

Issue: Group III Written Notice with Termination (workplace harassment, obscene/abusive language, disruptive behavior); Hearing Date: 10/25/18; Decision Issued: 12/08/18; Agency: DCR; AHO: Lorin A. Costanzo, Esq.; Case No. 11240; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
OFFICE OF EQUAL EMPLOYMENT DISPUTE RESOLUTION
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

IN THE MATTER OF: GRIEVANCE CASE NO. 11240

Hearing Date: October 25, 2018

Decision Issued: December 08, 2018

PROCEDURAL HISTORY

On May 30, 2018 Grievant was issued a Group III Written Notice with termination of employment for violation of Policy 2.30, workplace harassment, obscene or abusive language, and disruptive behavior. Grievant grieved the issuance of the written notice and the matter was qualified for hearing. Undersigned was appointed as hearing officer effective July 10, 2018.

At a pre-hearing telephone conference on 7/18/1, Grievant raised was attempting to secure counsel and address timeline matters. Both parties waived their right to a hearing being held within 35 days of the hearing officer's appointment and, by e-mail of 7/18/18, both parties agreed to a hearing date of September 12, 2018. However, on September 10, 2018, a pre-hearing conference call was held concerning weather and travel conditions as to the 9/12/18 hearing date. By agreement of the parties the hearing date was tentatively set for 0/22/18 and, due to witness availability issues, was by agreement, continued to October 30, 2018.

The grievance hearing was convened on October 30, 2018. However, one witness of Grievant was not available to appear at the 10/30/18 hearing date due to her being in the hospital for surgery. The parties agreed to receive her testimony by conference call upon her being discharged and being able to testify. On November 14, 2018, by agreement of the parties, Grievant's witness testified via conference call.

On motion and by agreement of the parties, closing arguments were submitted in writing November 27, 2018.

APPEARANCES and EXHIBITS

A. The following appeared at hearing:

Agency's Attorney.

Agency party designee (who was also a witness).

Grievant.

Grievant's designated individual to assist him at hearing.

Witnesses.

B. Exhibits were admitted *en masse*, by agreement of the parties, and consists of one binder containing both Agency's exhibits (numbered 1 through 11 with sub-parts, including one CD) and Grievant's exhibits (numbered 1 through 6 with sub-parts, including one flash drive).

C. Agency's Exhibits are referenced herein as "A. ___" with the exhibit number inserted at the "___". Grievant's Exhibits are referenced herein as "G. ___" with the exhibit number inserted at the "___".

ISSUES

Whether the issuance of a Group III Written Notice with termination was warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.¹

¹ Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.
EEDR Case No. 11240

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.²

FINDINGS OF FACT

01. Grievant has been employed by Agency for approximately 19 years.³

02. On May 30, 2018 Grievant was issued a Group III Written Notice with termination of employment for which noted violations of Policy 2.30, Workplace Harassment, Obscene or abusive language, and Disruptive Behavior. The Written Notice further provided Grievant has engaged in verbal and physical contact which has been deemed to be objectively offense, severe, harassing in nature and pervasive and the Written Notice had attached the Due Process Memorandum of 5/21/18.⁴

03. Grievant does not have any prior active written notices. However he received verbal counseling in 2011 concerning a May 3, 2011 complaint management received from a co-worker that Grievant was making excessive sexual innuendo and comments. A female co-worker reported seeing a text from Grievant stating, "I'm dancing naked here" as well as referencing a male porn star.⁵

04. Housekeeper was not at work on April 19, 2018, however, on April 20, 2018 Housekeeper, a female co-worker at Facility, raised allegations of sexual harassment occurring in the workplace on April 18, 2018 involving Grievant.⁶

05. On April 24, 2018 Grievant was notified, in writing, by management of it receiving a complaint alleging misconduct, harassment, and creation of an intimidating and hostile work environment by him. Grievant was further notified of an investigation being initiated into allegations and that he was being placed on pre-disciplinary paid administrative leave.⁷

06. Agency initiated an investigation into allegations. During its investigation Agency interviewed and recorded interviews with a number of employees, including Grievant and the female employee who

² Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

³ Testimony.

⁴ A. 2.

⁵ Testimony and A. 4.

⁶ A. 2 and testimony.

⁷ A. 3A and 3B.

made the complaint (“Housekeeper”). During its investigation of matters occurring on April 18, 2018 additional allegations and matters came to the attention of Agency which were also investigated.

