

Issue: Group I Written Notice (workplace harassment); Hearing Date: 10/24/14; Decision Issued: 11/03/14; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 10469; Outcome: No Relief - Agency Upheld.

**COMMONWEALTH OF VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

In the matter of: Case No. 10469

Hearing Officer Appointment: October 7, 2014

Hearing Date: October 24, 2014

Decision Issued: November 3, 2014

PROCEDURAL HISTORY, ISSUES  
AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge the issuance of a Group I Written Notice issued June 24, 2014 by Management of the Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A filed July 21, 2014.

The parties participated in a first pre-hearing conference call scheduled by the hearing officer on October 9, 2014 at 10:00 a.m. The Grievant confirmed he is seeking the relief requested in his Form A including rescission of the Group I Written Notice.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on October 9, 2014 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented himself and the Agency was represented by its attorney. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing<sup>1</sup>. The hearing officer used his own recording equipment and tapes.

No open issues concerning production of documents or non-attendance of witnesses remained by the conclusion of the hearing.

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<sup>1</sup> References to the agency's exhibits will be designated AE followed by the exhibit number. The Grievant did not offer any exhibits.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

### APPEARANCES

Representative for Agency  
Grievant  
Witnesses

### FINDINGS OF FACT

1. The Grievant is employed as a Lieutenant by the Agency at a correctional facility (the "Facility") which incarcerates approximately 488 offenders.
2. Security and safety at the Facility of staff, offenders and the public are paramount. To promote the smooth and efficient functioning of the Facility, the Agency has a policy against workplace harassment. AE 1 at 17.
3. At the time relevant to this proceeding, the Grievant supervised a female Corrections Officer (the "C/O") who worked mainly in the Master Control office.
4. From January to April 2006, while supervised by the Grievant, the C/O worked in Master Control approximately 60% of her time. After the March 3, 2014 incident discussed below, the Grievant completely stopped assigning the C/O to Master Control when he prepared the duty rosters for the subordinate correctional officers under his supervision.
5. While at first the Grievant and the C/O maintained a good working relationship, things began to deteriorate as the Grievant began to show an interest in trying to get the C/O to go out with him.
6. The Grievant admits that he invited the C/O to his parents' club and admits that he made a statement to the following effect to the C/O:

"...I made the statement to you that I won't give you \$300.00 to be with you - I said now you - if you was 21/22 years old maybe I would give money to someone for that purpose - but I said you getting old now - that I said no I would not do it..."

Tape recording at approximately 32 minutes.

7. On March 3, 2014, while the C/O was working her Master Control post, the Grievant said that the C/O needed a beating and the conversation further deteriorated with the Grievant calling the C/O words to the effect of a "trifling ass hateful bitch." The C/O responded that the Grievant was a "trifling motherfucker." AE 3.
8. After this incident and as the working relationship between the two deteriorated, an investigation was conducted by the Agency which found that the Grievant's actions constituted workplace harassment. AE 6. The investigation was thorough and professional and the findings were reasonably and methodically made.
9. The Facility's Chief of Security clearly instructed all lieutenants under his supervision, including the Grievant, that when they prepared the rotations for the duty rosters, the lieutenants were not to change the post assignments of the individuals who worked in Master Control, the sallyport or the basement.
10. Despite this clear command, to retaliate against the C/O, the Grievant completely stopped assigning the C/O to Master Control after the March 3, 2014 incident. The Grievant did not change the assignments of any persons assigned to the sallyport or to the basement.
11. The Grievant admits that he curses while working at the Facility but excuses this by asserting that everyone does. The Grievant admits that he has no idea why the C/O would want to set him up.
12. The testimony of the Agency witnesses was credible and convincing. The demeanor of the Agency witnesses was open, frank and forthright.

#### APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code § 2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

*Va. Code § 2.2-3000(A)* sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the Agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Operating Procedure 135.1 ("Policy No. 135.1"). AE 1. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

Pursuant to Policy No. 135.1, the Grievant's conduct could clearly constitute a Group I offense, as asserted by the Agency. AE 1 at 8.

Agency Policy 2.30 prohibits two types of workplace harassment conduct as follows:

A. **Prohibited Conduct**

1. **Harassment**

The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of any individual's race, sex, color, national origin, religion, *sexual orientation*, *gender identity*, age, veteran status, political affiliation, *genetics*, or disability. *Policy amended January 11, 2014 per Executive Order Number 1 (2014) Equal Opportunity.*

## 2. Retaliation

The Commonwealth will not tolerate any form of retaliation directed against an employee or third party who either complains about harassment or who participates in any investigation concerning harassment.

AE 1 at 18.

The Grievant's comments to the C/O on March 3, 2014, clearly denigrated the C/O on the basis of sex and/or gender within the meaning of the definition:

### Workplace Harassment

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 an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

*Policy amended January 11, 2014 per Executive Order Number 1 (2014) Equal Opportunity.*

AE 1 at 20.

Similarly, the Grievant violated the policy by retaliating against the C/O after the March 3, 2014 incident, as per the finding in paragraph 10 above.

In this case, the Agency appropriately determined that the Grievant's violations of Agency policies concerning workplace harassment constituted a Group I offense.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's attorney that the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a Group I offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work

performance.” . . . . 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. *Rules* § VI(B).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant.

The hearing officer considered a number of mitigating factors including those specifically referenced herein, in the Written Notice, in the Form A and all of those listed below in his analysis:

1. the Grievant’s long, good service to the Agency of approximately 23 years;
2. the often difficult and stressful circumstances of the Grievant’s work environment; and
3. the lack of prior formal discipline.

EDR has previously ruled that it will be an extraordinary case in which an employee’s length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee’s length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee’s service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

The workplace harassment at issue in this case was serious. The hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth’s employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government

and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

Additionally, because the Grievant is a Lieutenant, as a superior officer and supervisor, he is held to a higher standard. *See*, EDR Case No. 9872.

The hearing officer decides for the offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

### DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

### APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

- 1. A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.



2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

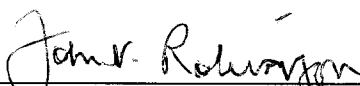
A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 11 / 03 / 14

  
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John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).