Issues: Two Group II Written Notices and one Group I Written Notice (failure to follow DHRM Policy 1.75, *Use of Internet and Electronic Communication Systems*); Hearing Date: 02/07/06; Decision Issued: 02/23/06; Agency: VCCS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8250,8251,8252; Outcome: Agency upheld in full. Substituted Decision issued 03/09/06. Outcome: Agency upheld in full.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8250 / 8251 / 8252

Hearing Date: February 7, 2006
Decision Issued: February 23, 2006

PROCEDURAL HISTORY

On September 22, 2005, the three Grievants received disciplinary action for failure to follow Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems*. Grievant B and Grievant K received Group II Written Notices of disciplinary action.[1] Grievant M received a Group I Written Notice.

All three employees filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievants and each requested a hearing. On January 6, 2006, the EDR Director issued Rulings 2006-1236, 2006-1237, and 2006-1238 consolidating the three grievances. On January 9, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 7, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant M

[1] The Agency reduced Grievant B's disciplinary action to a Group I Written Notice after considering mitigating circumstances.

Grievant B
Grievant M and B's Counsel
Grievant K's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether Grievants engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievants were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

A community college within the Virginia Community College System employs Grievant B[2] as an Architect/Engineer I, Grievant K[3] as a Law Enforcement Officer II, and Grievant M[4] as a Trades Worker IV. Grievant B has been employed by the Agency for

[2] Grievant B supervises eight or nine employees.

[3] Grievant K supervised three or four law enforcement employees prior to his leaving the Agency after the filing of the disciplinary action.

[4] Grievant M supervises eight or nine employees in the buildings and ground department.

over 19 years. No evidence of prior disciplinary action against any of the greivants was presented during the hearing.

On August 9, 2005, Grievant B used the Agency's computer system to send an email to an employee he supervised. The subject line of the email states, "FIVE WAYS 2 HYPNOTIZE A MAN." Four pictures were attached to the email. The first picture shows the front of a young woman beginning just below her breasts to the top of her head. She is not wearing clothing. She is covering her breasts with her hands. The second picture shows the same woman smiling but without her hands covering her breasts. The third picture shows the woman with her hands underneath her breasts pushing them upward. The fourth picture shows the woman arched forward with her hands under her breast pushing them upward.[5]

On June 15, 2005, Grievant K used the Agency's computer system to send an email to two individuals. The subject line of the email states, "Why Exercise Could be Bad For You." Attached to the email was a picture of a woman standing up while riding a bicycle. The woman appears wearing a shirt but her pants are down to her knees. Her bottom is fully exposed. The caption to the right of the picture reads: "NEW MOUNTAIN BIKE $450, NEW SNEAKS $85, GETTING YOUR SHORTS CAUGHT ON THE SEAT AND SHOWING YOUR ASS TO THE WORLD PRICELESS."[6]

On July 26, 2005, Grievant K used the Agency's computer system to send an email to five Agency employees. The subject line of the email states, "Swimsuit contest." Attached to the email were several pictures. The first picture shows two young women wearing only thong bathing suits. The woman are facing forward but looking backward and toward the center of the picture. The woman's bottoms and breast are exposed. The second picture shows the same women from the front. Their breasts are fully displayed.[7]

On June 30, 2005, Grievant M sent an email using the Agency's computer system. The subject line of the email states, "Click The Bear." The first page shows ten pictures. Three of the pictures show women's' breasts. One picture shows a woman's genitals. The second page shows the front of a woman from her waist up. She is not wearing any clothing.[8]

For the purpose of establishing a basis to reduce or rescind the disciplinary action against them, the Grievants presented evidence of an art display sanctioned by the Agency. From December 2005 until February 6, 2006, the Agency displayed the art work of one of its adjunct faculty in its student library. As discussed below, at least one

[5] Agency Exhibit 4.

[6] Agency Exhibit 5.

[7] Agency Exhibit 5.

[8] Agency Exhibit 6.

of the paintings is a lewd depiction of nudity. While the paintings were displayed, the Agency received several complaints. Several employees were offended by the display. After considering the matter, the Agency decided to leave the paintings on display and took down the paintings only when the exhibition was originally scheduled to end.

An employee objecting to the art display sent the Vice President an email asking:

> If I were to take digital pictures of the artwork that is currently displayed in the Gallery (and thus obviously sanctioned by the college) put those pictures on my PC and then sent them via e-mail to others, would I be guilty of violating the Colleges or State policy?

The Vice President responded:

> I believe the answer to your question is that, yes; you would be in violation of the state code which prohibits the electronic transfer on state equipment of sexually explicit material as defined in the code. I am not aware of any other code provision dealing with the display of objectionable art work. I will ask [Human Resource Officer] via a copy of this document, to make an official inquiry to the VCCS and VDHRM on the matter. I have received your comments as well as several others and have forwarded them to the appropriate office. The key concern seems to be the possibility of children on campus seeing the art work as it is displayed in an open and public viewing area.[9]

Grievants also presented evidence of an Agency English Department faculty member who worked as an editor of the "[name] Gay Men's Fiction Quarterly." At least one of the contributors to the quarterly wrote about a male character who discussed and described his genitals as being in a state of sexual arousal.[10] The Agency permits its faculty to have space on its web servers. The faculty member placed the contributor's article on the Agency's website. Several years ago, Agency managers discussed the faculty member's role as editor of the quarterly and concluded that he should be permitted to serve as editor in accordance with the Agency's expectation for "academic freedom." As editor, the faculty member can control the journal's contents and, thus, what is displayed on the Agency's web space.[11]

CONCLUSIONS OF POLICY

[9] Grievants' Exhibit 6.

