effect on the workplace was reasonable. The Agency has presented sufficient evidence to support the issuance of disciplinary action against Grievant for creating a hostile work environment contrary to DOC Operating Procedure 101.2. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. Upon the issuance of a Group III Written Notice, an agency may suspend an employee for up to 30 workdays, demote, transfer, and reduce the employee's pay. Accordingly, the Agency's 30 workday suspension, demotion, transfer, and disciplinary pay reduction must be upheld.

Grievant argued that cursing was widespread at the Facility. She denied making many of the offensive comments claimed by the Corrections Officer. Although Grievant proved that cursing was widespread among employees at the Facility, she did not establish that making comments about other employees' sexual behavior was widespread at the Facility. The Corrections Officer's testimony provided a sufficient basis to support the disciplinary action because her testimony before the Hearing Officer was credible. In addition, shortly after each offensive encounter with Grievant, the Corrections Officer recorded the

nature of the interaction and described in detail Grievant's comments. By recording the event shortly after it occurred, the Corrections Officer heightened the reliability of her descriptions of her interactions with Grievant.

Grievant argued that DHRM Policy 2.30 does not prohibit workplace harassment based on sexual orientation. She points out that DHRM Policy 2.30 prohibits conduct "on the basis of an individual's race, sex, color, national origin, religion, age, veteran status, political affiliation or disability." She argues that because sexual orientation is not enumerated in the list of prohibited conduct, discrimination based on sexual orientation is not a violation of DHRM Policy 2.30.

DOC Operating Procedure 101.2 is based on and is an extension of DHRM Policy 2.30. Although these policies do not specifically address discrimination based on sexual orientation, DOC Operating Procedure 101.2 makes it clear that comments of a sexual nature that create an offensive work environment provide a basis for disciplinary action. If the Hearing Officer disregards Grievant's comments criticizing the Correction Officer's sexual orientation, there remains sufficient comments made by Grievant relating to the Correction Officer's sexual behavior such that Grievant created a sexually hostile work environment for the Corrections Officer.

*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 ...." 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 nonexclusive 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

The hearing officer made the following decision in this case:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension, demotion, transfer, and disciplinary pay reduction is **upheld**.

### **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, 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, 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 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 policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In her request to this Department for an administrative review, the grievant contends that the hearing officer's decision is contrary to Department Policy (DOC). The grievant contends that she was charged with violating a policy for which there is no coverage. More specifically, she states that she was charged with sexually harassing an individual on the basis of her "sexual orientation", an area not covered under DHRM Policy No. 2.30. She points out that sexual orientation is covered under the Governor's Directive No. 1, but she was not charged with violating that policy.

However, the Governor's Directive No. 1 states, in part the following:

Employment discrimination of any kind will not be tolerated by this Administration. The Virginia Human Rights Act recognizes the unlawfulness of conduct that violates any Virginia or federal statute or regulation governing discrimination against certain enumerated classes of persons. The Equal Protection Clause of the United States Constitution prohibits discrimination without a rational basis against any class of persons. Discrimination based on factors such as one's sexual orientation or parental status violates the Equal Protection Clause of the United States Constitution. Therefore, discrimination against any class of persons set forth in the Virginia Human Rights Act or discrimination against any class of persons without a rational basis is prohibited.

Moreover, the hearing officer determined that absent the comments referring to the victim's sexual orientation, there remains sufficient offenses to support the agency's disciplinary actions. The DHRM Policy No. 1.60, Standards of Conduct, provides that an agency may determine the level of discipline based on the egregiousness of the offense.

Therefore, this Department has no basis to interfere with the application of this decision.

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Ernest G. Spratley  
Assistant Director  
Office of Equal Employment Services