Issue: Administrative Review of Hearing Officer's Decision in Case No. 9651; Ruling Date: December 19, 2011; Ruling No. 2012-3126; Agency: Department of Corrections; Outcome: Remanded to AHO.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2012-3126
December 19, 2011

The agency has requested that this Department administratively review the hearing officer's decision in Case Number 9651. For the reasons set forth below, the decision is remanded to the hearing officer for reconsideration consistent with this ruling.

FACTS

The pertinent facts and holdings of this case, as set forth in the hearing decision in Case No. 9651, are as follows:

> Grievant is a corrections officer for the Department of Corrections ("the Agency"), with 9 years of service. On January 10, 2011, the Grievant was charged with a Group III Written Notice for violation of Agency Policy 2.30, Workplace Harassment. The associated discipline was suspension for 24 hours. The Grievant had no other active Written Notices.
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> Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and she requested a hearing. On July 18, 2011, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. From efforts to conduct a pre-hearing conference, the hearing ultimately was scheduled for the first date available between the parties and the hearing officer, August 31, 2011. However, the Grievant retained an advocate who could not attend the hearing on August 31, 2011, and it was rescheduled, by agreement, to September 19, 2011, on which date the grievance hearing was held, at the Agency's facility. For these reasons, the prescribed time for completing the grievance was extended for good cause.

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The Agency's Standards of Conduct, Operating Procedure 135.1, defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 6. An example of a Group III offense is violation of DHRM Policy 2.30, Workplace Harassment, but depending on the nature of the violation. Examples of Group I and Group II offenses also include violation of Policy 2.30, depending on the nature of the violation.

The Agency's Policy 2.30, Workplace Harassment, 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, age, veteran status, political affiliation, 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.

The policy also provides that Agency managers

- stop any workplace harassment of which they are aware, whether or not a complaint has been made;
- express strong disapproval of all forms of workplace harassment;
- intervene when they observe any acts that may be considered workplace harassment;
- take immediate action to prevent retaliation towards the complaining party or any participant in an investigation; and
- take immediate action to eliminate any hostile work environment where there has been a complaint of workplace harassment.

* * *

The Agency employed Grievant as a corrections officer, with 9 years of service. The Grievant has no other active disciplinary actions, with a performance review history establishing an exceeds contributor rating. Agency Exh. 4. The Written Notice charged violation of DHRM Policy 2.30, Workplace Harassment, and described events that took place on December 12, 2010. The Written Notice recounted the Grievant's dissatisfaction with a post reassignment and her derogatory comments made to her lieutenant about the warden and assistant warden, stating, "I can't stand them motherfucking crackers, they don't like me and I don't like them either."

At hearing, the lieutenant testified that he considered the Grievant's comments to be racially offensive, and he described them as part of the Grievant's venting over a post reassignment with which she was dissatisfied. Other employees in the area, while aware of the Grievant's dissatisfaction over the post assignment, did not overhear the inflammatory and racial comments. The lieutenant testified specifically and unequivocally about the Grievant's utterance. Among the grievance materials and prior grievance steps, the Grievant did not express denial of her statements as charged.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. 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 (4th Cir. 1988).

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

As referenced above, the offense under Policy 2.30 can be classified as either Group I, II or III. The Agency, however, has the burden of proving the appropriate level of offense. The discipline was based on the unequivocal evidence from the lieutenant of the Grievant's spoken rant. The lieutenant testified that the Grievant never denied she made the comments. The Grievant, during her grievance hearing testimony, denied she actually made the racially

vulgar comments about the warden and assistant warden. Because the evidence preponderates in establishing that the Grievant, heretofore, had not expressly denied the statements, I find the lieutenant's testimony more persuasive and find that the Grievant made the comments as charged.

It is reasonable for the Agency to discipline an employee who makes racially biased, vulgar and offensive statements. I find that the statements at issue here are intended to be covered and prohibited by the workplace harassment policy forbiding such verbal conduct that either denigrates or shows hostility or aversion towards a person based on race, with the purpose of creating an intimidating, hostile or offensive work environment. It matters not that neither the warden nor the assistant warden heard the comments directly. By uttering such expletives to the lieutenant, the Grievant invoked the lieutenant's responsibilities under Policy 2.30 to respond to the harassing remarks.

I find that the Agency has borne its burden of proving the misconduct under Policy 2.30. The next issue is the level of discipline. Violation of Policy 2.30 can be anywhere along the continuum of discipline, and the Agency has the burden of proving the offense rose to the level of a Group III. Group I offenses include use of obscene or abusive language, disruptive behavior, and unsatisfactory work performance. Group II offenses include violating safety rules, misuse of state property, and failure to follow supervisor's instructions.

