

Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 11/27/18; Decision Issued: 03/15/19; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11267; Outcome: Full Relief; **Attorney's Fee Addendum issued 03/29/19 awarding \$6,255.25.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11267

Hearing Date: November 27, 2018
Decision Issued: March 15, 2019

PROCEDURAL HISTORY

On August 9, 2018 Grievant was issued a Group III Written Notice of disciplinary action with removal for workplace harassment and creating an intimidating and hostile work environment.

On September 5, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On September 18, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On November 27, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
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?

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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.

GENERAL 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 the Chief of Housing and Programs at one of its facilities. He had been employed by the Agency since June 1998. He began working at the Current Facility in June 2016. No evidence of prior active disciplinary action was introduced during the hearing.

Ms. W was a "star performer" in the office. She was a "resident expert" and everyone relied on her expertise. She worked in Grievant's housing unit.

Ms. W was having an affair with Lieutenant E. Many staff at the Facility were aware of the affair. Ms. W told Ms. B that Ms. W was in a relationship with the Lieutenant E. Ms. B knew Ms. W and Lieutenant E had exchanged text messages expressing love. Lieutenant E insinuated to Counselor L that he and Ms. W had had sex at the Facility. The Psychology Associate believed rumors of the affair between Ms. W and Lieutenant E. She believed Ms. W was upset because the relationship was "coming to a front" in March 2018 and Ms. W was being questioned about it. The Psychology Associate was not surprised that Ms. W was rumored to have an affair with Lieutenant E. The Psychology Associate had known Ms. W for ten years and knew Ms. W when Ms. W worked at two prior facilities. The Psychology Associate knew that Ms. W got involved with a patient at the first facility and also at the second facility. Ms. W married the patient at the second facility.

Ms. W expressed favoritism towards some inmates. She would comment to Ms. B about their looks. Ms. W was flirtatious towards some inmates and would sometimes call them by nick names or their gang names according to Counselor L.

Ms. W and Counselor L began working together in December 2017. They had conflict working together and that conflict peaked in March 2018. Counselor L felt that Ms. W was “backstabbing” her. Ms. W told Counselor L that she would be “weeded out” of the program.

Unit Manager M was unsure of the reason for the conflict between Ms. W and Counselor L. Grievant and Unit Manager M spoke with Ms. W and Counselor L to explain that they needed to work as a team whether they liked it or not.

The IPM and Counselor L spoke with Unit Manager M about their concerns with Ms. W. Unit Manager M informed Grievant of his concerns about Ms. W.

The Major knew of the rumor that Ms. W and Lieutenant E were having an affair. He learned of the rumor from the Assistant Warden who learned of the allegation from Grievant. The Major knew Ms. W and Lieutenant E often went to lunch together. The Major talked to Lieutenant E about his contact with Ms. W at the Facility. Lieutenant E changed how he interacted with Ms. W at the Facility. For example, they stopped going to lunch.

Grievant spoke with Ms. W about Lieutenant E. Grievant noticed that Ms. W and Counselor L began having problems after his conversation with Ms. W. Grievant believed Ms. W may have suspected Counselor L was responsible for revealing her relationship with Lieutenant E.

On April 20, 2018, Ms. W submitted a seven page detailed complaint to the Agency beginning “Over the duration of the past year in a few months while employed at [Facility] I have experienced uncomfortable and unwanted interactions with the Chief of Housing and Programs [Grievant].”¹ The Agency began an investigation. Ms. W resigned from her position after the EEO investigation began but before the grievance hearing. She did not testify during the hearing.

The EEO Manager conducted the Agency’s investigation. She met with Ms. W and Grievant in person and asked each employee questions. The EEO Manager made telephone calls to other Agency employees at the Facility. She called some of the employees more than once. The EEO Manager testified, “I follow where the investigation leads me.”

The EEO Manager spoke with Ms. B by telephone. Ms. B testified that the EEO Manager treated her “like I was a criminal. When I gave her answers, she got

¹ Agency Exhibit 9.

frustrated.” Ms. B believed the EEO Manager was “getting hostile with the fact that I was not giving answers” the EEO Manager wanted. Ms. B believed the EEO Manager “would put words in my mouth.” The EEO Manager called Ms. B several times and on the last call Ms. B got so upset that she decided that if there was a next time, she would have to meet face to face with the EEO Manager because “I wanted to see this person with so much attitude.”