[10] See, pages numbered 64 and 65 of Grievant's Exhibit 11.

[11] The Agency did not give written approval to the faculty member regarding any of the contents of the quarterly.

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[12] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

DHRM Policy 1.75 governs State employee use of the internet. This policy provides:

> Certain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to:
>
> - accessing, downloading, printing or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001);
> - downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images; ***
> - any other activities designated as prohibited by the agency.

DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

> Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:
>
> - interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
> - adversely affects the efficient operation of the computer system;
> - violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.)

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

Va. Code § 2827(B) provides:

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act (§ 2.2-3700).

Sexually explicit content is defined by *Va. Code § 2827(A)* as:

> (i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a **lewd exhibition of nudity**, as nudity is defined in § 18.2-390, **sexual excitement**, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism. (Emphasis added).

Va. Code § 18.2-390 defines nudity as:

> a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Va. Code § 2827 does not define "lewd exhibition of nudity." *Va. Code § 18.2-374.1* uses the same phrase and that section has been interpreted by Virginia courts. In Pederson v. City of Richmond, 219 Va. 1061, 1065 (1979), the Virginia Supreme Court considered the meaning of the terms, "lewd, lascivious, or indecent" and held:

> These words have meanings that are generally understood. We have defined 'lascivious' to mean 'a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of incident sexual desire and appetite.' 'Lewd' is a synonym of 'lascivious' and 'incident.' Webster's Third New International Dictionary 1301 (1969).

In Frantz v. Commonwealth, 9 Va. App. 348, the defendant took pictures of nude children but there was no evidence that the children assumed erotic or provocative poses. The Virginia Court of Appeals concluded the pictures were not legally obscene. Id. at 353. "[N]udity alone is not enough to make material legally obscene." Freeman v. Commonwealth, 223 Va. 301, 311 (1982). In Foster v. Commonwealth, 6 Va. App. 313, 329 (1988), the Virginia Court of Appeals held:

> The photographing of exposed nipples, while within the literal definition of nudity under *Code § 18.2-390*, is not, without more, the *lewd* exhibition of nudity required under *Code § 18.2-374.1 (1983).*

In Asa v. Commonwealth, 17 Va. App. 714, the Virginia Court of Appeals distinguished between mere nudity and sexually explicit photographs. The Court held:

> Asa's photographs of the teenager in this case include photographs depicting her posing in a sexually provocative manner, with the camera's eye focused on her genitalia. Included in the seized photographs are close-up photographs depicting the teenager's genitalia as the primary object depicted in the photograph. "Patently offensive representations or descriptions of … lewd exhibition of the genitals' are among the 'plain examples of what a state statute could define for regulation.'" *Freeman v. Commonwealth, 223 Va. 301, 311, 288 S.E.2d 461, 466 (1982) (quoting Miller v. California, 413 U.S. 15, 25, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973)).* These photographs, which contain as their primary focus the close-up views of the teenager's genitalia, depict the teenager sitting with her knees up to her breast and her legs widely spread to expose a frontal view of her genitalia. Those photographs are sexually explicit within the meaning of *Code § 18.2-374.1*.

Sending pictures by email first involves storing[13] them on the sender's computer. Emailing pictures of nude women may justify some sort of disciplinary action depending on the facts of the case, but in order for an employee to be deemed to have violated DHRM Policy 1.75 regarding sexually explicit content, that employee must have downloaded pictures constituting a "lewd exhibition of nudity."

Grievant B sent an email with pictures of a woman and constituting a lewd exhibition of nudity. The woman's breasts are the focus of the picture. She is holding her breasts in a manner as to focus the viewer's attention on her breasts.

Grievant K sent a picture of a woman riding a bike with her bottom uncovered. The picture represents a lewd exhibition of nudity. The woman's bare bottom is the focus of the picture. The woman is posed so as to draw the viewer's attention to her bottom. The caption of the picture confirms this conclusion by stating, "SHOWING YOUR ASS TO THE WORLD."

Grievant K also sent two pictures of two woman wearing only thong bathing suits. They are on a beach with water in the background. Each picture shows the woman standing, but does not show them making any obvious gestures or holding positions intended to draw attention to their exposed breasts or bottoms. Whether these pictures are merely nudity or are a lewd exhibition of nudity is sufficiently unclear that the

[13] In order to transmit a picture as an attachment to an email, the sender (at a minimum) must download the image into the computer's random access memory.

Hearing Officer must conclude the Agency has not met its burden of proof to show that the pictures are a lewd exhibit of nudity.

Grievant M sent a file with ten small pictures. One picture focuses on a woman's breasts without showing her face or her body below her breasts. Another picture shows a close up of a woman's genitals with the caption above it "LICK ME". A third picture shows a side view of a woman with breasts in the front and in the back. All of these pictures focus the viewer's attention on bare breasts and genitals and represent a lewd exhibit of nudity.