07. On May 21, 2018, after conclusion of its investigation, Agency provided Grievant a due process memorandum which addressed its findings and alleged violations of policy. Grievant was provided an opportunity to respond. Agency addressed to Grievant matters related its investigation and provided him a written summary of investigation findings. Agency also addressed its concerns that:

- a. Grievant had repeatedly issued unwelcome offensive, sexual, and inappropriate comments to and about other employees.
- b. On April 18, 2018 Grievant engaged in prohibited physical conduct which was determined to be harassing that is severe in nature.
- c. Grievant has engaged in additional inappropriate physical conduct with female co-workers.⁸

08. Grievant was provided opportunity, until 5:00 pm on May 23, 2018, to reply in writing to allegations set forth in its May 21, 2018 due process memorandum.⁹ Grievant provided his written response on May 23, 2018 to the alleged violations.¹⁰

09. After taking into consideration Grievant’s May 23, 2018 written response, Agency notified Grievant on May 30, 2018 of its decision to issue him a Group III Written Notice with termination.¹¹ Based upon the totality the circumstances, Agency concluded Grievant violated DHRM Policy 2.30 and violated of DHRM Policy 1.60 concluding, among other matters:

1. Grievant repeatedly engaged in issuing offensive, sexual, and inappropriate comments to and about other staff members.
2. Grievant made to co-workers, while at work, statements of or to the effect of:

⁸ A. 3B.

⁹ A. 3B.

¹⁰ A. 3C.

¹¹ G. 1.

- a. If you'll scoot back here closer to me, I'll rub your breasts for you;
 - b. I don't have any money, but I'll trade you sex for it (*ie. a cigarette*); and
 - c. If you lean any further, you're gonna make my day.
3. On April 18, 2018, at work, Grievant planned and attempted to frighten, startle, or otherwise elicit fear from a female co-worker, stared her down while advancing on her in an intimidating fashion and, at a minimum, touched her nose with his nose having witnessed her attempt to move at least a part of her person from his advance.
 4. On two separate occasions, Grievant engaged in inappropriate touching with two co-workers by rubbing one co-worker's feet and by massaging one co-workers shoulders and neck.¹²

CONCLUSIONS AND OTHER FINDINGS

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*.¹³ The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* 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.

¹² G. 1. and Testimony.

¹³ A. 5.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. 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 would warrant termination.

Examples of offenses, by group are presented in Attachment A. 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 judgement of the agency heads or their designees, undermines the effectiveness of the agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of Policy 1.60.

Violation of DHRM Policy 2.30, *Workplace Harassment*, may, depending on the nature of the offense, constitute a Group I, Group II, or Group III offense.

Policy 2.30:¹⁴

DHRM Policy 2.30 states the Commonwealth's policy to provide its employees with a workplace free from harassment. The Commonwealth strictly forbids the harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual's race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability.

Workplace Harassment is defined in DHRM Policy 2.30 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 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.

Sexual Harassment is also defined in DHRM Policy 2.30. DHRM Policy 2.30 defines "Sexual Harassment" as, "Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employee (third party)." Additionally, in defining *hostile environment*, it states:

¹⁴ A. 6.

Hostile environment - a form of sexual harassment when a victim is subject to unwelcome and severe or pervasive repeated sexual comments, innuendos, touching, or conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

DHRM Policy 2.30 further provides that any employee who engages in conduct determined to be harassment or encourages such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct.

Policy and Procedures No. 332:¹⁵

Agency also addresses Workplace Harassment its Policy and Procedures No. 332 (Eff. 6/20/15) which uses the same or similar definition for workplace harassment as provided in DHRM 2.30. This policy states and confirms the Department's policy to provide its employees with a workplace free from harassment.

Agency's Mission Statement and Code of Ethics:¹⁶

Agency has adopted a Mission Statement & Code of Ethics, a copy of which was signed by Grievant, which provides, as employees of the Commonwealth of Virginia and Agency, employees will, among other matters:

Conduct ourselves with integrity, dignity, and respect for others.

Adhere to the relevant Virginia Standards of Conduct for Employees (DHRM Policy 1.60) ...

Strive to perform the duties of our position and supervise the work of our subordinates with the highest degree of professionalism.

Hold ourselves accountable, as employees, for adhering to this Code of Ethics.

Complaint:

¹⁵ A. 7.

¹⁶ Agency Mission Statement, A. 11.

