Issues: Hostile/Intimidating Work Environment (sexual harassment), Age Discrimination, Retaliation; Hearing Date: 12/06/06; Decision Issued: 01/26/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8466; Outcome: Partial Relief (harassing work environment – founded) (discrimination and retaliation – unfounded); **Administrative Review: HO Reconsideration Request received 02/12/07; Reconsideration Decision issued 04/26/07; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 02/12/07; EDR Ruling #2007-1549, 2007-1550 issued 08/09/07; Outcome: Original decision affirmed (HO to clarify one issue); Second Reconsideration Decision issued 08/10/07 in accordance with EDR's ruling; Administrative Review: DHRM Ruling Request received 02/12/07; DHRM Ruling issued 09/20/07; Outcome: Original decision affirmed; Judicial Review: Appealed to Augusta Circuit Court; Outcome: Hearing Decision Reversed (01/15/08).**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8466S

Hearing Date: December 6, 2006
Decision Issued: January 26, 2007

PROCEDURAL HISTORY

On May 2, 2006, Grievant filed a grievance claiming the Agency created an intimidating and offensive work environment. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On October 16, 2006, the EDR Director issued Ruling No. 2007-1421 qualifying the grievance for hearing. On November 006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 6, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether the Agency violated Grievant's Constitutional Rights?
2. Whether the Agency created a hostile work environment for Grievant?

3. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. 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:

The Department of Corrections employs Grievant as a Case Management Counselor at one of its Facilities. She began working for the Agency on January 10, 2005. Grievant's duties include counseling inmates in the Agency's sex offender program and substance abuse programs. Grievant reports to the Treatment Program Supervisor (TPS). The TPS reports to the Assistant Warden who reports to the Warden.

The Office of Inspector General is a unit of the Department of Corrections responsible for conducting criminal and administrative investigations and inquiries. Employees of the Office report to the Inspector General who reports to the Agency Head.[1] Special Agents working as part of the Office of Inspector General may be located in various Facilities but they do not report to the Facility Wardens. Special Agents have police powers such as to arrest and to carry weapons. During the course of investigations at Facilities, Wardens may have control of the Facilities but Special Agents are in control of the "scene". If a conflict arises between the wishes of a Warden and of a Special Agent regarding an investigation, the Special Agent has greater authority.[2]

DOC employees are obligated to provide assistance to investigators of the Office of Inspector General. DOC Procedure 10-4(D) provides:

> 1. Employees must answer questions of official interest and provide the investigators with any evidence or information they have that might pertain to the investigation, provided their constitutional rights are not violated.

[1] The Internal Affairs Unit of the Office of Inspector General is staffed with individuals who can conduct police investigations.

[2] See, DOC Procedure Number 10-4.9(D).

2. Refusal to provide required assistance constitutes grounds for disciplinary action.

On August 31, 2005, Inmate L placed a note in Grievant's inbox. She read the note the following day, September 1, 2005. The note contained sexually explicit language. Grievant sought out Inmate L and confronted him. Inmate L asked Grievant if she had received his request. Grievant instructed Inmate L to show his identification which he did. Inmate L asked if he could come see her. Grievant responded "no" because of what he had written. Grievant went to Captain B and informed him of her interaction with Inmate L. Captain B told Grievant to make a copy of the note and that he would speak with Inmate L.

Inmate L met with Captain B and told Captain B that Grievant and Inmate R were having sex and that he wanted to have sex with her as well.

On September 2, 2005, Grievant received a telephone call from the TPS telling Grievant to turn in her keys but not sign out and that serious allegations had been made regarding Grievant. Grievant met with the Facility Investigator. The Facility Investigator was not part of the Agency's Office of Inspector General.[3] He explained the charges to Grievant as he and she drove from the Facility to the regional office of the Office of Inspector General.

