



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8116-R3

Reconsideration Decision Issued: May 25, 2006

RECONSIDERATION HISTORY

On November 22, 2005, the EDR Director issued Ruling Nos. 2006-1099 and 2006-1104 instructing the Hearing Officer to reconsider the original hearing decision. The Hearing Officer asked the parties if either wished to present additional testimony and Grievant requested the opportunity to do so. The Agency objected to this procedure. On December 20, 2005, the EDR Director issued Ruling No. 2006-1202 stating that the Hearing Officer did not abuse his discretion by permitting the parties to present additional evidence previously excluded. After initially scheduling a hearing for January 2006, the matter was re-scheduled for March 2006. The Hearing Officer granted the Grievant an opportunity to present evidence during an additional day of hearing. The Hearing Officer also granted the Agency a full day of hearing to present additional evidence. In order to write this Reconsideration Decision, the Hearing Officer considered the testimony presented during all three days of the hearing. The Hearing Officer considered the several hundred, possibly thousands, of pages of documents submitted by the parties. The Hearing Officer reviewed the video tapes, photographs, etc. presented by the parties. The Hearing Office believes the record as presented represents a full and complete representation of all relevant evidence for this dispute.

RECONSIDERATON FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Old Dominion University employed Grievant as a Law Enforcement Officer II within its Police Department until his removal effective March 22, 2005.¹ The chief

¹ Grievant is white.

objective of his position was to, “[p]atrol jurisdiction to prevent, detect and investigate criminal acts; to enforce Federal, State Law and University regulations; to protect the lives and property of its citizens.”² On May 20, 2004, Grievant was issued a Group II Written Notice for failure to comply with established written policy and procedures.³

Grievant reported to Sergeant B.⁴ Sergeant B reported to Lieutenant M⁵ who headed the patrol division of the Police Department.

Detective B⁶ reported to Sergeant R. Sergeant R reported to Lieutenant D⁷ who headed the detective division of the Police Department.⁸

Dispatcher B⁹ reported to Sergeant C who headed the training division of the Police Department. Dispatcher B is the aunt of Sergeant B. Dispatcher B believed the Police Department had discriminated against her based on her race. She told Sergeant B about what she perceived as discrimination. Dispatcher B told Sergeant B that Dispatcher B was in the process of filing an Equal Employment Opportunity claim alleging racial discrimination.¹⁰

² Agency Exhibit 2.

³ Agency Exhibit 14. Grievant challenged the disciplinary action. A Hearing Officer upheld the Agency’s issuance of the Group II Written Notice. See, Agency Exhibit 15.

⁴ Sergeant B is white.

⁵ Lieutenant M is an African American.

⁶ Portions of Detective B’s testimony were credible. Several significant parts of his testimony were not credible. In particular, Detective B was untruthful regarding the reason why he was watching Sergeant B and inaccurately reported several key details of his conversation with Sergeant B. Lieutenant M did not realize Detective B was not accurately reporting the details of his conversation with Sergeant B. When determining Lieutenant M’s state of mind at the time he told Sergeant B she would be fired, it is necessary to determine only what Lieutenant M believed rather than what Sergeant B actually said to Detective B.

⁷ Lieutenant D was not involved in issuing the disciplinary action against Grievant.

⁸ Detective B and Lieutenant D are African Americans.

⁹ Dispatcher B is white.

¹⁰ Dispatcher B believed she was being discriminated against because of her race. The evidence showed, however, that when given the opportunity to complain to senior managers about the discrimination, Dispatcher B did not express her concerns. For example, she told the Assistant Director of EEO that she was working in a hostile environment, not because of race but because of the type of person she was. In February 2005, Dispatcher B sought a change in her work schedule. She sent Acting Chief Q a memorandum outlining concerns about her health. See, RGE 67(3). Acting Chief Q ultimately granted her request. Dispatcher B did not inform Acting Chief Q that she believed she was being discriminated against based on her race. Although there is no reason to believe Dispatcher B was discriminated against because of her race, Sergeant B and Grievant had no reason to doubt the sincerity of her complaints when they heard Dispatcher B’s allegations.