On April 20, 2018 Housekeeper alleged to Agency an incident occurred at work on April 18, 2018 in which she was subjected to sexual harassment at the workplace by Grievant. Housekeeper was not at work on April 19, 2018.

Housekeeper reported she was at work on 4/18/18 mopping when Grievant walked in to get some coffee. Housekeeper was mopping her way out of the ice machine room into the kitchen area. Grievant asked her where everyone was and then began walking towards Housekeeper. Housekeeper stopped mopping. She alleged Grievant grabbed her about the arms, pressed her arms outward to the side, and backed her up or pressed her against the closed door to the ice machine room. She alleged he got very close to her, staring into her eyes, and she thought he was going to kiss her but then Grievant said words to the effect of, "Boy you ought to see the look on your face".

Agency initiated an investigation into Housekeeper's allegations. The investigation included interviews with Housekeeper, Grievant, and a number of other employees which Agency recorded.¹⁷ During its investigation management became aware of a number of other matters involving Grievant which gave rise to strong concerns as to Grievant's action including:

1. Matters occurring on 4/18/18 involving Housekeeper.
2. Statements and/or jokes of a sexual nature made to co-workers, including, but not limited to:
 - a. "If you'll scoot back here closer to me, I'll rub your breasts for you".
 - b. "I don't have any money, but I'll trade you sex for it."
 - c. "If you lean any further you're gonna make my day."
3. Inappropriate physical conduct with female co-workers.
4. Medication made available to another employee.

4/18/18:

It is not contested and the evidence indicates on 4/18/18 Housekeeper, while at work, was mopping the floor in a small room located off a kitchen at Facility where an ice machine was located. Housekeeper was backing out of the small room mopping into the kitchen. There were no other persons present when Grievant entered the kitchen looking for coffee. Grievant saw Housekeeper and was walking towards Housekeeper when she turned around to face him. It is not contested and the

¹⁷ Testimony and A. 10.

evidence indicates Grievant continued walking forward towards her after she turned around, said nothing, but staring into her eyes continued moving forward until his nose touched her nose. Housekeeper moved her head slightly backwards as Grievant approached. Upon leaving, Grievant told Housekeeper not to be scared or anything like that and that he was just joking.¹⁸

Housekeeper alleged, when she turned around, Grievant walked toward her, grabbed her forearm, and backed her up to the door to the small room where the ice machine was located. She told investigators she thought Grievant was going to kiss her.

Grievant told investigators he didn't intend to kiss Housekeeper, he had no sexual intent, and only wanted to make her laugh. Grievant denies he ever grabbed or held Housekeeper's arms and told investigators he only wanted to make Housekeeper laugh. He told investigators he was walking towards Housekeeper and, when he was about 2 steps away, Housekeeper turned around. He said he moved closer trying to "stare her down" only had physical contact when his nose touched her nose.¹⁹

In his 5/23/18 written response Grievant contended Housekeeper was a willing participant in a "staring contest" and while his nose touched Housekeeper's nose it was an accident. He also stated he wears tri-focal eyeglasses, his depth perception is really bad at close range, and contends this contributed to or was responsible for his accidentally and unintentionally touching his nose to her nose.

He also made statements that he saw Housekeeper's 1st, 2nd, and 3rd buttons on her blouse were unbuttoned, he could not see her bra, but that cleavage was showing.

Upon leaving, Grievant told investigators he told Housekeeper not to be scared or anything like that and that he was just joking. He indicated he made this statement because, in the past, Housekeeper had turned things around and turned it on him and he didn't want her to think this was sexual or intimidating.

Grievant confirmed to Agency, making the statement when leaving the room "[Housekeeper] don't be scared or anything like that. I was just joking with you."²⁰ Furthermore, in his 2nd interview with investigators, Grievant acknowledge he should not have touched Housekeeper, he got too close, and may have crossed the line. He admitted what he did was inappropriate and acknowledged his actions could be perceived an intimidation.

¹⁸ A. 10. ... Grievant's 1st and 2nd interviews and A. 6.

¹⁹ A. 10.

²⁰ A. 10.

In reviewing the totality of the evidence, including the recorded and written statements of Grievant, the testimony of all the witnesses, and the evidence admitted in this cause (including recordings of interviews), Hearing Officer finds Agency has met its burden of proof, by a preponderance, that Grievant acted in violation of DHRM Policy 2.30 and its prohibition of workplace harassment.