Once Grievant reached the regional office of the Office of Inspector General, she met with Special Agent D for approximately 2.5 hours. Special Agent D asked Grievant if she had had sex with Inmate R. He told Grievant that Inmate L said she was having sex with Inmate R. Grievant denied having sex with Inmate R and said that the allegation was ridiculous. Grievant wrote a seven page statement. Grievant was crying[4] during the meeting because of the harsh treatment of Special Agent D. Special Agent D asked Grievant if she felt like Sharon Stone in the movie, Basic Instinct.[5] Special Agent D said he did not believe her denial of having sex with Inmate R. He told Grievant to "come clean now."[6]

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[3] The Facility Investigator worked at Grievant's Facility and reported to the Warden.

[4] There is no reason for the Hearing Officer to believe that Grievant is unusually sensitive or cries easily.

[5] During the movie Basic Instinct, the character played by actress Sharon Stone is suspected of a crime and is interrogated by law enforcement officers. During the interrogation she crosses and uncrosses her legs exposing her genitals.

[6] Special Agent D did not need 2.5 hours to obtain the necessary information from Grievant. The information Special Agent D needed from Grievant was simple and straightforward. There was no basis for him to discuss the movie, Basic Instinct or to say he did not believe Grievant and that she should come clean now. Special Agent D acted contrary to DOC Procedure Number 10-4.10(B) requiring that, "[a]gents shall respect the rights of employees, inmates, and others, and shall be courteous in conducting investigations." There is a difference between questioning an employee and interrogating an employee. In particular, the intensity of questioning and the pressure put on the person is much greater for an interrogation than a questioning. In some cases it may be appropriate to interrogate an employee. In Grievant's case, there was no basis to interrogate Grievant. The only information Special Agent D had regarding Grievant's guilt came from a single convicted felon.

On September 6, 2005, Special Agent D requested of the Senior Assistant Chief that Grievant receive a polygraph examination regarding the allegation that she had sexual intercourse with Inmate R.[7] Special Agent M recommended to the Senior Assistant chief that a polygraph be taken.

On September 9, 2005, Special Agent D called the TPS and informed her that Grievant's polygraph test had been scheduled for Thursday, September 22, 2005 at 9 a.m. at the regional location of the Office of Inspector General.[8] On September 13, 2005, the Senior Assistant Chief sent Special Agent M an email approving the polygraph of Grievant.[9] Grievant asked the Facility Investigator to accompany her to the regional location.

Special Agent M is a sworn law enforcement officer functioning as the polygraph unit coordinator for the Agency. He is one of three employees conducting polygraphs for the Agency. He was certified as a polygraph examiner in 1989.[10] He has performed over nine hundred examinations.

On September 22, 2005, Grievant traveled with the Facility Investigator to the regional location of the Office of Inspector General to take a polygraph. Special Agent M took Grievant to the examination room and told her how the process worked.[11] Special Agent M advised Grievant of the Polygraph Standards of Practice and told her to fill out three forms including a waiver of her Miranda Rights and a consent form.[12] He told her he would be asking her questions about whether she had had sex with Inmate R. She believed Special Agent M intended only to ask her questions about Inmate R.

Grievant sat in a chair as Special Agent M asked Grievant 43 questions about her sexual behavior. Special Agent M held a piece of paper and gave the appearance of writing down Grievant's responses as he asked her questions.[13] The questions he asked were:

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[7] Grievant Exhibit 2.

[8] Grievant Exhibit 2.

[9] Grievant Exhibit 2.

[10] Polygraph examiners are licensed by the Department of Professional and Occupational Regulation. See, Va. Code § 54.1-1800 to § 54.1-1806, and 18 VAC 30-120-30 et seq.

[11] Special Agent M had not met Grievant prior to the polygraph examination.

[12] The consent form stated Grievant consented to questions about having sex with an inmate. The Miranda Right's form was not submitted as evidence.

[13] The "pretest" questioning lasted between 45 minutes and an hour. Special Agent M later destroyed the notes he had taken as part of his standard practice.

[The actual questions posed to the grievant, which were originally listed in this hearing decision, have been redacted for the reasons set forth in EDR Ruling 2007-1549, 2007-1550. For the same reason (agency security concerns), the paraphrased questions that were originally published in EDR Ruling 2007-1549, 2007-1550 and EDR Ruling 2007-1421 have also been removed. For purposes of this decision, it can be stated that the grievant was questioned extensively in very explicit terms about her entire past sexual history, including the timeframe prior to being employed by DOC. (If pending litigation results in a court decision denying the agency the ability to continue to use the questions posed in this case, this Department intends to publish the questions (or a paraphrasing of them) absent clear evidence of some genuine residual security threat in doing so.)]