Counselor L spoke twice with the EEO Manager by telephone. Counselor L described her conversations with the EEO Manager as, “She was ugly. She was aggressive with how she spoke with me to make me lie to her and say something not true.”

Ms. S spoke with the EEO Manager twice by telephone. Ms. S testified that during the first telephone call the EEO Manager’s demeanor was not like an interrogation. The second call was “rough.” The EEO Manager would say things that Ms. S did not recall and would make Ms. S feel like a liar. The EEO Manager would say that this is what Ms. W was saying and Ms. S was not being truthful. Ms. S felt like the EEO Manager was “trying to coerce me to say something. If I said something [the EEO Manager] would twist it to say what I was not saying.”

The Agency did not present any witnesses during the hearing showing that Grievant created a hostile work environment for them such that they were unable to perform their normal work duties. For example, Grievant did nothing to Ms. B that would have prevented her from doing her job. She had no problem if Grievant returned to work at the Facility. Ms. B pointed out that Grievant “took a chance on her” and he gave her the opportunity “to prove herself.” None of Grievant’s actions created a hostile or offensive work environment for Counselor L. None of Grievant’s actions interfered with her work performance or limited her employment opportunities. Counselor L would not have a problem with Grievant being reinstated at the Facility. The Psychology Associate would not have a problem if Grievant was reinstated at the Facility. Ms. S testified she had a “great” and “professional” relationship with Grievant.

DISCUSSION OF FACTS AND POLICY

Grievant was issued a Group III Written Notice with removal for violating DHRM Policy 2.30, workplace harassment, violating Operating Procedure 145.3, Equal Employment Opportunity and violating Operating Procedure 135.1 Standards of Conduct for workplace harassment and creation of an intimidating and hostile work environment.

DHRM Policy 2.30 defines workplace harassment 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, gender identity, age,

veteran status, political affiliation, genetics, 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 the employee's work performance; or (3) affects an employee's employment opportunities or consequences.

Violation of DHRM Policy 2.30 can be a Group I, Group II, or Group III depending on the nature of the violation.²

Operating Procedure 145.3(III) defines Workplace Harassment as:

Any unwelcome verbal, written or physical conduct that denigrates or shows hostility or aversion towards a person that:

Has the purpose or effect of creating an intimidating hostile or offensive work environment

Has the purpose or effect of unreasonably interfering with an employee's work performance [or]

Affects an employee's employment or opportunities or compensation. Workplace harassment on the basis of race, sex, (including sexual harassment, pregnancy, and marital status), color, national origin, religion, sexual orientation, gender identify, age, political affiliation, veteran status, or against otherwise qualified persons with disabilities is illegal. Workplace Harassment not involving protected areas is in violation of DOC Operating Procedures.

Section (IV)(D)(3) provides:

Any employee who engages in conduct determined to be harassment, or who encourages such conduct by others will be subject to corrective action under Operating Procedure 135.1 Standards of Conduct which may include discharge from employment.

The EEO Manager conducted an investigation and concluded:

1. By discussing the sexual harassment allegations brought against him at [Former Facility], [Grievant] has created an intimidating work environment by suggesting he is immune to such complaints.
2. By discussing his prior sexual harassment allegations at [Former Facility]; commenting how he prevented his accuser from the [Former Facility] complaint from being promoted; making comments about providing [Ms. W] interview questions; and that [Ms. Si] would be the new IPM prior to the interviews; Grievant has used his

² Operating Procedure 135.1(B)(2)(h), (C)(2)(j), and (D)(2)(t).