Agency has proven his actions in staring down while moving towards Housekeeper to the point she was, in the least, leaning her head back and his action in touching his nose to her nose was unwelcome physical conduct that denigrates or shows hostility or aversion towards a person on the basis of, sex and which had the purpose or effect of creating an intimidating, hostile or offensive work environment and/or unreasonably interfering with an employee's work performance.

Statements:

Grievant admitted to investigators that, in the workplace, he has used vulgar language, made sexual jokes, and that he and other employees, at times, "engage in very inappropriate jokes". He also told investigators he and other co-workers have talked about, joked about, or made references to sexual relationships with other co-workers.²¹

Grievant stated to investigators he, while at work, made a joke or sexual innuendo to a female co-worker as to what she would have to do since her husband had brought her a new car.²²

Grievant, at work, said to a co-worker ***"If you'll scoot back here closer to me, I'll rub your breasts for you"***. The female co-worker responded to him that if he did she would slap his face.²³ Grievant, in his 5/23/18 written response, addressed making this statement and wrote:

... The statement recorded here was made to a person who I considered to be a good friend and in response to a statement she made earlier that she didn't have anyone to do this for her. This was not a bona fide offer and she did not perceive it to be. She showed no indication of being offended at all, but instead, laughed out loud.²⁴

²¹ A. 10 ... Grievant's 1st and 2nd interview.

²² A. 10 ... Grievant's 2nd interview.

²³ A. 10 ... Grievant's 2nd interview.

²⁴ A. 3B & 3C.

On another occasion, while at work, Grievant asked Housekeeper 2 if she had a cigarette to which she replied, “yes, but what’s in it for me”. Grievant replied, **“I don’t have any money, but I’ll trade you sex for it.”** Grievant confirmed making this statement to investigators.²⁵ When Grievant made this statement to her, Housekeeper 2 used a profanity and told him that she did not appreciate the statement and to never say that to her again. Housekeeper 2 subsequently told her husband of this incident and told other employees of the incident.²⁶ In his 5/23/18 written response concerning the incident involving his asking for a cigarette, Grievant stated:

Jokingly, I replied, I don’t have any money, but I will trade you sex for it. She laughed, called me a name, and handed me the cigarette. She appeared to be amused and not offended at all.²⁷

The evidence indicates that Grievant told Housekeeper **“If you lean any further you’re gonna make my day.”** Grievant does not contest making this statement but contended to investigators he was referencing her falling onto the roadway. He further expressed concern Housekeeper has twisted what he had said to try to make it dirty. Grievant contended Housekeeper had told others he was trying to look down her shirt.²⁸

Investigators also were informed of an incident at work when Grievant was at a picnic table and Housekeeper was leaning over and talking to Grievant. Housekeeper 2 came by and noted Housekeeper leaning over and her shirt buttons were unbuttoned “pretty far down” and also indicated *you could see stuff*. Housekeeper 2 said to Housekeeper, “why don’t you put them things up”. Grievant then told the Housekeeper 2 to shut her mouth and mind your own business.²⁹ Grievant contended his statement only referred to his conversation with Housekeeper being interrupted by Housekeeper 2.

Physical conduct with female co-workers:

The evidence indicates, and Grievant does not contest, he rubbed/massaged the foot of a female employee at work. Park Ranger testified, Grievant had, at a table, pulled her shoe off and massaged foot. The evidence indicates, and Grievant does not contest, while at work, he

²⁵ A. 10 ... Grievant’s 2nd interview.

²⁶ Testimony and A. 10 ... Housekeeper 2’s interview

²⁷ A. 3B & 3C.

²⁸ A. 10 including... Grievant’s 2nd interview, A. 3C. .

²⁹ Testimony and A.10 ... Housekeeper 2 interview.

rubbed/massaged a female co-workers neck. However, Grievant stated his actions weren't of a sexual or romantic nature.³⁰

Additional matters:

Grievant confirmed to investigators he had an inappropriate romantic relationship with a female co-worker and he was her supervisor at the time. Grievant confirmed flirting with sexual overtones. Grievant indicated this relationship was six or seven years ago but indicated he did not remember how long the relationship lasted, only that it was a short period of time.³¹

Grievant contended to investigators he has had long term concerns that Housekeeper had a vendetta against him. However, it is noted Grievant's statements of themselves provided information and a basis for the findings as to matters occurring on 4/18/18. Grievant admitted to and even raised instances which brought on the strong concerns to management and the additional investigation into matters.