Sometime in January or the beginning of February 2005, Grievant met with Lieutenant M in Lieutenant M's office. Grievant told Lieutenant M that he believed Lieutenant D "has it out for him and it's a racial thing." Grievant asked Lieutenant M for permission to speak with Acting Chief Q. Lieutenant M told Acting Chief Q of Grievant's comments. Acting Chief Q told Lieutenant M that he would meet with Grievant. Grievant and Acting Chief Q met and discussed Grievant's concerns. Acting Chief Q called Lieutenant D into his office and the three of them discussed Grievant's concerns. Grievant stated he felt that Lieutenant D was harassing him because he was white and because he was a "pro-active law enforcement officer."¹¹

Four roads on the University's campus form a rectangular block. Inside the block are three buildings. Building OW and Building PL are attached by a common wall. They are positioned as if they are one building. Building PL opens into a long and narrow parking lot. On the other side of the parking lot is Building AS. If one drives on the roads forming the rectangular block and then drives into the long and narrow parking lot, one will have passed all four sides of Building AS, the three visible sides of Building OW and the three visible sides of Building PL. All of the doors and windows to these buildings can be observed from a vehicle driving this route.

On February 22, 2005, Grievant was working the midnight shift as a Police Officer. His shift began at approximately 11 p.m. and ended the following morning. He was in uniform and driving a marked police vehicle. One of Grievant's responsibilities was to verify that University buildings were locked and secured. Grievant believed both buildings had entry alarms that were activated during his shift. He believed if someone attempted to open a window or door to these buildings, an alarm would sound.

At approximately 1:26 a.m. on February 23, 2005, Grievant drove his police vehicle over the road forming the rectangular block and into the long and narrow parking lot. He observed the windows and doors of all three buildings and concluded they were secure. He used his radio to call to the police dispatcher and inform the dispatcher that he had completed a "256" with respect to Building OW, Building PL, and Building AS. A 256 code means that Grievant had secured the buildings. Grievant did not leave his vehicle and walk to each building to shake the doors and verify the windows were closed.

Sergeant B was in the process of transferring to another shift. She wanted to speak with Grievant to discuss the transition and other matters related to the Police Department. In the early morning of February 23, 2005, Sergeant B parked her police vehicle near Buildings PL and AS. Periodically, Grievant would drive his police vehicle

¹¹ When Grievant started working for the Police Department, he observed Lieutenant D passing out pamphlets to other officers. When Grievant approached her about obtaining her handouts, Lieutenant D told him it was none of his concern. Grievant later viewed one of the pamphlets and concluded it was a "black power" pamphlet. Grievant also had observed that Lieutenant D laughed and joked around with African American police officers, but rarely had that type of jovial conversation with white officers.

and position it next to Sergeant B's vehicle but facing the opposite direction. Grievant and Sergeant B could face each other and talk while seated in their respective police vehicles.

Detective B was also working that morning. He parked his vehicle a sufficient distance away so that he could observe Sergeant B without her knowing he was observing her. He began watching her rather than performing his regular duties. No one in the Police Department had instructed Detective B to observe Sergeant B. He watched her because of some personal motive or interest.¹² He also observed Grievant during those times Grievant's vehicle was parked next to Sergeant B's vehicle. Detective B observed the two talking. He waited until Grievant drove away in response to a radio call.¹³

Detective B approached Sergeant B's vehicle from the rear. He observed Sergeant B looking at a portable DVD player located on the passenger seat beside her. Once Detective B was next to the vehicle, Sergeant B rolled down the passenger side window and closed the portable DVD player. The two began speaking. The conversation began in a friendly manner but quickly became confrontational.

At approximately 6:30 a.m. several hours after her confrontation with Detective B, Sergeant B spoke with Acting Chief Q. She discussed changes in her work shift and problems she was having obtaining a daycare provider for her children.

