Issues: Group II Written Notice (workplace violence, workplace harassment, failure to follow policy), and Group III Written Notice with Termination (unsatisfactory performance, violation of EEO policy, workplace harassment, disruptive behavior); Hearing Date: 10/23/14; Decision Issued: 11/07/14; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10463, 10464; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 11/21/14; EDR Ruling No. 2015-4055 issued 12/22/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 11/20/14; DHRM Ruling issued 01/06/15; 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: 10463, 10464

Hearing Date: October 23, 2014
Decision Issued: November 7, 2014

PROCEDURAL HISTORY

On June 27, 2014, Grievant was issued a Group II Written Notice of disciplinary action for workplace violence, workplace harassment, and failure to follow policy. On August 25, 2014, Grievant was issued a Group III Written Notice with removal for unsatisfactory work performance, violation of equal employment opportunity policy, workplace harassment, and disruptive behavior.

On July 27, 2014, Grievant timely filed a grievance to challenge the Agency's Group II Written Notice. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 28, 2014, Grievant timely filed a grievance to challenge the Agency's Group III Written Notice. On September 12, 2014, the Office of Employment Dispute Resolution issued Ruling No. 2015-3994, 2015-3995 consolidating the two grievances for a single hearing. On September 22, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 23, 2014, 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 Notices?

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 Virginia Department of Transportation employed Grievant as a Transportation Operations Manager II, Superintendent, at one of its residencies. He had been employed by the Agency for approximately 16 years. No evidence of prior active disciplinary action was introduced during the hearing.

Mr. T worked as one of two superintendents reporting to Grievant. Mr. T sought employment at another of the Agency's facilities. He received an offer of employment subject to a reference check. Grievant and Grievant's supervisor, Mr. C, gave references for Mr. T. Grievant's reference was "glowing". Grievant told the HR Manager that Mr. T had received an offer of employment at another facility. She was unaware of the offer. She contacted Ms. B at the other location and learned of the offer. The HR Manager said she was surprised at the references given for Mr. T because Mr. T had received disciplinary action and had been counseled several times by Grievant. The offer of employment made to Mr. T was retracted because of the discrepancies

between Mr. T's application and his reference checks. This angered Mr. T[1] so he went to the HR Manager and began complaining about Grievant's use of the word ni--er.

Mr. S reported to Grievant for five months. On one occasion in the Fall of 2013, Mr. S, Grievant and Mr. T were at a work site and observed bi-racial children playing in a yard at a house. Later in the day, Mr. S questioned why children would be out playing on a school day. Grievant said that the children were Mr. Co's "ni—er grandkids." Mr. Co was also an employee in Grievant's chain of command. Mr. S was shocked and upset by Grievant's statement although he took no action to report the incident.

In April 2014, a basketball team owner made racially offensive comments that became public. Stories about his comments appeared on television.

Mr. L began reporting to Grievant on April 10, 2014. He replaced Mr. S. Grievant, Mr. L, and several employees were gathered near a television in the office. A news reporter began discussing the basketball team owner's comments. Mr. L was not familiar with the incident and said, "I don't know what that fellow done, but he is on TV a lot." Grievant replied that the basketball team owner "did not want his girlfriend associating with ni—ers." Mr. L leaned forward and said, "Excuse me?" Grievant said, "he did not want his girlfriend hanging around ni—ers." Mr. L was surprised at Grievant's comment and sat back in his chair. A picture of a famous basketball player appeared on the television and Grievant commented that the basketball player did "not want his girlfriend hanging around with that ni—er right there." Mr. L was offended by Grievant's use of racially offensive language.

The Agency decided to remove Mr. T from Grievant's residency sometime after Mr. T complained to the HR Manager and before June 18, 2014.

On June 17, 2014, the Residency Administrator met with Grievant to present him with the due process allegation letter. The letter expressed the Agency's allegations against Grievant and afforded him the opportunity to respond prior to the Agency's decision whether to issue disciplinary action. The Residency Administrator discussed the letter with Grievant. The Residency Administrator discussed the allegations about Grievant's use of "ni—er", his denial of equal opportunities, and failure to report damage to equipment. Grievant asked if he could tell his employees about the letter and ask if they had ever heard him use the offensive words. The Residency Administrator told Grievant that was not a good idea and that the Residency Administrator did not think Grievant should do so.

On June 18, 2014, Grievant assembled his subordinate employees. He said he had something to announce. Grievant's demeanor showed that he was upset. Grievant told his employees that apparently he had offended someone when he made comments about a basketball team owner and ni—er basketball players. Grievant said he was in

[1] Mr. T left the Agency on October 17, 2014 for reasons unrelated to his work performance for the Agency. He did not testify during the hearing.

trouble for inconsistently calling people to work overtime and hiding damage to vehicles. He asked if anyone had heard him say "ni—er" or say anything about Mr. Co's 'ni—er grandchildren." Grievant stated that if employees wanted to write letters to support him he would be glad to take them. Grievant said he had spoken with a lawyer and the lawyer said "how many people do you want me to embarrass." Mr. L interpreted Grievant's description of the lawyer's comments as a threat against employees saying something Grievant did not wish to hear. Grievant said that whatever they did they should tell the truth.