- position of authority in a manner that has created an intimidating and fearful work environment.
3. By entering another co-worker's personal space in an unwelcome manner, touching her face and stating, "you can back away when this feels uncomfortable" created an intimidating and offensive work environment. This action is also viewed as threatening behavior since the co-worker stated she did not know what he was going to do next and immediately backed away from him.
 4. By touching the hair of several female employees, again [Grievant] has entered their personal space and touched them in an unwelcome manner.
 5. Using the phrase "Boss, not a boss" has created an intimidating work environment.
 6. [Ms. W] stated [Grievant's] behavior has created a fearful environment and keeps her door locked to avoid being alone with him. [Ms. W] also stated her work performance has suffered due to her anxiety and fearfulness of being around [Grievant]. Therefore, [Grievant's] behavior can be viewed as unreasonably interfering with [Ms. W' S] work performance.
 7. [Grievant's] discussion with [Assistant Warden] regarding [Ms. W's] potential disciplinary action is seen as potentially affecting [Ms. W's] employment.

Allegation 1

By discussing the sexual harassment allegations brought against him at [Former Facility], [Grievant] has created an intimidating work environment by suggesting he is immune to such complaints.

Facts. Grievant had an allegation of sexual harassment brought against him at a Former Facility. He discussed that allegation with some staff as a means of showing that if an employee trusted the complaint and investigation process, then the process would work for the employee. Grievant did not discuss the allegations in extensive detail. His comment during an orientation was in response to a question asked by a new employee.

Grievant mentioned to Ms. M allegations brought against him at another facility. He did not discuss them in detail with Ms. M.

Ms. B testified that the EEO Manager said that by discussing prior allegations of sexual harassment, Grievant created the environment that he was immune from the allegation. Ms. B testified that "this was not said to me; not like this."

The Psychology Associate was among several new employees participating in orientation. She heard Grievant discuss a prior sexual harassment complaint made

against him. Grievant explained what happened and said that employees would be aware of their behavior. Grievant was not boastful.

Conclusion. Grievant did not suggest to any employee that he was immune from complaints of sexual harassment. Grievant did not create a hostile work environment for any employees because he discussed a prior allegation of sexual harassment. Grievant's statements were made with the objective of showing that employees should trust the complaint and investigation process to work.

Allegation 2

By discussing his prior sexual harassment allegations at [Former Facility]; commenting how he prevented his accuser from the [Former Facility] complaint from being promoted; making comments about providing [Ms. W] interview questions; and that [Ms. Si] would be the new IPM prior to the interviews; Grievant has used his position of authority in a manner that has created an intimidating and fearful work environment.

Facts. Ms. M testified that Grievant told her in 2017 about a woman he dated at Facility R. When the woman sought promotion and would result in a move to Grievant's Former Facility, Grievant provided the woman with a poor reference in order to stop the promotion. Grievant's statements shocked and bothered Ms. M. Grievant's comment did not affect her work other than that she felt his action was not a nice thing to do.

Grievant did not say anything to Ms. S about employees who brought complaints against him at the Former Facility. Grievant did not tell Ms. S anything about employees not being promoted. Ms. S did not hear Grievant say that he had provided someone with interview questions. Ms. S was not intimidated by Grievant or fearful of working around him. She did not feel that Grievant denigrated her or caused her to be uncomfortable. She did not consider Grievant's action to be hostile.

Grievant testified that he did not provide Ms. W with interview questions prior to a job interview. Grievant did not sit on the interview panel. No credible evidence was presented to contradict Grievant's testimony.

Grievant met Ms. Si when she sat on an interview panel with Grievant. Grievant was impressed by her knowledge and skills. Ms. Si toured the Facility with Grievant. At the end of the tour, Ms. Si said she was thinking of applying for the vacant IPM position at the Facility. After the tour, Grievant spoke with Ms. M. Grievant told Ms. M that Ms. Si was "up and coming" at the Department of Corrections and he was trying to get her to come to the Facility. Grievant denied saying that she would be the next IPM.

Conclusion. Grievant did not create a hostile work environment for Ms. M by commenting on stopping promotion of a former coworker because Ms. M's work performance was not affected by Grievant's comment. Grievant did not make comments about providing Ms. W with interview questions. Grievant did not say Ms. Si

would be the new IPM. His statements that she was up and coming and he wanted to have her come to the Facility were not comments that could create a hostile work environment or would be otherwise contrary to policy. Grievant did not create an intimidating and fearful work environment.