Grievant M also sent a picture of a smiling woman without clothing from her waist upward. Whether this picture is merely nudity or is a lewd exhibition of nudity is sufficiently close that the Hearing Officer must conclude the Agency has not met its burden of proof to show that the picture is a lewd exhibit of nudity.

The Agency has presented sufficient evidence to establish that all three Grievants acted contrary to DHRM Policy 1.75.

Grievants contend the disciplinary action against them should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[14] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive.

Notice of the Existence of the Rule. Grievants received adequate notice of DHRM Policy 1.75. The policy was emailed to them and was generally available for their review along with other human resource policies. Grievants contend the Agency failed to maintain a copy of the email receipt showing which employees received a copy of the policy. When the Agency changed its computer system, its email receipts were lost.[15] The Agency's inability to show that it was "requiring and retaining acknowledgement statements, signed by each user, acknowledging receipt of a copy of this policy and agency policy, if appropriate"[16] is harmless error. The purpose of the provision is to cause agencies to disseminate copies of the policy, not to create an independent standard of minimum notice.

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[14] *Va. Code § 2.2-3005.*

[15] On June 3, 2003, the Agency sent a copy of DHRM Policy 1.75 to all of its employees by email. The Agency asked employees to respond to the email so that the Agency would have a receipt showing delivery of the policy. All three Grievants were employed by the Agency on June 3, 2003.

[16] DHRM Policy 1.75 governing Agency Responsibilities.

Grievants argue that the disciplinary actions against them should be reversed because the Agency failed to distribute to them copies of Va. Code § 2.2-2827. Va. Code § 2827 states, "All agencies shall immediately furnish their current employees copies of this section's provisions, and shall furnish all new employees copies of this section concurrent with authorizing them to use agency computers."

Although the Agency admits it did not distribute copies of Va. Code § 2.2-2827, its failure to do so is harmless error. On July 15, 2002, the Agency sent a memorandum to all its employees stating,

> In the 1996 legislative session, legislation was passed which states that no agency employee shall utilize a state computer to access sexually explicit material. Recent correspondence from the Chancellor's office requested that copy of the legislation be distributed for your information. A copy of the legislation is on the reverse side of this memorandum.

Sections 2.1-804, 2.1-805, and 2.1-806 of the Code of Virginia were attached to the memorandum. The sections were revised and renumbered as section 2.2-2827. There is no material difference between these three sections and section 2.2-2827. For example, section 2.1-804 defines "Sexually explicit content" as:

> (i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism.

In short, the Agency notified its employees that State law prohibits having sexually explicit content on one's computer, but failed to attach an updated draft of the law. The Agency's error does not affect the outcome of this appeal. There is no basis to mitigate the disciplinary action because of inadequate notice.

Consistent Application of Disciplinary Action. Whether the Agency has consistently disciplined its employees depends on what employees are to be compared. No evidence was presented suggesting other *classified* employees were not disciplined for sending emails containing lewd depictions of nudity.

Employees acting contrary to DHRM Policy 1.75 may receive up to a Group III Written Notice depending on the employee's behavior.[17] Of the 15 classified employees alleged to have violated DHRM Policy 1.75, eleven received Group I Written Notices

[17] DHRM Policy 1.75 states:

> The appropriate level of disciplinary action will be determined on a case-by-case basis by the agency head or designee, with sanctions up to or including termination depending on the severity of the offense, consistent with Policy 1.60 or the appropriate applicable policy.

and four received Group II Written Notices.[18] Grievant B received a Group II Written Notice because he held a supervisory position. The Agency reduced the disciplinary action during the step process due to mitigating circumstances. Grievant K received a Group II Written Notice because the Agency expected a law enforcement officer to be more likely to know not to act contrary to policy. A law enforcement officer is one who enforces law. The Agency expected a law enforcement officer to set an example for others. The Agency's expectation is a reasonable basis to distinguish between Grievant K and the classified employees receiving a Group I Written Notice.[19]

The Agency did not take disciplinary action against the English Department faculty member who edits the Gay Men's Quarterly.[20] The Agency does not believe his actions warrant disciplinary action. No evidence was presented to show that the faculty member was a classified employee. Only classified employees are subject to DHRM Policy 1.75 and DHRM Policy 1.60. The Agency cannot be considered as having engaged in the inconsistent application of discipline with respect to employees not subject to being disciplined under DHRM policy. Accordingly, the Agency's failure to discipline a faculty member for displaying text describing sexual excitement is not a basis to mitigate the disciplinary action against the Grievants.[21]

Free of Improper Motive. No credible evidence was presented to suggest that the Agency acted out of any improper motive. The evidence showed that the Agency took disciplinary action against the Grievants because Agency managers believed the Grievants violated DHRM Policy 1.75. There is no basis to mitigate the disciplinary action because of any improper motive of the Agency.

List is not All-inclusive. Although the *Rules* list three examples of when disciplinary action may be mitigated, that list is not all-inclusive.[22]

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[18] Agency Exhibit 11.

[19] Grievant K argues that the Vice President failed to properly mitigate the disciplinary action. He argues that the offense is a Group II and that the Vice President mistakenly believed the offense was a Group III offense prior to mitigation. If the Vice President had known the offense was actually a Group II offense and then mitigated the offense, the outcome would have been a Group I offense, according to Grievant K. This argument fails because the Vice President was correct that actions contrary to DHRM 1.75 could be a Group III Written Notice.