Grievant answered all of the questions Special Agent M asked because she believed she would not pass the test without doing so.[14] Grievant believed she had to take the polygraph examination to prove she did nothing wrong. She felt extremely uncomfortable answering the approximately[15] 43 questions posed by Special Agent M.[16] She commented to Special Agent M that he knew more about her than did her mother.

After considering Grievant's responses to the 43 questions, Special Agent M formulated the actual test questions. He attached the polygraph components to her body and explained their function. He then asked her three groups of questions in different order. The questions were drawn from the following questions:

[The actual questions are redacted for the reasons set forth in EDR Ruling 2007-1549, 2007-1550.]

The polygraph examination lasted approximately two hours.

After Grievant finished her polygraph examination, Inmate R met with Special Agent M to have a polygraph examination. As Special Agent M presented Inmate R with the three forms and was explaining the process with Inmate R, Special Agent M concluded he could not give the polygraph to Inmate R. Special Agent M then began an interrogation and Inmate R confessed that he lied about having sex with Grievant. No polygraph was taken of Inmate R.

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[14] As Special Agent M began asking the questions about her prior sexual behavior, she told him that she felt the questions were "really personal".

[15] Not all of the questions Special Agent M asked Grievant are listed. Although the listed questions include a question about whether Grievant engaged in oral sex, both Grievant and the Special Agent M testified that he asked whether she had performed "fellatio." The question asked used the word "fellatio."

[16] Grievant testified she felt as if she were standing naked in the room.

Special Agent M drafted a polygraph examination report on September 22, 2005. The report stated:

> The purpose of this examination is to refute the allegations that [Grievant] engaged in sexual intercourse with [Inmate R] at [Facility]. The following relevant questions were asked:
>
> 1. Did [Inmate R] touch you in a sexual manner?
> 2. Did [Inmate R] touch you in a sexual manner, at [Facility]?
>
> An evaluation of the polygraph charts determined [Grievant] to be non-deceptive when she answered, "No" to the relevant questions.[17]

On September 22, 2005, Special Agent D called the TPS and informed her that Grievant had passed the polygraph test. The TPS informed Grievant of Special Agent D's call.

On January 30, 2006, the Department of Corrections Equal Employment Opportunity Office acknowledged receiving Grievant's allegation of sexual harassment.[18] The Department's EEO division issued its determination on April 24, 2006 and wrote to Grievant:

> While we can understand your discomfort at the questions asked, we have determined that these types of questions have been used in polygraphs involving both male and female examinees and therefore we did not find evidence of discriminatory practices in the administering of the polygraphs based on gender.[19]

On April 11, 2006, the TPS called Grievant and informed her that she needed to participate in an investigation. Grievant asked the TPS if she would be Grievant's witness because Grievant did not trust the employees in Internal Affairs. Grievant went to meet with Special Agent H and Ms. T. Grievant explained that the TPS was her witness but Grievant was told she could not have a witness and the TPS left the interview. Special Agent H asked Grievant to write a statement and Grievant complied. Grievant's statement was not acceptable to Special Agent H so he asked her to re-write it. She did so. Grievant stated that she would not provide the statement to the Special Agent H unless she could make a copy of it herself. She held her hand on the paper and Special Agent H told her "You will remove your hand right now."

Grievant left the interview with Special Agent H and began crying in the hallway. On April 13, 2006, Grievant met with Warden B and he suspended[20] her and instructed

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[17] Grievant Exhibit 2.

[18] Grievant Exhibit 2.

[19] Grievant Exhibit 2.

[20] No evidence was presented regarding why the Warden suspended Grievant.

her to leave the Facility. Two hours later, the TPS called Grievant and told Grievant to come back to work and said that Grievant would be paid for the period of suspension.