Although Detective B reported to Lieutenant D, Detective B drafted a memorandum dated February 23, 2005 to Lieutenant M who worked in the patrol division. Detective B wanted to inform Lieutenant M of his confrontation with Sergeant B. The memo stated, in part:

[Sergeant B] rolled down the passenger's side window, at which point I told [Sergeant B] that she needed to [be] careful as to where she decides to sit and talk to her officer's. I then said to [Sergeant B] that it could have

¹² Detective B's assertion that he was watching two police vehicles because he was concerned that the employees were not performing their patrol duties lacks credibility. Several portions of Detective B's testimony were untruthful. Devoting approximately an hour to observing two supposedly derelict employees would be outside the scope of Detective B's responsibilities and unnecessary to conclude the employees were not performing their duties. In particular, Detective B testified that, "I felt that due to everything that was happening, the armed robberies, the stolen vehicles, the vandalism to vehicles – I felt that in my opinion their time would have been spent more productively checking the lots and showing the police presence in the problem areas, but I am not a supervisor, but that's why I decided to turn around and see what was going on because we had a lot of things happen in that two week time frame." Furthermore, Detective B wrote that he observed Grievant's and Sergeant B's patrol vehicle side-by-side for over 50 minutes. In fact, Grievant responded to other calls throughout the campus and was not parked next to Sergeant B's vehicle for over 50 minutes. Why Detective B would be untruthful regarding this aspect of what he observed has not been explained.

¹³ Detective B could have confronted both Sergeant B and Grievant if he believed they were not performing their duties. Instead, Detective B waited until Grievant left and then spoke with Sergeant B privately.

been [Lieutenant D] or [Lieutenant M] as opposed to me who caught her sitting in between the two buildings. [Sergeant B] responded by stating '[fuck Lieutenant D]' she needs to watch what the fuck she is doing because this department is about to have its ass handed to them. [Sergeant B] further stated that this department is becoming Pro-Black and if you are a black officer you could do no wrong. [Sergeant B] further stated that she didn't see me bothering [Officer P] or [Officer J] who were parked in lot 27.¹⁴ I responded by stating that I didn't see [Officer P] or [Officer J] parked in lot 27 talking for over fifty minutes. I observed you and [Grievant]. [Sergeant B] also stated, 'this is bullshit that you guys are trying to sneak up on me to watch what I'm doing', I'm a sergeant and I should know when a fucken investigator is working. [Sergeant B] stated that this was harassment and she was going to see [Acting Chief Q] in the morning. [Sergeant B] also stated that she was a Sergeant and that she could park anywhere she chose. I responded by stating 'that's true' but as to [Grievant], he can not afford to sit in between these two buildings for over fifty minutes when we are having vehicles broken into in the campus parking lots. I also asked [Sergeant B] if she was aware of the recent vehicle break-ins that occurred in the campus parking lots. Sergeant B states, 'no I was off the last four days and I could not enforce something that I'm not aware of.' I then told [Sergeant B] that [Lieutenant D] wanted me to make sure that the officers on every shift were checking the parking lots around the campus during their tour of duty. I then stated, '[last name of Sergeant B] just be careful with what your doing.' [Sergeant B] responded by stating 'you don't' call me [Sergeant B's last name] you address me as [Sergeant B]. [Sergeant B] then rolled up the window and drove off.

Detective B discussed his memorandum with Lieutenant M. Detective B claimed to be upset about his interaction with Sergeant B. Detective B testified, "It – it really threw me for a loop because that's the first time I had ever heard her talk like that. Um, about the racism." Detective B also told Sergeant R about his encounter with Sergeant B. Sergeant R informed his supervisor, Lieutenant D.

On February 25, 2005, Grievant went to the Agency's Equal Employment Office. He had spoken with Dispatcher B prior to contacting the Agency's Equal Employment Office. Grievant spoke with the Assistant Director of EEO. Grievant told her of the problems he was having with Lieutenant D. He told her he "felt 'called out' because he is the only white officer."¹⁵ The Assistant Director of EEO indicated she would contact Lieutenant D.

¹⁴ Officer P and Officer J are African American.

¹⁵ Reconsideration Grievant Exhibit 72.