[20] It is not clear the Agency was aware of the contents of the journal until Grievants presented that information to the Agency during the grievance step process. The Agency did not indicate it intended to take disciplinary action against the faculty member.

[21] The Agency also failed to take disciplinary action against those involved in presenting the art work in the library. Senior Agency managers authorized the display. The painter was not a classified employee. Which senior managers were involved and whether they were classified employees was not established during the hearing.

[22] See, EDR Ruling 2004-583 issued March 12, 2004 (also numbered as 2003-539).

Grievants argue the Agency openly sanctioned the lewd exhibit of nudity in its library and tolerates the textual description of sexual excitement on its computer servers and web pages. Grievants have presented evidence supporting this argument.[23]

The Agency has admitted that the content of the paintings on display in the library constitute sexually explicit material as the term is used by DHRM Policy 1.75 and Va. Code § 2.2-2827. The Agency's Vice President admitted that if an employee took a digital photograph of the painting and sent it to another person by email that the employee would be in violation of DHRM policy. In order for the email to be in violation of DHRM Policy 1.75, it would have to be a lewd exhibition of nudity. Thus, the Agency has admitted that the contents of at least some of the paintings represent sexually explicit content. This admission alone is sufficient to establish the Grievants' argument that the Agency is sanctioning a lewd display of nudity. A review of the paintings displayed in the library confirms the Agency's admission. At least one (and possibly several more) of the paintings represents a lewd display of nudity. For example, the bottom picture of Grievants' Exhibit 3 shows a picture of an unclothed woman. Her breasts and pubic hair are visible. The picture angle is as if the viewer is looking upward from just below her knee. The effect is that the lower portion of her body appears larger than the upper part of her body.[24] The woman's right hip is angled slightly thereby emphasizing her pubic area. Her shoulders are arched backwards slightly to emphasize her breasts.

Grievants question how they can be disciplined for sending sexually explicit pictures while the Agency openly promotes sexually explicit material in its library and on its web pages. If it is all right for the Agency to engage in such behavior, it must be all right for the Grievants to engage in similar behavior, according to the Grievants.

The Agency contends its actions are distinguishable from the Grievants' actions because DHRM Policy 1.75 prohibits the Grievants' actions but no policy prohibits the Agency's art show.[25] In other words, the presence or absence of policy governs seemingly similar actions.

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[23] In some ways, the Agency's art display raises more concerns than do the Grievants' emails. For example, Grievants could control who viewed their emails. The Agency had little control over who viewed the art display. Indeed, the Vice President expressed concern that children might see the Agency's art display. Moreover, the paintings were not displayed in a museum where a visitor might expect to see nudity. It is possible many visitors would not expect to see lewd displays of nudity on the walls of a library.

[24] In other words, the picture emphasizes the woman's face and head less than her breasts and pubic area.

[25] Although no DHRM policy specifically prohibits an Agency from displaying sexually explicit art work, the Agency's assertion that no policy prohibits its action is not certain. DHRM Policy 2.30 governs workplace harassment. DHRM Policy 2.30, *Workplace Harassment* provides:

> The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, national origin, age, sex, religion, disability, marital status or pregnancy.

The Hearing Officer is not free to define additional mitigating circumstances without any restrictions.[26] For example, the *Rules* require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters."

The Agency has utilized its business judgement to permit its employees to openly display sexually explicit art work while prohibiting them from sending sexually explicit emails. The logic of the Agency's decision is supported by the existence of a policy specifically prohibiting Grievants' behavior and the absence of a policy specifically prohibiting the Agency's action. [27] Under the standard of deference, the Hearing Officer must uphold the Agency's judgement when it is has some basis in logic. The Hearing Officer must grant deference regardless of whether the Hearing Officer agrees or disagrees with the Agency's judgement. Accordingly, there is no basis under the *Rules* to mitigate the disciplinary action taken against the Grievants.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant B of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance to Grievant K of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to Grievant M of a Group I Written Notice is **upheld**.

> **Hostile environment** – A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

Several Agency employees complained about the art display. The details of their complaints are not part of this hearing. Although the Hearing Officer cannot conclude that the Agency created a hostile work environment, the Agency's claim that it has not violated policy is not inviolate.

[26] Just as the DHRM Director is the final authority regarding interpretation of DHRM policies, the EDR Director is the final authority regarding what circumstances are sufficient to mitigate disciplinary action. This is true because the EDR Director has created the policy defining mitigating circumstances.

[27] In addition, it appears that the Agency does not consider the art work in the library or the journal writings to be "obscene." Va. Code § 18.2-372 states:

> The word "obscene" where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

The Agency views the art work and journal writings as having serious literary or artistic value.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   830 East Main St. STE 400
   Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[28]

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

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

S/Carl Wilson Schmidt

_____

Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8250 / 8251 / 8252

Hearing Date: February 7, 2006
Decision Issued: February 23, 2006
Substituted Decision: March 9, 2006

SUBSTITUTED DECISION

The Hearing Officer acting *sua sponet*, issues this Substituted Decision for the purpose of clarifying the original decision issued February 23, 2006. Portions of the original decision are stated herein with modifications as appropriate.