Sergeant B sought out Grievant and told her that Inmate J said he wanted to get a charge against himself so he could remain at the Facility and not be transferred to another Facility with a lower security level. Sergeant B asked Grievant to speak with Inmate J to dissuade him from getting a charge. Grievant spoke with Inmate J but was unable to persuade Inmate J. Grievant told Sergeant B she was unable to change the inmate's mind. She told Sergeant B that she told Inmate J there was no way he would stay at the Facility because of the point system. The Agency began an investigation.

On April 20, 2006, the TPS informed Grievant she needed to speak with Special Agent D. Grievant said she would talk to anybody but him. The TPS told Grievant, Grievant could not refuse. The TPS said she would remain in the interview. Special Agent D allowed the TPS to remain in the room. Special Agent D asked Grievant questions about Inmate J. Special Agent D accused Grievant of trying to get Inmate J to get a charge by misbehaving. In addition, Special Agent D told Grievant that he worked there often and that he did not care whether she liked him or not. Grievant left the meeting and started crying. She went to the treatment area where a lot of other counselors were working. Several tried to calm down Grievant but were not successful. Grievant asked the TPS if she could go home and the TPS agreed. Another counselor accompanied Grievant home. No one from the Office of Inspector General questioned Sergeant B who referred Inmate J to Grievant.

Grievant has a part-time job as a cashier at a local department store. She was working as a cashier and looked up to see that her next customer was Special Agent D. Special Agent D said "Good evening" and smiled. Several cash register lines were open with cashiers and no waiting. Special Agent D saw Grievant. Instead of choosing one of the other lines, Special Agent D chose to check out in the line where Grievant was working as a cashier. Grievant quickly asked another employee to assume her duties as cashier and Grievant walked away crying. She walked to the Assistant Manager's office and explained what had happened. Shortly thereafter the cashier who relieved Grievant told Grievant that Special Agent D "flipped out" and demanded that Grievant could not walk away and leave her post at the service line.

On April 28, 2006, Grievant and Special Agent D attended an "anniversary" group lunch offered to Facility employees. Grievant sat down at a rectangular table with Counselor A to her side. Special Agent D walked to nearby table and sat down so that he directly faced Grievant. During the lunch and presentation, Special Agent D glared at Grievant in intimidating manner. Counselor A observed Special Agent D's behavior and observed Grievant suffer from signs of what Counselor A recognized as a panic attack including rapid pulse, increased breathing rate, chest pain, crying, and feelings of terror.

Grievant sought employment at another DOC Facility located several hours distance from her current Facility. She applied for a position and was offered employment in August 2006. The position was with the same title and pay as her current position. She was informed that she had to resign from her existing position.

She believed the Agency was creating a pretext to remove her from the Agency so she refused to resign. She did not believe she had to resign from one DOC Facility to be transferred to another Facility. Her offer of employment was revoked.[21]

As a result of the stress caused by working at the Facility, Grievant had had at least six counseling sessions with a Licensed Professional Counselor beginning in June 2006.[22]

CONCLUSIONS OF POLICY

Right to Liberty

In Lawrence v. Texas, 539 U.S. 558 (2003), the U.S. Supreme Court addressed the constitutionality of a Texas criminal law prohibiting certain sexual acts. The issue before the Court was, "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."[23] The Court reasoned:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.[24]

The Court held that the defendant's rights to liberty under the Due Process Clause gives them the full right to engage in their sexual conduct without intervention of the government.[25]

In Martin v. Ziherl, 269 Va. 35 (2005), the Virginia Supreme Court addressed a civil dispute between an unmarried man and woman in a sexually active relationship. *Va. Code § 18.2-344* punished sexual intercourse between unmarried persons as a Class 4 misdemeanor. Prior Virginia Supreme Court opinions prohibited a plaintiff engaged in criminal behavior from advancing a civil suit for damages arising from that

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[21] Grievant did not present any documents demonstrating the terms of the new Facility's offer of employment and did not call that Facility's Human Resource Officer. Accordingly, there is insufficient information for the Hearing Officer to conclude that the new Facility's staff was working in conjunction with other Agency staff to cause Grievant to leave the Agency.