Allegation 3

By entering another co-worker's personal space in an unwelcome manner, touching her face and stating, "you can back away when this feels uncomfortable" created an intimidating and offensive work environment. This action is also viewed as threatening behavior since the co-worker stated she did not know what he was going to do next and immediately backed away from him.

Facts. In November 2017, Grievant and Ms. S were in the hallway inside the institution. Other employees were also in the hallway. Grievant had a picture of his wife on his cell phone. Ms. S said she loved Grievant's wife's hair. Grievant said his wife was going to cut her hair. He intended to touch Ms. S's hair and show her an example of "how much" his wife intended to cut her hair. Grievant reached out and put the tip of his finger on Ms. S's cheek and said Ms. S could back away when she felt uncomfortable. Ms. S backed away. Ms. S went to the Warden's Secretary and described how she had been touched. The Warden's Secretary asked Ms. S if Ms. S needed to report the incident. Ms. S said she was not sure. Ms. S went back to her office.

The Warden's Secretary went to the Warden and reported the incident. The Warden's Secretary called Ms. S and asked Ms. S to come to the Warden's office. Ms. S said to the Warden's Secretary "you told him³ didn't you" and the Warden's Secretary said "yes."

Ms. S went to the Warden's office. She was nervous because she did not want Grievant to see her in the Warden's office. Grievant did not tell Ms. S that Ms. S would get in trouble if Ms. S complained about him.

Ms. S met with the Warden, Warden's Secretary and the Assistant Warden. Ms. S told the Warden that Grievant touched her face and she stepped back. The Warden asked Ms. S several times if she wanted to file a complaint against Grievant but she declined to do so.

On November 16, 2017, the Assistant Warden met with Grievant to discuss an allegation that he touched a staff member around the neck area in the break room and said, "if this is uncomfortable to step up or something in nature of that comment." Grievant said he did not do that. Grievant asked for the staff person's name but the Assistant Warden said he would not provide Grievant with that name.

³ "him" refers to the Warden.

The Warden did not move Grievant or Ms. S to another position. He considered the matter addressed by counseling Grievant. He did not speak with Grievant because he trusted his chain of command to address the matter. The Warden did not refer the matter to EEO for investigation.

Ms. S did not know Grievant very well at the time of the incident. After the incident, Grievant and Ms. S would “joke” where Grievant might say he couldn’t touch her and she would say don’t touch me.

After the incident, Ms. S continued a professional relationship with Grievant which she viewed as “great” and “there was nothing inappropriate after that.” Grievant did not ask her out on a date.

Conclusions. Grievant’s action of touching Ms. S’s hair and face was inappropriate. She did not welcome the behavior. Grievant’s action was not sufficiently material to justify the issuance of disciplinary action in this case. This conclusion derives from (1) Ms. S’s refusal to initiate a complaint against Grievant, (2) the Warden did not deem Grievant’s behavior sufficient to refer to the Agency’s EEO for investigation, (3) the Warden did not alter the working or reporting relationship between Ms. S and Grievant, (4) Grievant’s behavior was corrected through counseling, and (5) at the time of the hearing, Ms. S viewed her working relationship with Grievant as “great.”

Grievant’s objective was to communicate how much of his wife’s hair his wife intended to cut. His objective was not to denigrate or affect Ms. S’s work performance.

Allegation 4

By touching the hair of several female employees, again [Grievant] has entered their personal space and touched them in an unwelcome manner.

Ms. D had hair that hung down to her waist. Her hair was much longer than the hair of most of the other employees at the Facility. Ms. M testified that Ms. D was walking down a hallway with Ms. M behind her. Ms. D passed between Grievant and the Major who were talking. As Ms. D passed Grievant, Grievant pulled out Ms. D’s hair and let it go. Ms. D did not realize that Grievant had touched her hair. Ms. M thought Grievant’s behavior was unusual but it did not bother her.

Ms. M said that Ms. D’s hair looked nice and added, “her hair looked nice; if I had been close enough I would have touched it too.”

Ms. B testified that when she went from blonde to black hair color a lot of people touched her hair but Grievant was not one of them.

Conclusions. Grievant touched the hair of Ms. D, but Ms. D was not aware of the touching and it did not affect her in any way. Grievant's action did not affect any other employees at the Facility.