The Agency has presented insufficient evidence to support the issuance of the highest level of misconduct, a Group III Written Notice. The evidence shows that the Grievant was guilty of a solitary act of misconduct that is not shown to be of the most severe nature of potential workplace harassment. Accordingly, the disciplinary action must be reduced. In viewing similar levels of misconduct, I find that this offense is on par in severity with the Group I offenses such as disruptive behavior or using obscene or abusive language. Given the relatively limited publication of the offensive remarks, the context of the expression coming in a moment of venting, and the apparent solitary instance of the conduct, I find that the appropriate level of discipline is a Group I Written Notice.[1]

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions … on all matters related to procedural compliance with the grievance procedure."[2] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

[1] Decision of the Hearing Officer in Case No. 9651, issued September 21, 2011 ("Hearing Decision") at 1-4.
[2] Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.[3]

The agency asserts that the hearing officer erred by reducing the Group III to a Group I. The hearing officer determined that the agency "has presented insufficient evidence to support the issuance of the highest level of misconduct, a Group III Written Notice."[4] He found that "evidence shows that the Grievant was guilty of a solitary act of misconduct that is not shown to be of the most severe nature of potential workplace harassment."[5] He went on to conclude that:

> In viewing similar levels of misconduct, I find that this offense is on par in severity with the Group I offenses such as disruptive behavior or using obscene or abusive language. Given the relatively limited publication of the offensive remarks, the context of the expression coming in a moment of venting, and the apparent solitary instance of the conduct, I find that the appropriate level of discipline is a Group I Written Notice.[6]

From the foregoing, it appears as though the hearing officer reduced the level of discipline on the basis that he believed that the established misconduct was more appropriately identified as a Group I offense as opposed as a Group II or Group III. The *Rules for Conducting Grievance Hearings ("Rules")* provide that "a hearing officer is not a 'super-personnel officer'" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[7] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice,
> (ii) the behavior constituted misconduct, and
> (iii) the agency's discipline was consistent with law and policy,
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> the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[8]

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[3] *See Grievance Procedure Manual* § 6.4(3).
[4] Hearing Decision at 4.
[5] *Id.*
[6] *Id.*
[7] *Rules at* VI(A).
[8] *Rules at* VI(B). The Merit Systems Protection Board's ("Board's") approach to mitigation, while not binding on this Department, can be persuasive and instructive, serving as a useful model for EDR hearing officers. For example, under Board law, which also incorporates the "limits of reasonableness" standard, the Board must give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

In this case, it appears as though the hearing officer may have reduced the discipline at the third step of the analysis: "the agency's discipline was consistent with law and policy." Whether a particular act of misconduct is appropriately viewed as a Group I, II or III is a policy call, and the Department of Human Resource Management ("DHRM") Director has sole authority to make a final determination on whether the decision comports with policy.[9] Accordingly, the agency may, within **15 calendar days** of the date of this ruling, request administrative review from "Sara Wilson, Director of the Department of Human Resource Management" at: 101 North 14th St., 12th Floor, Richmond, VA 23219.

We note that the decision was not entirely clear as to whether the hearing officer had considered potential mitigating circumstances. It may be that he viewed the factors used to reclassify the Group III as a Group I—the relatively limited publication of the offensive remarks, the context of the expression coming in a moment of venting, and the apparent solitary instance of the conduct—as mitigating circumstances. Assuming that these factors were viewed as mitigating circumstances, this Department cannot agree that they would be sufficient to justify a reduction from a Group III to a Group I.

Reduction of discipline via mitigation can only occur where the discipline exceeds the limits of reasonableness. The steep reduction in the level of discipline in this case does not meet that mitigation standard. Noting that it is a paramilitary agency, the agency reasonably contends that respect for the chain of command is a paramount concern. Furthermore, uttering a racial slur can reasonably be viewed as a far more serious offense than the mere use of obscene language. While the latter, depending on the particular obscenity and context can be quite inflammatory, few, if any forms of speech have a more incendiary effect than racial slurs. Moreover, while a single utterance of a racial slur may not be sufficient to establish liability in a race discrimination claim, a single utterance of a racial epithet in a workplace, particularly the sort in which the grievant works, can be extremely disruptive, extraordinarily inflammatory, and has the potential to incite.

Accordingly, the hearing officer must reconsider his decision in light of this ruling. The hearing officer may refrain from issuing his reconsidered decision for at least 15 days to see if

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it amounts to an abuse of discretion." Parker v. U.S. Postal Service, 819 F.2d 1113, 1116 (Fed. Cir. 1987). *See also* Lachance v. Devall, 178 F.3d 1246, 1258 (Fed. Cir. 1999) (the Board may reject those penalties it finds abusive, but may not infringe on the agency's exclusive domain as workforce manager). This is because the agency has primary discretion in maintaining employee discipline and efficiency. Stuhlmacher v. U.S. Postal Service, 89 M.S.P.R. 272, 279 (2001). The Board will not displace management's responsibility in this respect but instead will ensure that managerial judgment has been properly exercised. *Id. See also* Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987)(the Court "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors").

[9] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653; 378 S.E.2d 834 (1989).

the agency appeals to DHRM. If the agency appeals to DHRM, the hearing officer may issue a single decision in response to this Ruling and any remand instruction, if any, by DHRM.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[10] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[11] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[12]

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Claudia T. Farr
Director

[10] *Grievance Procedure Manual* § 7.2(d).
[11] Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).
[12] *Id.; see also* Virginia Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).