Based on Detective B's memo and discussions with Detective B, Lieutenant M drafted a memo dated March 1, 2005 and addressed to Grievant notifying him of an administrative suspension pending an internal investigation. Grievant was advised, "[t]his investigation will center on your conduct that took place on February 23, 2005 at approximately 0100 hours. As a result of your alleged conduct you are being charged with having violated Policies and Procedures C-4.0, Article V, Section C, Para 3; line e, s, v and x. These offenses are Group III offenses which include acts of such severity as to merit suspension or dismissal at a single occurrence."¹⁶

On March 1, 2005, Grievant called the Assistant Director of EEO and told her not to talk to Lieutenant D because he had been notified he was being suspended. The Assistant Director of EEO had not yet spoken with Lieutenant D or notified her of Grievant's concerns.¹⁷

Based on Detective B's memo, the Police Department began an investigation. The investigation included videotaping Sergeant B's answers to questions asked by Lieutenant M.¹⁸ Lieutenant M had reviewed Detective B's memo to him and determined what questions to ask of Sergeant B based on that memorandum. Part of the questioning was as follows:

Lieutenant M - Would you be surprised in knowing that the reason why we are sitting here today, the only reason why we are sitting here today, is because [Detective B], was totally taken back at your response when he walked up on you, knocked on the window, and had a conversation with you. He said he had no idea that you were going to respond that way. He had no idea that you had such hatred for the department. He had no idea that you had such animosity for the department. He had no idea that you felt that the department was in any way, shape, or form pro-black, or for blacks, or even prejudiced against whites. He had no idea. This was a total shock to him. Which is why –

Sergeant B - Which can't be entirely true –

Lieutenant M - Which is why – let me finish –

Sergeant B – I'm sorry.

¹⁶ Grievant Exhibit 8.

¹⁷ The Hearing Officer finds that the failure of the Agency's EEO Department to investigate Grievant's complaint was understandable because Grievant had requested that EEO Department stop its investigation.

¹⁸ Lieutenant D did not take part in the video questioning of Detective B, Grievant, and Sergeant B.

Lieutenant M – Which is why he typed this up officially. Because if not for the fact that you responded the way he said you responded – it would have been forgotten. So go ahead.

Based on the memorandum Detective B drafted which contained references to race and the video taped interviews of Sergeant B, Detective B, and Grievant, Lieutenant M concluded that he wished to remove Sergeant B from her employment.¹⁹ Lieutenant M did not believe the department favored African Americans. He did not wish to hear an allegation that the department favored African Americans. He disliked hearing the allegation especially since the person making the allegation was white. He concluded that a white employee making an allegation about race should not be employed by the Police Department.

Lieutenant M contacted Sergeant B and informed her that the Agency intended to issue her a Group III Written Notice and remove her from her position. He informed her that the Written Notice would not be issued if she chose to resign from her position. He told her the Agency would provide her with a favorable employment reference upon resignation. Sergeant B chose to resign rather than receive the disciplinary action.

Based on the memorandum drafted by Detective B, the video taped interviews of Sergeant B, Detective B, and Grievant, Lieutenant M concluded he wished to remove Grievant from his employment.

On March 9, 2005, Lieutenant M presented Grievant with a memorandum informing him that the Agency intended to issue him a Group III Written Notice with removal and presented him with the opportunity to respond within 24 hours.²⁰ Grievant, by counsel, responded on March 14, 2005. On March 22, 2005, Lieutenant M issued Grievant a Group III Written Notice of disciplinary action with removal effective March 22, 2005. The Written Notice was also signed by the Acting Chief of Police, the Vice President for Administration and Finance, and the Director of Human Resources.²¹

On April 15, 2005, Grievant filed a grievance challenging the Agency's disciplinary action. He also listed as an issue:

Whether Old Dominion University Police Department and/or any of its members have discriminated against [Grievant] on the basis of his race (white) and, if so, the relief to be provided to [Grievant] for same.

¹⁹ Sergeant B did not have any active prior disciplinary action.

²⁰ Grievant Exhibit 9. The date to respond was later extended until March 14, 2005. See, Grievant Exhibit 12.

²¹ Grievant Exhibit 13.