Allegation 5

Using the phrase "Boss, not a boss" has created an intimidating work environment.

Facts. Grievant attended a Christmas gathering including Ms. S and Ms. B. Part of the gathering involved an exchange of "gag" gifts. Ms. B brought socks which included the word "Boss" written on them. As the socks were passed around the group, the person holding the socks would say "boss, not a boss".

Ms. S testified that it was a joke and everyone would joke with Grievant about "boss, not boss." One day it got on her nerves but she knew it was a joke. Ms. S did not find Grievant's actions denigrating or uncomfortable.

Ms. B testified that they were all using the joke, "boss, not boss." She said, "We all joked about it." She gave an example where she might give Grievant a paper and try to explain what was going on. When she questioned Grievant, Grievant would reply "boss, not boss." She would point to herself and say, "gonna be your boss". Their conversation was made in a joking manner.

When Counselor L heard Grievant say to others "boss, not boss" she believed Grievant was "joking around". Counselor L would sometimes make that statement to Grievant in a joking manner.

The Psychology Associate thought the phrase was funny. Its use did not offend her or cause her anxiety.

Grievant denied saying the phrase in a derogatory manner. He always said it in a joking manner.

Conclusions. Grievant's use of the phrase "boss, not a boss" was light-hearted and always intended in a joking manner. Employees who heard Grievant use the phrase understood the context of the phrase and that Grievant was "joking" with them. Grievant did not use the phrase "boss, not a boss" to create an intimidating work environment.

Allegation 6

[Ms. W] stated [Grievant's] behavior has created a fearful environment and keeps her door locked to avoid being alone with him. [Ms. W] also stated her work performance has suffered due to her anxiety and fearfulness of

being around [Grievant]. Therefore, [Grievant's] behavior can be viewed as unreasonably interfering with [Ms. W's] work performance.

Facts. Ms. W and Counselor L shared an office with a door that locked. Some staff came into the office when Counselor L was not in the office and “destroyed” Counselor L’s desk, took out her ink pens, and taped her phone and computer mouse. Counselor L started locking the office door. Counselor L did not believe Ms. W was afraid of Grievant or that she locked the door because of Grievant.

After Counselor L moved out of the office she shared with Ms. W, Ms. W continued to lock the door to the office. Counselor L did not know why Ms. W continued to keep her door locked.

Ms. W told the Warden that she kept her door closed and locked because she was fearful of Grievant.

Conclusions. Counselor L kept the office door she shared with Ms. W closed and locked because she feared pranks by other employees. After Counselor L left the office, Ms. W kept the door closed and locked supposedly because she feared Grievant. If Ms. W feared Grievant, it was not because he had engaged in any inappropriate behavior directed at her. Ms. W’s behavior changed after her affair with Lieutenant E was exposed and challenged by Facility managers. It is reasonable to conclude that Ms. W continued to lock her office door because she disliked that Facility managers were aware of her relationship with Lieutenant E and were attempting to interfere with that relationship. To the extent Ms. W’s behavior changed, it was in response to her perception of her work environment and not because of any inappropriate behavior by Grievant.

Allegation 7

[Grievant's] discussion with [Assistant Warden] regarding [Ms. W's] potential disciplinary action is seen as potentially affecting [Ms. W's] employment.

Facts. Unit Manager M approached Grievant and complained about Ms. W. He told Grievant that Ms. W was not showing up for meetings and was “fussing” with other staff. Grievant met with Ms. W and told her she was not a supervisor, she was a counselor. After this meeting, Ms. W began “shunning” her supervisors. In some meetings with employees, Ms. W would act like she was not paying attention.

On March 30, 2018, Grievant, IPM and Unit Manager M became concerned about Ms. W’s work performance and that Ms. W was disgruntled. They met with the Assistant Warden to express their concerns about Ms. W being disgruntled “due to some moves, job re-alignments with counselors that were going to take place in the future.” Unit Manager M voiced his concerns based on his observation of Ms. W. Unit Manager M was concerned about Ms. W because she did not seem to be able to work

well with other employees. The Assistant Warden indicated he wanted to see documentation of the problem. He wanted to see what work Ms. W was not doing. The Assistant Warden testified that Grievant, IPM, and Unit Manager M were saying the “same thing” about Ms. W.