Grievant raised being told Housekeeper said she was going to get him for what he had done to her. He raised his belief this may be due to his having reported her on several occasions for asking for his pain medication and for his reporting other matters.³²

During his follow-up interview Grievant raised to investigators an incident occurring about 3 years ago where a female employee (named in the interview but not further identified herein), who had been on the job about 3 days, indicated she was having back pains. Grievant further indicated the employee told him she normally took Loratab but was out of Loratab. Grievant told her he had one extra Loratab. Grievant indicated to investigators he told the employee he was not giving her his Loratab as that would be unethical and illegal but also told the employee where he kept the Loratab wrapped in a tissue paper. Grievant further stated to investigators he also told her if she were to take the Loratab, then its on her, but he would not prosecute her. When he checked about an hour or so later the Loratab pill was not there.³³

Prior counseling:

³⁰ A. 10 ... Grievant's 1st interview.

³¹ A. 10 ... Grievant's 2nd interview.

³² A. 10 ... Grievant's 2nd interview.

³³ A. 10.

Grievant received oral counseling from management in 2011 concerning a complaint involving sexual innuendo and his sending a text message stating “dancing nude here” and referencing a named male porn star.³⁴

Knew/should have known:

The evidence indicates Grievant knew or should have known of agency’s policy prohibiting workplace harassment and sexual harassment. Grievant had received counseling on sexual innuendo matters. Grievant has had duties as a supervisor and been employed with Agency for approximately 19 years. Grievant’s EWP provides, under *Measures for Agency/Departmental Objectives*, “Professionally provides information and maintains a thorough knowledge of policy and procedures”. Testimony further indicates that employees received training in workplace harassment and sexual harassment including when initially employed.

Group III:

Agency became aware of a number of statements and actions of Grievant at the workplace during its investigation concerning matters occurring on 4/18/18. Agency determined Grievant engaged in a number of instances of making offensive, sexual, and/or inappropriate comments or actions in the workplace. These statements and actions occurred over an extended period of time and involved a number of female employees. These matters gave rise to strong concerns of management and ultimately the determination to issue a Group III Written Notice with termination for violation of DHRM Policy 2.30, *Workplace Harassment*, obscene and abusive language and disruptive behavior.

In looking at the totality of Grievant’s actions, as more thoroughly discussed above, including the number instances, the number of female employees involved, the time period over which matters occurred, the nature of his statements and actions, the facts and circumstances involved, and his having received counseling in 2011, the evidence indicates his actions were severe, pervasive, and of such a number and nature as to warrant issuance of a Group III Written Notice with termination. Grievant used obscene or abusive language, his behavior was disruptive, and he was in violation of DHRM Policy 2.30. He engaged in verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of sex. His actions have the purpose or effect of creating an intimidating, hostile or offensive work environment or the purpose or effect of unreasonably interfering with an employee’s work performance.

Mitigation:

Va. Code § 2.2–3005.1 authorizes a hearing officer to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the

³⁴ A. 4 and Testimony.

rules established by the Department of Human Resources Management ...".³⁵ The hearing officer must receive and consider evidence in mitigation or aggravation of any offense charged by an agency.³⁶

The *Rules for Conducting Grievance Hearings* provide that a hearing officer is not a "super-personnel officer" and, 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. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness and, if the hearing officer mitigates the Agency's discipline, the hearing officer is charged with stating in the hearing decision the basis for mitigation.

Grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The Agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.³⁷

Consideration has been given to the totality of the evidence in this cause including Grievant's length of service and not having any prior active written notices. Based upon review of all the evidence in this cause, the Hearing Officer finds the issuance of the Group III Written Notice with termination does not exceed the limits of reasonableness.

CONCLUSION

For the reasons stated above, based upon consideration of all the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.

³⁵ Va. Code § 2.2-3005.

³⁶ Va. Code § 2.2-3005 (C)(6).

³⁷ Rules for Conducting Grievance Hearings, § VI. (B.)(2.).

4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

Furthermore, Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with termination was warranted and appropriate under the circumstances and Agency's discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency's issuance to Grievant of a Group III Written Notice with termination is **UPHELD**.

APPEAL RIGHTS

You may request an administrative review by EEDR within 15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued. Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.

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

Sl Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copy of decision e-mailed to Grievant, Agency Attorney, and EEDR

as requested by Grievant a copy of decision also to be sent via mail to Grievant