When planning work for employees in the residency, Grievant relied on his two supervisors to assign work duties. Some employees would receive more overtime based on a supervisor's preference that would often include the employee's proximity to the work site.

When equipment was broken, Grievant would sometimes have his employees fix the equipment. Mr. L observed a piece of maintenance equipment with a damaged grill and hood. Tree bark was stuck to the grill and the grill was caved in. Later on, Mr. L observed the equipment again and the grill had been straightened and the repairs painted. He did not know if an accident report had been written.

Grievant was placed on administrative leave effective July 10, 2014.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[2] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Group II Written Notice

DHRM Policy 2.30 governs Workplace Harassment. Prohibited conduct under this policy includes harassment of any employee on the basis of an individual's race. 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, 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

[2] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

> 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

On at least two occasions, Grievant described other people as "ni—ers" in a manner to denigrate and show aversion towards those individuals because they were African Americans. His comments were unwelcome by the employees hearing them. They were surprised and offended by Grievant's racial slurs. Grievant created an offensive work environment for those employees.

DHRM Policy 2.30 provides that, "[a]ny employee who engaged in conduct determined to be harassment … shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct." The Agency elected to issue Grievant a Group II Written Notice. The Agency's issuance to Grievant of a Group II Written Notice is upheld.

Grievant denied using racially offensive language. The Agency, however, has presented sufficient evidence to show that Grievant said "ni—er" on at least two occasions. The testimony of Mr. S and Mr. L was credible. Grievant was unable to present any credible basis to show that either men had a reason to lie about Grievant's actions.

The Agency argued that Grievant's management style was unprofessional and that he favored some employees over others. The Agency asserted that Grievant cause the workload to be unevenly distributed. The Agency claimed equipment accidents were not being reported in accordance with district guidelines. Insufficient evidence was presented to support these allegations. Most of the Agency's evidence involved generalizations and opinions based on preference rather than detailed examples of inappropriate behavior. Many assignments were given by Grievant's two subordinates and not by Grievant. The Agency failed to identify specific provisions of its policies that it believed Grievant violated.

Group III Written Notice

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

The Agency asserted that Grievant should receive a Group III Written Notice for his actions on June 18, 2014. The Agency has presented a sufficient basis to support the issuance of disciplinary action but the offense level does not rise higher than a Group II Written Notice.

On June 17, 2014, Grievant asked the Residency Administrator if he could speak with his employees regarding the allegations against him. The Residency Administrator told Grievant that doing so was not a good idea. Upon receiving this warning, Grievant should have recognized that speaking with his employee would place him at risk of disciplinary action. Grievant disregarded the Residency Administrator's warning thereby justifying the Agency's decision to take disciplinary action.

The question becomes what level of disciplinary action is appropriate. Grievant communicated his displeasure with the Agency's allegations and expressed his intent to challenge the allegations. He instructed his employees to tell the truth. By combining his expression of contempt for the Agency's allegations, disclosing those allegations verbatim, and expressing his desire that employees tell the truth, Grievant placed himself at risk of being perceived as instructing his subordinates to tell the "truth" as Grievant wanted it to be told. Furthermore, Grievant solicited letters of support from his subordinates. This placed his subordinates in the position of identifying themselves as being loyal or not loyal to Grievant. Grievant held a position of power over his subordinates. If an employee failed to provide Grievant with a letter of support, the employee may consider himself at risk of being viewed with suspicion by Grievant. Grievant placed himself in the position of identifying those employees who were his supporters and those who might be complaining about him.[3] At least one employee in the group, Mr. L, interpreted Grievant's comments as threatening employees about saying anything Grievant did not wish to hear. When the facts of Grievant's behavior on June 18, 2014 are considered as a whole, Grievant's behavior justifies the issuance of a Group II Written Notice.

Grievant argued that he had the right to question employees about the allegations made against him to help him prepare to fight the charges against him. Grievant's argument fails for several reasons. First, nothing in the grievance procedure or State policy authorizes an employee to conduct an independent investigation involving his subordinates to elicit evidence to support his position in a grievance. Second, to the extent Grievant had the right to question his co-workers, it would have been as part of the Step Process of the grievance procedure. On June 18, 2014, Grievant had not filed a grievance to challenge the Agency's action and no due process Step Hearing had been scheduled. Third, Grievant did not speak with employees on an individual basis, he spoke to them as a group. If Grievant's motive was to obtain evidence to support his case, he would have conducted his investigation the same way the Agency did, namely, by asking individuals separately and privately. Grievant's actions gave the appearance of influencing the opinions of his staff rather than conducting an investigation.

[3] Although Grievant knew that Mr. T had been reassigned to another location, there remained employees who had overheard his offensive racial comments and might be witnesses to his alleged favoritism and failure to repair equipment.

Upon the issuance of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove him from employment.

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 …."[4] 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice is **reduced** to a Group II Written Notice. The Agency's decision to remove Grievant from employment is **upheld** based on the accumulation of disciplinary action.

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

[4] Va. Code § 2.2-3005.

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.[5]

[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

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