Issue: Group III Written Notice with demotion, pay reduction and transfer (workplace harassment); Hearing Date: 06/24/16; Decision Issued: 06/29/16; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10814; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 07/12/16; DHRM Ruling issued 08/04/16; 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: 10814

Hearing Date: June 24, 2015
Decision Issued: June 29, 2016

PROCEDURAL HISTORY

On February 8, 2016, Grievant was issued a Group III Written Notice of disciplinary action with demotion, disciplinary pay reduction, and transfer for workplace harassment.

On March 8, 2016, 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 23, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 24, 2016, 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 Department of Corrections employed Grievant as a Lieutenant at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant reported to the Captain. Sergeant W reported to Grievant. Officer H reported to Grievant.

Grievant was frustrated with the Agency's inability to provide a sufficient number of staff for his shift. He sent several emails to Agency managers asking for assistance. The Agency assigned the Sergeant to work with Grievant in supervising the officers reporting to Grievant.

In November 2015[1], Grievant was working in the Yard. He expected the Sergeant to work in the Yard to assist him. The Captain called the Sergeant from the Yard into his work area. This frustrated Grievant.

[1] Grievant argued that the incident occurred on November 11, 2015 instead of November 6 or 7, 2015. The specific date the incident occurred has no bearing on the outcome of this case.

Officer H approached Grievant in the Yard. Officer H asked "where is [Sergeant W]?" Grievant responded, "probably up front sucking [Captain's] d—k."

Offender H spoke with Officer C and told her what Grievant said. She repeated the comment to other employees and Sergeant W learned of Grievant's comment. She was offended by his comment.

Officer H was later asked to write an incident report. He wrote, [Grievant] didn't mean it sexually, he was angry at the time. [Grievant] meant it as if she were receiving favoritism as an 'ass kisser.'" Officer H repeated this assertion during the hearing.

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."[2] 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."[3] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[4]

"Use of obscene or abusive language" is a Group I offense.[5] Grievant said that an employee was "sucking [Captain's] d—k." His statement was obscene and abusive. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

In rare circumstances, a Group I may constitute a Group II where the DOC can show that a particular offense had an unusual and truly material adverse impact on the agency. In this case, Grievant made the comment about his subordinate and his supervisor. As the Warden testified, Grievant's comment was unprofessional, demeaning, and not tolerated by the Agency. Grievant destroyed his working relationship with his subordinate and undermined his relationship with his supervisor. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. A ten workday suspension is appropriate in this case.

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[2] Virginia Department of Corrections Operating Procedure 135.1(V)(B).

[3] Virginia Department of Corrections Operating Procedure 135.1(V)(C).

[4] Virginia Department of Corrections Operating Procedure 135.1(V)(D).

[5] See, DOC Operating Procedure 135.1 (V)(B)(2)(a).

Grievant argued that he did not make the offensive statement, but rather Officer H made the statement to him. Grievant claimed:

> [Officer H] stated, "She probably up front sucking d—k in a joking manner." [Officer C, Officer Co, and Officer B] asked [Officer H] what did you say[. He] stated "She probably up front sucking [Captain's] d—k a second time."[6]

The Hearing Officer believes Officer H's account of the events is more credible than Grievant's account for several reasons. First, Officer H's testimony was credible. When asked if he made the offensive statement, Officer H's denial was credible. Second, Offender H had no motive to make the offensive statement and then blame Grievant. Third, Grievant claimed Officer H made the offensive statement twice to three corrections officers. Not one of those corrections officers testified to hearing Officer H make the offensive statement.

Grievant argued that the Agency's investigation of the incident was flawed. This hearing decision is not based on how well the Agency investigated the matter.

The Agency argued that Grievant engaged in workplace harassment. Department of Human Resource Policy 2.30 prohibits Workplace Harassment. Workplace harassment is defined as:

> Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

The Agency cannot rise above its evidence in this case. Sergeant W was offended by Grievant's statement when she was later informed of what he said. She did not hear the statement when it was made. Officer H heard Grievant's statement and concluded Grievant "didn't mean it sexually" and meant it "as if she was receiving favoritism." Officer H's testimony was credible. The Hearing Officer cannot choose to consider only portions of Officer H's credible testimony. Grievant did not reveal sufficient intent for the Hearing Officer to conclude that Grievant engaged in workplace harassment. Grievant's action was not on the basis of sex.

Mitigation

[6] Agency Exhibit 12.

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 Human Resource Management …."[7] 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[8] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment 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.[9]

Grievant engaged in protected activity because he complained to Agency managers about staffing at the Facility. Grievant suffered an adverse employment action because he received disciplinary action. Grievant did not establish a connection between his protected activity and the Agency's disciplinary action. The Agency did not take disciplinary action as a pretext for retaliation.

[7] Va. Code § 2.2-3005.

[8] 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.

[9] 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).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to demotion and transfer, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** received during the period of demotion and credit for leave and seniority that the employee did not otherwise accrue. The Agency may reduce Grievant's award of back pay to account for a ten workday suspension.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

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 14th St., 12th 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 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.[10]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

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