PROCEDURAL HISTORY

On September 22, 2005, the three Grievants received disciplinary action for failure to follow Department of Human Resource Management (DHRM) Policy 1.75, *Use of Internet and Electronic Communication Systems*. Grievant B and Grievant K received Group II Written Notices of disciplinary action.[29] Grievant M received a Group I Written Notice.

All three employees filed grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievants and each requested a hearing. On January 6, 2006, the EDR Director issued Rulings 2006-1236, 2006-1237, and 2006-1238 consolidating the three grievances. On January 9, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 7, 2006, a hearing was held at the Agency's regional office.

[29] The Agency reduced Grievant B's disciplinary action to a Group I Written Notice after considering mitigating circumstances.

APPEARANCES

Grievant M
Grievant B
Grievant M and B's Counsel
Grievant K's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

5. Whether Grievants engaged in the behavior described in the Written Notice?

6. Whether the behavior constituted misconduct?

7. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

8. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievants were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

A community college within the Virginia Community College System employs Grievant B[30] as an Architect/Engineer I, Grievant K[31] as a Law Enforcement Officer II,

[30] Grievant B supervises eight or nine employees.

and Grievant M[32] as a Trades Worker IV. Grievant B has been employed by the Agency for over 19 years. No evidence of prior disciplinary action against any of the greivants was presented during the hearing.

On August 9, 2005, Grievant B used the Agency's computer system to send an email to an employee he supervised. The subject line of the email states, "FIVE WAYS 2 HYPNOTIZE A MAN." Four pictures were attached to the email. The first picture shows the front of a young woman beginning just below her breasts to the top of her head. She is not wearing clothing. She is covering her breasts with her hands. The second picture shows the same woman smiling but without her hands covering her breasts. The third picture shows the woman with her hands underneath her breasts pushing them upward. The fourth picture shows the woman arched forward with her hands under her breast pushing them upward.[33]

On June 15, 2005, Grievant K used the Agency's computer system to send an email to two individuals. The subject line of the email states, "Why Exercise Could be Bad For You." Attached to the email was a picture of a woman standing up while riding a bicycle. The woman appears wearing a shirt but her pants are down to her knees. Her bottom is fully exposed. The caption to the right of the picture reads: "NEW MOUNTAIN BIKE $450, NEW SNEAKS $85, GETTING YOUR SHORTS CAUGHT ON THE SEAT AND SHOWING YOUR ASS TO THE WORLD PRICELESS."[34]

On July 26, 2005, Grievant K used the Agency's computer system to send an email to five Agency employees. The subject line of the email states, "Swimsuit contest." Attached to the email were several pictures. The first picture shows two young women wearing only thong bathing suits. The woman are facing forward but looking backward and toward the center of the picture. The woman's bottoms and breast are exposed. The second picture shows the same women from the front. Their breasts are fully displayed.[35]

On June 30, 2005, Grievant M sent an email using the Agency's computer system. The subject line of the email states, "Click The Bear." The first page shows ten pictures. Three of the pictures show women's' breasts. One picture shows a woman's genitals. The second page shows the front of a woman from her waist up. She is not wearing any clothing.[36]

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[31] Grievant K supervised three or four law enforcement employees prior to his leaving the Agency after the filing of the disciplinary action.

[32] Grievant M supervises eight or nine employees in the buildings and ground department.

[33] Agency Exhibit 4.

[34] Agency Exhibit 5.

[35] Agency Exhibit 5.

[36] Agency Exhibit 6.

For the purpose of establishing a basis to reduce or rescind the disciplinary action against them, the Grievants presented evidence of an art display sanctioned by the Agency. From December 2005 until February 6, 2006, the Agency displayed the art work of one of its adjunct faculty in its student library. As discussed below, at least one of the paintings is a lewd depiction of nudity. While the paintings were displayed, the Agency received several complaints. Several employees were offended by the display. After considering the matter, the Agency decided to leave the paintings on display and took down the paintings only when the exhibition was originally scheduled to end.

An employee objecting to the art display sent the Vice President an email asking:

> If I were to take digital pictures of the artwork that is currently displayed in the Gallery (and thus obviously sanctioned by the college) put those pictures on my PC and then sent them via e-mail to others, would I be guilty of violating the Colleges or State policy?

The Vice President responded:

> I believe the answer to your question is that, yes; you would be in violation of the state code which prohibits the electronic transfer on state equipment of sexually explicit material as defined in the code. I am not aware of any other code provision dealing with the display of objectionable art work. I will ask [Human Resource Officer] via a copy of this document, to make an official inquiry to the VCCS and VDHRM on the matter. I have received your comments as well as several others and have forwarded them to the appropriate office. The key concern seems to be the possibility of children on campus seeing the art work as it is displayed in an open and public viewing area.[37]

Grievants also presented evidence of an Agency English Department faculty member who worked as an editor of the "[name] Gay Men's Fiction Quarterly." At least one of the contributors to the quarterly wrote about a male character who discussed and described his genitals as being in a state of sexual arousal.[38] The Agency permits its faculty to have space on its web servers. The faculty member placed the contributor's article on the Agency's website. Several years ago, Agency managers discussed the faculty member's role as editor of the quarterly and concluded that he should be permitted to serve as editor in accordance with the Agency's expectation for "academic freedom." As editor, the faculty member can control the journal's contents and, thus, what is displayed on the Agency's web space.[39]

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[37] Grievants' Exhibit 6.