[22] Grievant Exhibit 9. During the sessions with the Counselor, Grievant "addressed work stress and coping skills" according to the Counselor's note.

[23] Id. at 564.

[24] Id. at 562.

[25] Id. at 578.

criminal behavior. The Martin court applied Lawrence v. Texas to conclude that *Va. Code § 18.2-344* violated the Due Process Clause of the Fourteenth Amendment.[26] The Virginia Supreme Court prohibited the Commonwealth's intrusion into the personal and private lives of adults exercising their liberty interests.

In this grievance, the Department of Corrections acting through Special Agent M intruded into Grievant's private life and violated her right to liberty by asking Grievant questions about her personal and private sexual behavior outside of the Department of Corrections and prior to her employment with the Agency. Asking Grievant whether she had ever engaged in **[the actual questions posed are redacted for the reasons set forth in EDR Ruling 2007-1549, 2007-1550]** was not information about Grievant that the Agency had the right or even the legitimate reason to ask. Employees of the Commonwealth of Virginia have the right to be free from invasive and offensive intrusions into their private, consensual, lawful, sexual behavior and relationships.[27]

One could argue that because Special Agent M destroyed his notes regarding Grievant's responses, the Agency has taken appropriate measures to limit the extent of the Agency's violation of Grievant's privacy. This argument fails because although there may be no written record of Grievant's responses, Special Agent M retained knowledge of some of her responses. For example, as part of an inquiry by the Department of Professional and Occupational Regulation into the legality of the polygraph examination, Special Agent M sent the DPOR Assistant Director a letter outlining the facts surrounding Grievant's polygraph. On page 3 of the letter, Special Agent M discusses how he asked Grievant a sex question that she did not understand. She asked him if he meant a certain sex act. Special Agent M wrote that he told Grievant "yes" and then Special Agent M wrote what was Grievant's answer to the question. In short, destroying information about Grievant's responses to sex questions, did not destroy knowledge of her answers or minimize the invasion of her private behavior.

Special Agent M was acting on behalf of the Agency and with the full authority of the Agency. Special Agent M was one of the Agency's experts on polygraphs and the Agency's practice was to delegate to him the authority to determine how polygraphs were to be conducted. Special Agency M was a sworn law enforcement officer with the power to arrest. In many respects his authority and power exceeded those of the Agency Head.

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[26] The Virginia Supreme Court wrote that the U.S. Supreme Court, "determined that the statutes proscribing certain acts between persons of the same sex sought to control a personal relationship that is 'within the liberty of persons to choose without being punished as criminals.'" (citations omitted). Martin v. Ziherl, 269 Va. 35, 41 (2005).

[27] The Hearing Officer is not suggesting that sex between employees and inmates is beyond the scope of the Department of Corrections' investigation or administrative proceedings. It is not likely that an employee would have a reasonable expectation of privacy in a correctional facility. It is not likely that an inmate in the custody of the Department would have the legal capacity to give full consent to sexual behavior. Thus, sexual behavior between employees and inmates would not likely be private consensual sexual behavior.

Agency Defenses to Polygraph Procedures

The Agency contends it was necessary to ask certain questions of Grievant in order to establish a base from which it could measure the accuracy of Grievant's response to the appropriate questions of whether she had sex with an inmate.[28] No credible evidence was presented to support this contention. The Hearing Officer finds that there was no scientific or other reason that would require the Special Agent M to ask the specific questions he asked about Grievant's prior private sexual behavior.

The Agency argues that Grievant consented to taking a polygraph and, thus, she could not complain about a process she elected to follow. No employee informed Grievant prior to taking the polygraph that she would be expected to divulge intimate details of her private sexual behavior to another Agency employee as part of the polygraph. Grievant had been informed that the polygraph was to address whether she had sex with an inmate and she expected to be questioned about her sexual behavior with an inmate. To the extent Grievant consented to the polygraph, she only consented with respect to being question about her sexual behavior with an inmate.[29] Grievant did not consent to be questioned about her private sexual behavior not involving an inmate.

