Issue: Group I Written Notice (obscene language); Hearing Date: 07/17/13; Decision Issued: 08/02/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10128; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 08/16/13; EDR Ruling No. 2014-3694 issued 09/17/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 08/16/13; DHRM Ruling issued 09/20/13; Outcome: Declined to review.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10128

Hearing Date: July 17, 2013
Decision Issued: August 2, 2013

PROCEDURAL HISTORY

On January 16, 2013, Grievant was issued a Group I Written Notice of disciplinary action for using obscene language towards another corrections officer and disruptive behavior.

On February 12, 2013, 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 June 20, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 17, 2013, 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?

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 employs Grievant as a Corrections Officer at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On December 13, 2012, Grievant was tired from standing for several hours and wanted to switch posts with Officer M. Officer M was working at the front entry search area of the Building[1] but was scheduled to begin working on the roving patrol post. Grievant entered the building from the outside and approached Officer M. Grievant asked Officer M if she would do Grievant a favor by switching posts with Grievant. Grievant explained that her back was hurting and she really wanted Officer M to do a favor for Grievant by switching posts. Officer M said she thought they should adhere to the normal schedule rotation.[2] Grievant became frustrated, said "whatever!" and walked down a hallway. Officer M continued to work the front entry search post. Grievant returned to Officer M's location and said "F—k it!" Grievant was angry and her voice was raised when she spoke to Officer M. Officer M said, "You don't have to curse me just because I can't do you a favor." Grievant said, "I'm not cursing you, just cursing."

[1] The front entry search area was an area open to the public. Volunteers and other members of the public often entered that part of the Building.

[2] Officer M did not have the authority to grant Grievant's request. Post assignments including changes could only be made by a higher ranking officer.

Officer M said, "I understand you're exhausted, we both are." Grievant said, "Just go, just go, just go." Grievant assumed the front entry search post and Officer M went to the roving patrol post.

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."[3] 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."[4] Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."[5]

"Use of obscene or abusive language" is a Group I offense. Webster's New Universal Unabridged Dictionary defines "obscene" to include "offensive to morality or decency; indecent; depraved; *obscene language.*" "Abusive" is defined to include, "using, containing, or characterized by harshly or coarsely insulting language; *an abusive author; abusive remarks.*" Disruptive behavior is a Group I offense.[6]

On December 13, 2012, Grievant said "f—k" while attempting to persuade Officer M to change post assignments. Officer M lacked the authority to grant the request which should have been directed to a higher ranking employee such as the Watch Commander. Grievant used obscene language. Her behavior was disruptive because she upset Officer M and attempted to circumvent the Agency's protocol that post assignments were to be made by a higher ranking employee such as a Watch Commander. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant claimed she said "frickin" instead of "f—k". The Agency presented credible evidence from several witnesses who heard Grievant say "f—k". The Agency presented sufficient evidence to show that Grievant used obscene language.

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

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

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

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

[6] Operating Procedure 135.1 (V)(B)(2)(c) and (e).

[7] Va. Code § 2.2-3005.

officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant asserted that other employees had made offensive statements without being disciplined. No credible evidence was presented to support this allegation. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[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 claimed that the Warden retaliated against her by issuing her a Group I Written Notice.

Grievant had applied for a position as a Counselor at Facility B. Warden J had selected her for the position but she had not yet assumed the position. She was scheduled to begin working as a Counselor at Facility B on January 10, 2013.

On December 14, 2012, the Warden called Warden J at Facility B and said that he had some issues with Grievant but that he had not finished his review. The Warden said he would let Warden J know if he issued a Written Notice. The Warden explained

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[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).

that he called Warden J as a "professional courtesy." Warden J sent Grievant a letter dated December 14, 2012 informing her that Facility B was withdrawing its offer of employment for the Counselor position.[10] On January 3, 2013, Grievant filed a grievance challenging the withdrawal of the employment offer "based on false allegation."[11] The Warden learned that Grievant had filed a grievance challenging the employment offer. On January 16, 2013, the Warden issued the Group I Written Notice to Grievant.

The Warden testified that he might have lowered the offense to a counseling instead of issuing a Group I Written Notice had Grievant been truthful about what she said. It is clear that the Warden was angry with Grievant for using profanity on December 13, 2012, but it is not clear whether he was also angry that Grievant had filed a grievance disputing the actions of another warden or that he would have acted differently had she not filed a grievance.

Grievant engaged in a protected activity when she filed a grievance on January 3, 2013. Grievant suffered an adverse employment action because she received a Group I Written Notice. Grievant has not established a nexus between her protected activity and the adverse employment action. Grievant has not presented sufficient evidence to support conclusion that the Warden issued her a Group I Written Notice as retaliation for filing a grievance or that the disciplinary action was a pretext for retaliation.

DECISION

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

[10] Whether it was appropriate under policy for Warden J to withdraw the offer of employment is not an issue before the Hearing Officer.

[11] Grievant's Exhibit 2.

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.[12]

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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