Although the specific dates of several discussions are uncertain, the decision to discipline and remove Grievant from employment was made by Lieutenant M, the Director of Human Resources, the Acting Chief of Police, and University Counsel.

RECONSIDERATION CONCLUSIONS OF POLICY

This Reconsideration Decision addresses two issues. First, whether Grievant should receive a Written Notice of disciplinary action and, if so, what level of disciplinary action? Second, whether the Agency discriminated against Grievant because of his race?

Appropriateness of Disciplinary Action

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses include, [o]ffenses of minor severity, yet require correction in the interest of maintaining a productive and well-managed Department.”²² Group II offenses include “[o]ffenses which include more severe acts and misbehavior.”²³ Group III offenses include “[o]ffenses that include acts of such severity as to merit suspension or dismissal at a single occurrence.”²⁴

“Inadequate or unsatisfactory work performance” is a Group I offense.²⁵ In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant’s Employee Work Profile requires him to, “Conduct security patrol of all University buildings and grounds. Check doors and windows to ensure they are secured thereby preventing unauthorized entry.”²⁶ In order to meet this requirement, Grievant must leave his patrol vehicle and walk around a building to observe that the doors and windows are locked and secure. On February 23, 2005, Grievant drove around three buildings and observed the building exteriors from his police vehicle. Although Grievant’s work performance would otherwise be unsatisfactory, the disciplinary action against him must be reversed for the reasons discussed below.

Claim of Racial Discrimination

²² ODU Police Department Standards of Conduct, (V)(C)(1).

²³ ODU Police Department Standards of Conduct, (V)(C)(2).

²⁴ ODU Police Department Standards of Conduct (V)(C)(3).

²⁵ ODU Police Department Standards of Conduct, (V)(C)(1)(a).

²⁶ Agency Exhibit 2.

The Governor's Executive Order on Equal Opportunity prohibits employment discrimination on the basis of race, gender, color, national origin, religion, age, or political affiliation, or against otherwise qualified persons with disabilities. State agencies must apply their employee compensation policies in accordance with the Governor's Executive Order.

DHRM Policy 2.05 prohibits employment discrimination with respect to the "application of corrective actions, including disciplinary actions" In other words, an agency may not issue a Written Notice to an employee as part of racial discrimination against that employee. In addition, if an employee has engaged in inappropriate behavior thereby justifying the issuance of a Written Notice, an agency may not inflate the level of discipline or sanction against that employee as a part of racial discrimination against the employee.

Direct and Circumstantial Evidence. Grievant may establish racial discrimination by demonstrating through direct or circumstantial evidence that race motivated the Agency's adverse treatment of him. Grievant does not need to demonstrate that race was the sole motivating factor in the Agency's actions. Grievant must merely show that race was a motivating factor.²⁷ In other words, Grievant can meet his burden of proof by showing the Agency acted against him for both permissible and forbidden reasons.

Lieutenant M engaged in racial discrimination against Sergeant B because she was a white employee who he believed complained about how the Agency treated her and other white employees. Lieutenant M stated as part of the video interview of Sergeant B, "[b]ecause if not for the fact that you responded the way he said you responded – it would have been forgotten." In this part of Lieutenant M's comment, he is admitting the Agency would not have taken disciplinary action including removal against Sergeant B but for her oral statements to Detective B. The oral statements of greatest significant to Detective B were Sergeant B's comments about racial discrimination. In other words, by having lengthy conversations with a subordinate or by briefly looking at a DVD player, Sergeant B did not engage in behavior Lieutenant M felt was sufficient to justify disciplinary action. By making statements about the Police Department being pro-Black, however, Lieutenant M believed Sergeant B should be removed from employment. **The Hearing Officer finds that Lieutenant M intended to issue Sergeant B a Written Notice with removal with the objective of discriminating against her because of her race.**

The Agency contends Sergeant B engaged in conduct justifying disciplinary action. The Hearing Officer finds that none of the possible misconduct by Sergeant B would justify issuance of a Group III Written Notice with removal. For example, Sergeant B used profanity, briefly watched a DVD player, and failed to properly supervise her subordinates, according to the Agency. Use of obscene or abusive