Another factor undermining the Agency's arguments supporting its method of conducting polygraph is that the polygraph of Grievant was unnecessary. The Agency scheduled Inmate R's polygraph after Grievant's polygraph under the theory that when a corrections officer has sex with an inmate the inmate is the victim. When Inmate R knew he would have to take a polygraph, he confessed that he had not had sex with Grievant. If the Agency had scheduled the inmate's polygraph first, it would have learned that the inmate was untruthful and been able to avoid taking Grievant's polygraph. Inmates are convicted felons. *Va. Code § 19.2-269* provides, "[a] person convicted of a felony or perjury shall not be incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit." In other words, the felony conviction of a witness testifying in court enables a jury to evaluate that person's testimony with an additional perspective. No persuasive evidence was presented to justify the Agency's decision to take Grievant's polygraph first. Surely the Agency could have considered that inmates are convicted felons when determining the order of polygraph examinations.

The Agency contends it did nothing improper as evidenced by the findings following an investigation by the Department of Professional and Occupational

[28] As Special Agent M testified, the initial 43 questions were designed to provoke Grievant into lying about at least some of them. By lying to some of the pretest questions, Grievant would be a better candidate to evaluate when questions about having sex with Inmate R were asked as part of the polygraph.

[29] Grievant was required to sign a Polygraph Standards of Practice acknowledgement. One of the standards stated, "This examination is exempt from Section 40.1-51.4:3, Code of Virginia (1950 as amended). Therefore, if relevant, questions concerning sexual activities may be asked." After reading this standard, it was reasonable for Grievant to believe that she would be asked only relevant questions about whether she had sex with an inmate. For example, questions about whether she ever had sex with the dead would not be relevant.

Regulations. Upon reviewing Grievant's objections to the polygraph and Special Agent M's explanation of how he conducted the examination (including the questions asked of Grievant), the Regional Field Supervisor for DPOR wrote, "The Department has determined that the information in the file does not support a violation of the Board's regulations and/or laws; therefore, the file has been closed."[30] The DPOR opinion does not exonerate DOC. DPOR considered only its regulations and statutes. There is no reason to believe DPOR considered Grievant's Constitutional Rights or DHRM Policy. DPOR's opinion is based on the absence of regulation, not on an authorization by regulation.

Workplace Harassment

DHRM Policy 2.30 prohibits workplace harassment and defines this 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, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

DHRM Policy 2.30 prohibits sexual harassment including creating a hostile work environment.[31] A hostile work environment is 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."[32]

To establish her claim for harassment, Grievant must show that the Agency's conduct was (1) unwelcome; (2) based on her sex; (3) sufficiently severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.

Grievant has established that none of her interactions with Special Agent D were welcomed. She regularly took steps to avoid interaction with him and made it clear to him and other Agency employees she did not wish to interact with him.

Grievant has established that Special Agent D's actions arose because of her gender. With only limited information that one inmate said another inmate claimed to have sex with Grievant, Special Agent D interrogated her for approximately 2.5 hours,

[30] Agency Exhibit 1.

[31] Executive Order 1 (2006) "prohibits discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age, political affiliation, or against otherwise qualified persons with disabilities."

[32] DHRM Policy 2.30, *Workplace Harassment.*

said he did not believe her and told her to come clean now. It was unnecessary for Special Agent D to interrogate Grievant for such a lengthy period of time. No information existed upon which Special Agent D could state with credibility that he did not believe Grievant's denial. Special Agent D unduly and unnecessarily focused on Grievant on September 2, 2005. He did so because she was a female. His intent was revealed by his comment to her about whether she felt like Sharon Stone in the movie Basic Instinct. Basic Instinct involved a sexual relationship between a male law enforcement officer and a woman accused of murder. During an interrogation depicted in the movie, the character played by Sharon Stone crosses and uncrosses her legs to expose her genitals. The movie did not involve a sexual relationship between a Counselor and an inmate. Special Agent D had no legitimate reason to comment to Grievant about the movie Basic Instinct.

Grievant has established that Special Agent D has repeatedly and consistently engaged in offensive behavior rendering her temporarily unable to perform her job duties until she recovered from panic attacks. Special Agent D's offensive comments, lengthy interrogation, visits to her part time employment workplace, and glaring at her during group functions created an abusive and hostile work environment for Grievant.