[38] See, pages numbered 64 and 65 of Grievant's Exhibit 11.

[39] The Agency did not give written approval to the faculty member regarding any of the contents of the quarterly.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).[40] Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

DHRM Policy 1.75 governs State employee use of the internet. This policy provides:

> Certain activities are prohibited when using the Internet or electronic communications. These include, but are not limited to:
>
> - accessing, downloading, printing or storing information with sexually explicit content as prohibited by law (see Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001);
> - downloading or transmitting fraudulent, threatening, obscene, intimidating, defamatory, harassing, discriminatory, or otherwise unlawful messages or images; ***
> - any other activities designated as prohibited by the agency.

DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

> Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:
>
> - interferes with the user's productivity or work performance, or with any other employee's productivity or work performance;
> - adversely affects the efficient operation of the computer system;
> - violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law

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

> or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.)

Va. Code § 2827(B) provides:

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content. Agency approvals shall be given in writing by agency heads, and any such approvals shall be available to the public under the provisions of the Virginia Freedom of Information Act (§ 2.2-3700).

Sexually explicit content is defined by *Va. Code § 2827(A)* as:

> (i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a **lewd exhibition of nudity**, as nudity is defined in § 18.2-390, **sexual excitement**, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism. (Emphasis added).

Va. Code § 18.2-390 defines nudity as:

> a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

Va. Code § 2827 does not define "lewd exhibition of nudity." *Va. Code § 18.2-374.1* uses the same phrase and that section has been interpreted by Virginia courts. In Pederson v. City of Richmond, 219 Va. 1061, 1065 (1979), the Virginia Supreme Court considered the meaning of the terms, "lewd, lascivious, or indecent" and held:

> These words have meanings that are generally understood. We have defined 'lascivious' to mean 'a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of incident sexual desire and appetite.' 'Lewd' is a synonym of 'lascivious' and 'incident.' Webster's Third New International Dictionary 1301 (1969).

In Frantz v. Commonwealth, 9 Va. App. 348, the defendant took pictures of nude children but there was no evidence that the children assumed erotic or provocative poses. The Virginia Court of Appeals concluded the pictures were not legally obscene.

Id. at 353. "[N]udity alone is not enough to make material legally obscene." Freeman v. Commonwealth, 223 Va. 301, 311 (1982). In Foster v. Commonwealth, 6 Va. App. 313, 329 (1988), the Virginia Court of Appeals held:

> The photographing of exposed nipples, while within the literal definition of nudity under *Code § 18.2-390*, is not, without more, the *lewd* exhibition of nudity required under *Code § 18.2-374.1 (1983).*

In Asa v. Commonwealth, 17 Va. App. 714, the Virginia Court of Appeals distinguished between mere nudity and sexually explicit photographs. The Court held:

> Asa's photographs of the teenager in this case include photographs depicting her posing in a sexually provocative manner, with the camera's eye focused on her genitalia. Included in the seized photographs are close-up photographs depicting the teenager's genitalia as the primary object depicted in the photograph. "Patently offensive representations or descriptions of … lewd exhibition of the genitals' are among the 'plain examples of what a state statute could define for regulation.'" *Freeman v. Commonwealth, 223 Va. 301, 311, 288 S.E.2d 461, 466 (1982) (quoting Miller v. California, 413 U.S. 15, 25, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973)).* These photographs, which contain as their primary focus the close-up views of the teenager's genitalia, depict the teenager sitting with her knees up to her breast and her legs widely spread to expose a frontal view of her genitalia. Those photographs are sexually explicit within the meaning of *Code § 18.2-374.1*.

Sending pictures by email first involves storing[41] them on the sender's computer. Emailing pictures of nude women may justify some sort of disciplinary action depending on the facts of the case, but in order for an employee to be deemed to have violated DHRM Policy 1.75 regarding sexually explicit content, that employee must have downloaded pictures constituting a "lewd exhibition of nudity."

Grievant B sent an email with pictures of a woman and constituting a lewd exhibition of nudity. The woman's breasts are the focus of the picture. She is holding her breasts in a manner as to focus the viewer's attention on her breasts.

Grievant K sent a picture of a woman riding a bike with her bottom uncovered. The picture represents a lewd exhibition of nudity. The woman's bare bottom is the focus of the picture. The woman is posed so as to draw the viewer's attention to her bottom. The caption of the picture confirms this conclusion by stating, "SHOWING YOUR ASS TO THE WORLD."

[41] In order to transmit a picture as an attachment to an email, the sender (at a minimum) must download the image into the computer's random access memory.

Grievant K also sent two pictures of two woman wearing only thong bathing suits. They are on a beach with water in the background. Each picture shows the woman standing, but does not show them making any obvious gestures or holding positions intended to draw attention to their exposed breasts or bottoms. Whether these pictures are merely nudity or are a lewd exhibition of nudity is sufficiently unclear that the Hearing Officer must conclude the Agency has not met its burden of proof to show that the pictures are a lewd exhibit of nudity.

Grievant M sent a file with ten small pictures. One picture focuses on a woman's breasts without showing her face or her body below her breasts. Another picture shows a close up of a woman's genitals with the caption above it "LICK ME". A third picture shows a side view of a woman with breasts in the front and in the back. All of these pictures focus the viewer's attention on bare breasts and genitals and represent a lewd exhibit of nudity.

Grievant M also sent a picture of a smiling woman without clothing from her waist upward. Whether this picture is merely nudity or is a lewd exhibition of nudity is sufficiently close that the Hearing Officer must conclude the Agency has not met its burden of proof to show that the picture is a lewd exhibit of nudity.

The Agency has presented sufficient evidence to establish that all three Grievants acted contrary to DHRM Policy 1.75.

Grievants contend the disciplinary action against them should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[42] Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive.

Notice of the Existence of the Rule. Grievants received adequate notice of DHRM Policy 1.75. The policy was emailed to them and was generally available for their review along with other human resource policies. Grievants contend the Agency failed to maintain a copy of the email receipt showing which employees received a copy of the policy. When the Agency changed its computer system, its email receipts were lost.[43] The Agency's inability to show that it was "requiring and retaining acknowledgement statements, signed by each user, acknowledging receipt of a copy of

[42] *Va. Code § 2.2-3005.*

[43] On June 3, 2003, the Agency sent a copy of DHRM Policy 1.75 to all of its employees by email. The Agency asked employees to respond to the email so that the Agency would have a receipt showing delivery of the policy. All three Grievants were employed by the Agency on June 3, 2003.

this policy and agency policy, if appropriate"[44] is harmless error. The purpose of the provision is to cause agencies to disseminate copies of the policy, not to create an independent standard of minimum notice.

Grievants argue that the disciplinary actions against them should be reversed because the Agency failed to distribute to them copies of Va. Code § 2.2-2827. Va. Code § 2827 states, "All agencies shall immediately furnish their current employees copies of this section's provisions, and shall furnish all new employees copies of this section concurrent with authorizing them to use agency computers."

Although the Agency admits it did not distribute copies of Va. Code § 2.2-2827, its failure to do so is harmless error. On July 15, 2002, the Agency sent a memorandum to all its employees stating,

> In the 1996 legislative session, legislation was passed which states that no agency employee shall utilize a state computer to access sexually explicit material. Recent correspondence from the Chancellor's office requested that copy of the legislation be distributed for your information. A copy of the legislation is on the reverse side of this memorandum.

Sections 2.1-804, 2.1-805, and 2.1-806 of the Code of Virginia were attached to the memorandum. The sections were revised and renumbered as section 2.2-2827. There is no material difference between these three sections and section 2.2-2827. For example, section 2.1-804 defines "Sexually explicit content" as:

> (i) any description of or (ii) any picture, photograph, drawing, motion picture film, digital image or similar visual representation depicting sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, coprophilia, urophilia, or fetishism.

In short, the Agency notified its employees that State law prohibits having sexually explicit content on one's computer, but failed to attach an updated draft of the law. The Agency's error does not affect the outcome of this appeal. There is no basis to mitigate the disciplinary action because of inadequate notice.

Consistent Application of Disciplinary Action. Whether the Agency has consistently disciplined its employees depends on what employees are to be compared. No evidence was presented suggesting other *classified* employees were not disciplined for sending emails containing lewd depictions of nudity.

Employees acting contrary to DHRM Policy 1.75 may receive up to a Group III Written Notice depending on the employee's behavior.[45] Of the 15 classified employees

[44] DHRM Policy 1.75 governing Agency Responsibilities.

[45] DHRM Policy 1.75 states:

alleged to have violated DHRM Policy 1.75, eleven received Group I Written Notices and four received Group II Written Notices.[46] Grievant B initially received a Group II Written Notice because he held a supervisory position. The Agency reduced the disciplinary action during the step process due to mitigating circumstances.

The Agency's disciplinary action taken against Grievant K is inconsistent with the disciplinary action taken against Grievant B. Grievant K received a Group II Written Notice because the Agency expected a law enforcement officer to be more likely to know not to act contrary to policy. A law enforcement officer is one who enforces law. The Agency expected a law enforcement officer to set an example for others. Similarly, the Agency initially issued a Group II Written Notice to Grievant B because the Agency also believed he should have known better than to behave as he did and he should have set an example for others. The Agency considered Grievant B as a "senior manager." The Agency also believed Grievant B should have known better than to behave as he did because he served as the interim human resource manager and, thus, should have become familiar with State policy such as DHRM Policy 1.75. The two primary reasons to give Grievant K a Group II Written Notice applied to Grievant B yet the Agency reduced Grievant B's disciplinary action from a Group II to a Group I Written Notice. Accordingly, to rectify the discrepancy, the Group II Written Notice issued to Grievant K must be reduced to a Group I Written Notice.

The Agency did not take disciplinary action against the English Department faculty member who edits the Gay Men's Quarterly.[47] The Agency does not believe his actions warrant disciplinary action. No evidence was presented to show that the faculty member was a classified employee. Only classified employees are subject to DHRM Policy 1.75 and DHRM Policy 1.60. The Agency cannot be considered as having engaged in the inconsistent application of discipline with respect to employees not subject to being disciplined under DHRM policy. Accordingly, the Agency's failure to discipline a faculty member for displaying text describing sexual excitement is not a basis to mitigate the disciplinary action against the Grievants.[48]

> The appropriate level of disciplinary action will be determined on a case-by-case basis by the agency head or designee, with sanctions up to or including termination depending on the severity of the offense, consistent with Policy 1.60 or the appropriate applicable policy.