The Assistant Warden later called Ms. W and asked how things were going with her programs. He thanked Ms. W for what she was doing with a particular program and to let her know she was supported by the administration. He asked Ms. W if the IPM and Grievant were giving her the support she needed. Ms. W said she felt they were supporting her. The Assistant Warden thanked Ms. W again and advised her he was just checking on her to see how things were going. Ms. W appeared to the Assistant Warden to appreciate calling her.

Conclusions. Grievant did not single out Ms. W for disciplinary action based on any improper purpose. Grievant responded to the concerns brought to him by the Unit Manager M and the IPM. Ms. W’s work performance had deteriorated to the point it was affecting other employees. Grievant acted appropriately to bring his concerns and the concerns of the two other supervisors to the attention of Grievant’s supervisor.

OVERALL CONCLUSIONS

The Agency has not presented sufficient evidence to support the issuance of disciplinary action in this case. The Agency’s allegations rest largely on two factors – statements made by Ms. W and the conclusions of the EEO Manager.

Ms. W did not testify during the hearing. Grievant presented an alternate credible theory regarding why Ms. W would falsely accuse him of creating a hostile work environment for her. Ms. W was angry that Grievant and other managers at the Facility had exposed her improper relationship with Lieutenant E. Grievant has presented credible evidence questioning the character of Ms. W. For example, Ms. W had inappropriate relationships with former patients and married one of her former patients. The Hearing Officer cannot presume that Ms. W’s statements made to the EEO Manager were credible.

The EEO Manager conducted telephone interviews with several employees working at the Facility with the exception of Grievant and Ms. W. She formed opinions of Grievant’s and Ms. W’s veracity based on her interaction with them.⁴ The EEO Manager is an experienced and competent EEO investigator as her testimony demonstrated. Her conclusions regarding Ms. W, however, are not substantiated because (1) Ms. W did not testify during the hearing and (2) Grievant presented ample evidence to show that Ms. W’s opinions of him resulted from his questioning her work

⁴ One of among several observations the EEO Manager made of Grievant was that Grievant was “smug” when he answered her questions. Grievant was also “smug” when he testified during the hearing. Grievant’s smugness appears to be a personal trait and not necessarily an indicator of untruthfulness.

performance and (3) Ms. W displayed questionable judgment. The Hearing Officer does not believe Ms. W accurately described Grievant's behavior to the EEO Manager.

The EEO Manager testified her conclusions about Grievant followed from the information she received during her investigation. It is not unusual for a capable investigator sometimes to have to prod, cajole, and annoy witnesses to reveal the truth. The testimony of several witnesses in this case, however, showed the EEO Manager attempted to elicit information from them to support her opinion that Grievant created a hostile work environment for Ms. W. The testimony of several witnesses adequately undermines the conclusions drawn by the EEO Manager. The Hearing Officer finds the EEO Manager's conclusions unpersuasive.

Grievant did not act contrary to DHRM Policy 2.30. He did not take any action on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability.

Grievant did not act contrary to DOC Operating Procedure 145.3. He did not create an intimidating, hostile, or offensive work environment for Ms. W or any other employee at the Facility. He did not unreasonably interfere with any employee's work performance. Grievant did not affect any employee's employment, opportunities, or compensation.

The disciplinary action against Grievant must be reversed.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at a facility located west of Grievant's facility prior to removal. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of

removal. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 11267-A

Addendum Issued: March 29, 2019

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁵ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁶

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Attorney devoted 47.75 hours to representing Grievant in this grievance. At the hourly rate of \$131, Grievant is entitled to be paid \$6,255.25 by the Agency.

AWARD

Grievant is awarded attorneys' fees in the amount of \$6,255.25.

⁵ Va. Code § 2.2-3005.1(A).

⁶ § 7.2(e) Department of Human Resource Management, *Grievance Procedure Manual*, effective August July 1, 2017. § VI(E) EEDR *Rules for Conducting Grievance Hearings*, effective July 1, 2017.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer