Issue: Group III Written Notice with Termination (inappropriate conduct);   Hearing Date: 02/10/15;   Decision Issued: 02/23/15;   Agency: VDOT;   AHO: Thomas P. Walk, Esq.;   Case No. 10514;   Outcome: Partial Relief;   Attorney's Fee Addendum issued 03/12/15 awarding $3,615.00.

VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: EDR CASE NO.: 10514

DECISION OF HEARING OFFICER

HEARING DATE: FEBRUARY 10, 2015
DECISION ISSUED: FEBRUARY 23, 2015

I. PROCEDURAL MATTERS

The grievant instituted this matter by filing her written grievance on November 24, 2014, challenging the issuance of a Group III Written Notice and her termination from employment with the agency. The Department of Human Resource Management, Office of Employment Dispute Resolution, appointed me as hearing officer on December 3, 2014. I contacted the grievant by telephone. She requested time to retain legal counsel prior to a prehearing conference. After I was notified of her having retained counsel, I conducted the prehearing conference by telephone on December 19. I scheduled the matter for hearing for February 10, 2015 without objection from the parties. I conducted the hearing on that date. The hearing lasted approximately 2 hours and 10 minutes.

II. APPEARANCES

The agency was represented by legal counsel. It presented two witnesses and eighteen exhibits.

The grievant was also represented by legal counsel. She testified as her only witness. She presented exhibits labeled A through M. All proffered exhibits by the parties were accepted

into evidence.

III. ISSUE

Whether the agency acted appropriately in issuing the Group III Written Notice and terminating the grievant from employment for violating Department of Human Resource Management Policies 2.05, 2.30, and “other” reasons?

IV. FINDINGS OF FACT

The subject agency has divided the Commonwealth of Virginia into numerous districts for administrative purposes. At all relevant times, the grievant served as the Human Resources Manager for one of these districts. The grievant reported directly to a Supervisor in the agency’s main office in Richmond. The district was overseen by a separate District Administrator who was based in the district. The agency maintained a separate office or division for purposes of receiving and investigating complaints from employees or customers regarding alleged civil rights violations.

On March 14, 2013 the grievant sent to the District Administrator an e-mail relating to a complaint filed by an employee in the district. The employee was a white female. The grievant asked why the employee had sent a copy of her complaint to the Civil Rights Office. The District Administrator responded that the employee had involved that office “because civil rights (name of prior head of the Civil Rights Office given but redacted herein) has ‘trained’ all minorities in the district that if anything happens to them it must be because they are being discriminated against.” On March 15, 2013 the grievant replied “agreed. We have to nip it don’t you agree?”

Around the time of this e-mail exchange a black male employee of the agency filed suit

in Federal Court against the agency, alleging various acts of discrimination. The former Civil Rights Manager who had investigated this man's claim had resigned from the agency, allegedly due to pressure being put on her to make certain findings regarding the man's claim. She also filed suit against the agency around the time of the e-mail exchange.

The e-mails came to light as a part of the discovery process in those civil suits. The Plaintiffs deposed the grievant on August 30, 2014. During her deposition she admitted to sending the e-mail and acknowledged that it was inappropriate. When the e-mail exchange came to light as a result of the deposition, the then manager of the Civil Rights Office promptly notified the Supervisor of the grievant. She commenced an independent investigation of the grievant. The investigation revealed no acts of discrimination or harassment by the grievant.

Each of the civil suits brought by the former employees was settled by the agency. The case involving the black male employee was settled on October 10, 2014. The *Roanoke Times* newspaper posted an article at its website on that same date describing the settlement. The story recited portions of the e-mail exchange between the grievant and the District Administrator. The appearance of the article raised further concerns with the top management of the agency.

On October 13 the agency suspended the grievant from her position and issued a due process memorandum to her. On November 3 the agency issued the grievant a Group III Written Notice for inappropriate conduct in violation of Department of Human Resource Management ("DHRM") Policies 2:05, 2:30, and Executive Orders No. 6 and No. 10. As part of the disciplinary action the agency terminated the grievant from employment.

At the time of the termination, the grievant had been serving as the Human Resource Manager for the district for approximately seven years. During her tenure she had received no other disciplinary actions of any level. Her performance reviews labeled her as a "contributor"

on a consistent basis.

V. DISCUSSION AND ANALYSIS

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a *Grievance Procedure Manual* (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving by a preponderance of the evidence that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards from the Department of Employment Dispute Resolution, *Rules for Conduction Grievances.* These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review the facts *de novo* and determine:

I. Whether the employee engaged in the behavior described in the Written Notice;

II. Whether the behavior constituted misconduct;

III. Whether the discipline was consistent with law and policy; and

IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

The grievant admits that she authored the e-mails in question. The agency has, therefore, met its burden of proof on this prong.

The grievant testified in her deposition that the e-mails sent by her were inappropriate.

This concession does not end the inquiries required of me. A review of the policies relied upon by the agency is required.

Policy 2.05 is labeled “Equal Employment Opportunity.” The purpose of the policy is to require that Human Resource Management be conducted without regard to certain enumerated factors such as race, sex, color, etc. The prohibition against discrimination is made applicable to “all aspects of the hiring process and employment practices.” The policy sets forth that Executive Order No. 6 issued by Governor Robert McDonnell on February 5, 2010 be implemented by an agency supervisor responsible for compliance with the policy and for the consistent application of the policy. Executive Order No. 6 is a policy statement issued by the Governor, reflecting the anti-discrimination mandates in state employment.

Although the agency cites both Executive Order No. 6 and Executive Order No. 1 issued by Governor Terrance R. McAuliffe on January 11, 2014, the later Executive Order expressly supersedes and rescinds Executive Order No. 6 as material here. It carries forward the policies expressed in the earlier order without material change. Because one argument of the agency here is that of a continuing duty of the grievant to report the e-mail exchange, I find that Executive Order No. 1 covers the acts or omissions of the grievant subsequent to January 11, 2014.