²⁷ 42 U.S.C. § 2000e-2(m) provides: "an unlawful employment practice is established when the complaining party demonstrates that race ... was **a motivating factor** for any employment practice, even though other factors also motivated the practice." (Emphasis added).

language is a Group I offense. Abuse of State time is also a Group I offense. Failure to perform a job duty such as supervising subordinates is inadequate or unsatisfactory job performance, a Group I offense. The Agency was concerned that Sergeant B said “f—k, [Lieutenant D].” Sergeant B testified credibly that what she actually said was “f—k it. [Lieutenant D] is always after me.” Even if the Agency’s version of facts were supported by the evidence, Sergeant B’s statement would amount to no more than insubordination. Rarely is insubordination higher than a Group II offense. Since Sergeant B did not address her comments about Lieutenant D directly to Lieutenant D, her otherwise insubordinate comments could rise no higher than a Group I offense.

Lieutenant M also interviewed Grievant as part of the Agency’s investigation. During the video interview of Grievant, Lieutenant M did not make similar statements to Grievant that would reveal Lieutenant M’s intent to discriminate. The question becomes whether there is sufficient evidence to believe that when Lieutenant M issued Grievant a Group III Written Notice with removal Lieutenant M was discriminating against Grievant because of his race.

The evidence is sufficient for the Hearing Officer to conclude it is more likely than not that Lieutenant M issued Grievant a Group III Written Notice with removal in order to discriminate against Grievant because of his race. There are several reasons for this conclusion. First, in January or February 2005, Grievant met with Lieutenant M and expressed concern that Lieutenant D’s actions towards him were motivated by intentional racial discrimination. At the time Lieutenant M attempted to remove Sergeant B from employment because of her race and because of her complaint about the racism in the Police Department, Lieutenant M also knew Grievant’s feelings about the Police Department were similar to Sergeant B’s feelings. Second, both Grievant and Sergeant B are white. Third, Grievant and Sergeant B were involved in the same incident. Fourth, Lieutenant M used the incident as an excuse to remove Sergeant B from employment and likely viewed the incident as also an opportunity to remove Grievant from employment. Fifth, Lieutenant M wanted to issue Sergeant B and Grievant the same disciplinary action – a Group III Written Notice with removal. In short, the facts and circumstances of Sergeant B’s removal and Grievant’s removal are sufficiently similar to conclude that if Lieutenant M sought to remove Sergeant B because of her race, then he also sought to remove Grievant because of Grievant’s race. The Hearing Officer finds that Lieutenant M intended to issue Grievant a Written Notice with removal with the objective of discriminating against him because of his race.

*Primary Employees Involved In Issuing Discipline.*²⁸ Four different actors were involved in determining the level of disciplinary action against Grievant – (1) Acting Chief Q, (2) University Counsel, (3) Human Resource staff, and (4) Lieutenant M. There is no evidence whatsoever to suggest that Acting Chief Q sought or participated in the removal of Grievant because of Grievant’s race. University attorneys are especially talented and knowledgeable regarding the University’s obligation to act consistently with laws and policies prohibiting racial discrimination. Grievant’s race was

²⁸ See footnote 21 of the EDR Director’s Ruling No. 2006-1099, 1104.

not a factor in the decision-making process of University Counsel. No evidence was presented suggesting the Agency's Human Resource staff sought Grievant's removal because of his race.

Lieutenant M was involved in the daily supervision of police officers. He was in a position to evaluate what impact the actions of police officers would have on the operations of the Police Department and the security of the Agency. Because of his status as Police Department supervisor, he was in the position to influence the decision-making of the other three actors. In other words, the three other actors were likely to believe Lieutenant M when he represented to them that Grievant should be removed from employment. The Hearing Officer finds that Grievant's race was a motivating factor in the Agency's decision to issue him a Group III Written Notice with removal.