[46] Agency Exhibit 11.

[47] It is not clear the Agency was aware of the contents of the journal until Grievants presented that information to the Agency during the grievance step process. The Agency did not indicate it intended to take disciplinary action against the faculty member.

[48] The Agency also failed to take disciplinary action against those involved in presenting the art work in the library. Senior Agency managers authorized the display. The painter was not a classified employee. Which senior managers were involved and whether they were classified employees was not established during the hearing.

Free of Improper Motive. No credible evidence was presented to suggest that the Agency acted out of any improper motive. The evidence showed that the Agency took disciplinary action against the Grievants because Agency managers believed the Grievants violated DHRM Policy 1.75. There is no basis to mitigate the disciplinary action because of any improper motive of the Agency.

List is not All-inclusive. Although the *Rules* list three examples of when disciplinary action may be mitigated, that list is not all-inclusive.[49]

Grievants argue the Agency openly sanctioned the lewd exhibit of nudity in its library and tolerates the textual description of sexual excitement on its computer servers and web pages. Grievants have presented evidence supporting this argument.[50]

The Agency has admitted that the content of the paintings on display in the library constitute sexually explicit material as the term is used by DHRM Policy 1.75 and Va. Code § 2.2-2827. The Agency's Vice President admitted that if an employee took a digital photograph of the painting and sent it to another person by email that the employee would be in violation of DHRM policy. In order for the email to be in violation of DHRM Policy 1.75, it would have to be a lewd exhibition of nudity. Thus, the Agency has admitted that the contents of at least some of the paintings represent sexually explicit content. This admission alone is sufficient to establish the Grievants' argument that the Agency is sanctioning a lewd display of nudity. A review of the paintings displayed in the library confirms the Agency's admission. At least one (and possibly several more) of the paintings represents a lewd display of nudity. For example, the bottom picture of Grievants' Exhibit 3 shows a picture of an unclothed woman. Her breasts and pubic hair are visible. The picture angle is as if the viewer is looking upward from just below her knee. The effect is that the lower portion of her body appears larger than the upper part of her body.[51] The woman's right hip is angled slightly thereby emphasizing her pubic area. Her shoulders are arched backwards slightly to emphasize her breasts.

Grievants question how they can be disciplined for sending sexually explicit pictures while the Agency openly promotes sexually explicit material in its library and on its web pages. If it is all right for the Agency to engage in such behavior, it must be all right for the Grievants to engage in similar behavior, according to the Grievants.

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[49] See, EDR Ruling 2004-583 issued March 12, 2004 (also numbered as 2003-539).

[50] In some ways, the Agency's art display raises more concerns than do the Grievants' emails. For example, Grievants could control who viewed their emails. The Agency had little control over who viewed the art display. Indeed, the Vice President expressed concern that children might see the Agency's art display. Moreover, the paintings were not displayed in a museum where a visitor might expect to see nudity. It is possible many visitors would not expect to see lewd displays of nudity on the walls of a library.

[51] In other words, the picture emphasizes the woman's face and head less than her breasts and pubic area.

The Agency contends its actions are distinguishable from the Grievants' actions because DHRM Policy 1.75 prohibits the Grievants' actions but no policy prohibits the Agency's art show.[52] In other words, the presence or absence of policy governs seemingly similar actions.

The Hearing Officer is not free to define additional mitigating circumstances without any restrictions.[53] For example, the *Rules* require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters."

The Agency has utilized its business judgement to permit its employees to openly display sexually explicit art work while prohibiting them from sending sexually explicit emails. The logic of the Agency's decision is supported by the existence of a policy specifically prohibiting Grievants' behavior and the absence of a policy specifically prohibiting the Agency's action. [54] Under the standard of deference, the Hearing Officer must uphold the Agency's judgement when it is has some basis in logic. The Hearing Officer must grant deference regardless of whether the Hearing Officer agrees or

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[52] Although no DHRM policy specifically prohibits an Agency from displaying sexually explicit art work, the Agency's assertion that no policy prohibits its action is not certain. DHRM Policy 2.30 governs workplace harassment. DHRM Policy 2.30, *Workplace Harassment* provides:

> The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, national origin, age, sex, religion, disability, marital status or pregnancy.
>
> **Hostile environment** – A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

Several Agency employees complained about the art display. The details of their complaints are not part of this hearing. Although the Hearing Officer cannot conclude that the Agency created a hostile work environment, the Agency's claim that it has not violated policy is not inviolate.

[53] Just as the DHRM Director is the final authority regarding interpretation of DHRM policies, the EDR Director is the final authority regarding what circumstances are sufficient to mitigate disciplinary action. This is true because the EDR Director has created the policy defining mitigating circumstances.

[54] In addition, it appears that the Agency does not consider the art work in the library or the journal writings to be "obscene." Va. Code § 18.2-372 states:

> The word "obscene" where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.

The Agency views the art work and journal writings as having serious literary or artistic value.

disagrees with the Agency's judgement. Accordingly, there is no basis under the *Rules* to mitigate the disciplinary action taken against the Grievants.

DECISION

For the reasons stated herein, the Agency's issuance to Grievant B of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance to Grievant K of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency's issuance to Grievant M of a Group I Written Notice is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

4. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

5. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

6. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   830 East Main St. STE 400
   Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[55]

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

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

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