The agency did not prove how the e-mail exchange was an important piece of the Civil Rights lawsuits brought against the agency. The sole exception is the fact that the former Human Rights Director is one of the Plaintiffs. Despite this lack of a direct nexus, the agency has framed the acts and omissions of the grievant in the context of those suits and the ensuing publicity surrounding the settlement of the cases in which the e-mails came to light. The context is important but not dispositive. The agency presented insufficient evidence to establish that either of the suits was settled as a proximate result of the e-mail exchange coming to light. Had

evidence been presented that the direct actions of the grievant, or the District Administrator, were the causes of the suits (and subsequent settlements) and that the e-mail exchange was viewed as a "smoking gun", then I would be required to view the case differently.

The agency further presented as an exhibit a statistical analysis of the minority workforce in the district as compared to its other districts. The breakdown by race reflects that the subject district had a minority workforce much smaller (in terms of percentage) than almost every other district. I am not convinced that this breakdown should be given substantial weight. It fails to show other factors that could indicate a lack of discrimination taking place in employment by the agency. Those factors would include, but are not necessarily limited to, the percentage of minorities in the general population in the district, the comparative level of education or other training of minority applicants for employment, and the relative length of time of employment for minority and non-minority employees. To be clear, I am not saying that minority applicants for employment or promotion are in general less-qualified than non-minority employees. I am merely stating that such additional analysis would either support or refute the implication of discrimination.

The agency has attempted to establish that the e-mails show a predisposition by the grievant to violate Policy 2.05. The written notice alleges "a profound lack of leadership … a total disregard of the rights of employees, and the intent to retaliate against employees raising claims of discrimination." She is also accused of undermining the stated commitment of the agency to Policy 2.05.

Policy 1.60 of DHRM (the "Standards of Conduct") describes Group III offense as "acts of misconduct of a most serious nature that severely impact agency operations." A Group II offense is defined as an act "of misconduct of a more serious nature that significantly impact

agency operations." The Standards of Conduct give an example of a Group II offense as being failure to follow written policy. I cannot find that the actions of the grievant qualify as either of these levels of offenses. The issuance of the Group III Written Notice to the grievant and termination of her employment is inconsistent with law and policy.

No evidence has been presented showing that any specific employee or group of employees was affected by the e-mail exchange. I view the comments by the grievant in the context of her perception that employees had been trained that a claim of discrimination should be raised to buttress any alleged workplace wrong. Without finding that such training actually occurred, it is understandable that the grievant and the District Administrator might have been frustrated by such. Legitimate claims of discrimination are not to be ignored or downplayed. No evidence exists that such occurred with the grievant or the administrator.

I analogize this situation to a criminal law conspiracy. Although no overt act by the grievant has been proven to support a claim of discrimination against any specific employee, no such act is required under these circumstances to support the issuance of some discipline against a state employee, even in the absence of proven harm. A public employee may be disciplined for otherwise protected speech if it is likely to be disruptive of agency operations. *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed. 686 (1994).

The Standards of Conduct define a Group I offense is one that has "a relatively minor impact on agency business operations but still require management intervention." The agency has failed to show that the disruption of agency operations was either severe or significant. The proven impact consisted of the events being investigated and some unfavorable publicity generated by the settlements in the civil cases. I find this impact is consistent with a Group I offense.

The agency has further alleged a violation of the DHRM Policy 2.30. That policy prohibits workplace harassment. That term is defined as "any unwelcome verbal, written or physical conduct that either denigrates or shows hostility 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 an employees work performance; or (3) affects an employee's employment opportunities or compensation. I do not find that the grievant violated this policy. Her statement reflects a desire to eliminate spurious claims of discrimination. Furthermore, I do not find that it meets any of the three possible prongs of the definition.

The grievant has argued that 598 days passed from the e-mail until the time of the issuance of the discipline. My decision is not based on this delay. A Ruling from the DHRM in Case No. 9916 allows a hearing officer to mitigate the level of discipline when there is an unreasonable delay in the issuance of the written notice. A good example of such a remedy being granted is further found in the decision of the hearing officer in Case No. 9123. Here, I see no evidence that the grievant was prejudiced in her ability to defend this action because of the delay. In fact, the delay in the e-mails coming to light benefitted the grievant by giving her the opportunity to argue that no subsequent acts of discrimination or retaliation occurred in interim.

The agency has further argued that the failure by the grievant to report the statement of the District Administrator in the e-mail exchange is grounds for discipline. That failure to report can, and should be, viewed as a continuing offense. Viewed in that light, any delay becomes immaterial. The failure to report cannot support the issuance of discipline by this agency. It

has not cited any specific policy requiring the reporting of another for violating Policy 2.05. For the reasons stated above, I do not find that the District Administrator violated Policy 2.30. Therefore, the grievant had no information she was required to report. With regard to Policy 2.05, I note that she could not have reported his statement without incriminating herself (after she agreed with his sentiment). Such has not been shown to be required.

Finally, I find no evidence has been presented to support a further mitigation of the discipline given to the grievant.

VI. DECISION

For the reasons stated above, I hereby rescind the Group III Written Notice and reduce it to a Group I offense. The agency shall restore the grievant to her employment with the agency in the position she last held, or an equivalent position if such is not available. Full back pay shall be awarded. She shall be restored to full benefits and seniority. The attorney for the grievant may file a request for attorney's fees within 15 calendar days of this decision.

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 to EDR.

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.

ENTERED this February 23, 2015.

/s/Thomas P. Walk_______________
Thomas P. Walk, Hearing Officer