McDonnell Douglas "Pretext" Analysis. In the August 26, 2005 Reconsideration Decision, the Hearing Officer addressed the *McDonnell Douglas* framework within the context of the evidence the Hearing Officer allowed Grievant to present during the hearing. The EDR Director ruled that the Hearing Officer erred by restricting Grievant's evidence. One of these errors involved the application of the *McDonnell Douglas* analysis. The EDR Director stated:

We nevertheless conclude that the hearing officer's application of *McDonnell Douglas* was flawed, however, because the hearing officer improperly limited his analysis of the grievant's discrimination claim to the discipline taken against the grievant. Therefore, on reconsideration, the hearing officer is directed to apply the *McDonnell Douglas* framework in light of all alleged discrimination for which the grievant presented evidence at hearing. In applying this framework, the hearing officer should consider evidence directly related to the grievant's termination as well as any other evidence of discrimination presented by the grievant. In this regard, we note that in considering the evidence presented by the grievant of disparate discipline, the hearing officer is not limited to considering only those examples, if any, where employees engaged in identical conduct as the grievant. Rather, the hearing officer may consider the discipline taken by the agency for misconduct of "comparable seriousness" to that allegedly committed by the grievant. The weight, if any, to be accorded to this evidence is to be determined by the hearing officer, in his discretion. (Footnotes omitted).

Based on the EDR Director's ruling, the Hearing Officer will reapply²⁹ the *McDonnell Douglas* analysis with consideration of the evidence presented on the first day as well as the subsequent two days of the hearing.

²⁹ The Hearing Officer's analysis under *McDonnell Douglas* described in this Reconsideration Decision supersedes the analysis presented as part of the August 26, 2005 Reconsideration Decision.

Grievant claims he was subjected to harsher discipline because of his race. Under the *McDonnell Douglas* analysis, Grievant must show (1) he was a member of a protected class; (2) the prohibited conduct in which he was engaged was comparable in seriousness to the misconduct of employees outside the protected class; and (3) the disciplinary measures enforced against him were more severe than those enforced against those other employees.³⁰ If the Agency articulates a legitimate, non-discriminatory reason, then Grievant must show that the stated reason was false and a pretext for discrimination.

Grievant is white and is a member of a protected class by race. On December 18, 2001, an African American Police Officer received a Group I Written Notice that was later reduced to a counseling memorandum. The Written Notice described the facts as:

During roll call at approx. 2245 hrs, on 12-18-01, [Officer P] was assigned zones 4, 5 and was ordered to secure both gyms a.s.a.p. On 12-19-01 at approx. 0530 hrs, housekeeping made contact with ODUPD and advised that the Admin Gym (IAB) was found unsecured. When the reporting sergeant asked [Officer P] if he had secured the gym, [Officer P] stated that he forgot. This written notice is being issued to [Officer P] for failing to secure a building in a timely manner.

Grievant's and Officer P's conduct were similar and of comparable seriousness because both involved securing buildings.³¹ The Agency could have issued Officer P a Group II Written Notice for failure to follow a supervisor's instructions. The result of Officer P's failure to act was an unsecured building. In contrast, Grievant verified that two buildings were secured except that he did not physically check the doors to the buildings. In Grievant's case, the two buildings remained secured. Grievant did not receive an instruction from a supervisor to secure buildings. In the light most favorable to the Agency, Grievant's behavior did not rise any higher than a Group I Written Notice for unsatisfactory work performance. Instead, the Agency gave him the highest possible sanction of a Group III Written Notice with removal. The Agency disciplined Grievant far more seriously than it did Officer P, an African American. Grievant has met his prima facie case.

Because Grievant had met his prima facie case under the *McDonnell Douglas* framework, the Agency must articulate a legitimate, non-discriminatory reason for its action. Issuing disciplinary action involves at least two steps. First, the Agency must decide whether to take disciplinary action. Second, if the Agency decides to take disciplinary action, it must decide what level of discipline to issue. The Agency has articulated a legitimate, non-discriminatory reason for taking disciplinary action under step one. In particular, the Agency has established that Grievant was responsible for securing buildings and that he failed to do so in accordance with the Agency's

³⁰ The Agency's burden at this stage is merely a burden of production of evidence.

³¹ Acting Chief Q was the Assistant Chief of Police at the time Officer P was disciplined.