Grievant has established that the actions of Special Agent D should be imputed to the Agency. As a Special Agent within the Office of Inspector General, Special Agent D is given great latitude by Agency executives to conduct investigations. Because he is a sworn law enforcement officer, Special Agent D has police power to arrest and carry weapons. In some instances, his authority exceeds that of the Facility Warden and the Director of the Department of Corrections.

The Department of Corrections, acting through Special Agent D, has created a hostile work environment for Grievant based on her gender.

Grievant argued that her vehicle was vandalized several times in the Facility parking lot.[33] She does not know who vandalized her vehicle. Thus, there is insufficient evidence to attribute the vandalism to the Agency.

Grievant contends the Agency acted improperly by refusing to permit her to select a witness of her own choosing when Grievant was interviewed as part of Agency investigations. Grievant did not present any policy requiring that she be given the discretion to select her own witness. In addition, no evidence was presented showing the Agency treated Grievant any differently from other employees with respect to having witnesses during investigations.

The facts of this case should be viewed in their context and distinguished from the Agency's operations as a whole. The Department of Corrections employs several thousand people who perform duties many Virginians are not capable or willing to perform. Many Department employees regularly endure risk of physical injury and death in order to protect the Commonwealth from dangerous felons. The difficulties of their jobs are often unnoticed by the public. Many of the facts of this grievance

[33] See, Grievant Exhibit 1 regarding vandalism in March 2006.

represent an exception to the customary standard presented by Virginia's Department of Corrections.

Other Relief

Grievant seeks an apology from the Agency because of the way she has been treated. The Hearing Officer lacks the authority to order an agency to issue an apology.

Grievant contends she was discriminated against because of her age. She was born in 1981. No credible evidence was presented to support this allegation.

Grievant contends the Agency retaliated against her for engaging in a protected activity, namely filing an EEO complaint. Grievant's mistreatment occurred prior to and after she filed an EEO complaint. The Agency's actions towards likely would have occurred regardless of whether she filed an EEO complaint. The Hearing Officer cannot conclude that the Agency retaliated against Grievant.

Grievant contends the Agency has inappropriately initiated investigations against her as a form of harassment. The evidence showed that Grievant was involved in investigations that arose out of legitimate concerns about Agency operations. Grievant was not involved in investigations because of her gender.

RECOMMENDATIONS

Va. Code § 2.2-3006(D) provides, "Either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision or recommendation of a hearing officer." The *Rules for Conducting Grievance Hearings § (VI)(A)* states:

> Hearing officers should be aware that as of 2000, a party may petition the circuit court for an order implementing a hearing officer's order or recommendation. Therefore, hearing officers should be cognizant that, as a practical matter, their recommendations may have the same force and effect as their orders. If a recommendation is made, the hearing decision should clearly identify it as such and distinguish it from an order. Absent a court order, an agency is not compelled to act upon any recommendation. All remedies provided by a hearing officer in his decision, whether ordered or recommended, must conform to law and policy.

The Hearing Officer recommends that:

- The Agency permit Grievant to transfer to another Facility of her preference to serve in a similar position. Grievant's transfer should occur upon the opening of a position to which she is suitable for transfer.
- The Agency not involve Grievant in any investigations handled by investigators of the Office of Inspector General without first obtaining the approval of the Agency

Head, Regional Director or Inspector General after consideration of the need for information from Grievant.

- The Agency discontinue polygraph procedures involving questioning anyone about private consensual sexual behavior by adults.

DECISION

The Agency is ordered to refrain from inquiring into Grievant's private consensual sexual relationships and behavior.

The Agency is ordered to cease the hostile work environment it has created for Grievant. The Agency is ordered to refrain from further creating or promoting a hostile work environment for Grievant. To accomplish this, the Agency is ordered to prohibit Special Agent D from interacting with Grievant absent extraordinary circumstances requiring interaction for legitimate business needs of the Agency. Grievant shall be permitted to have a witness of her own choosing when such extraordinary interactions are necessary.

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 all of your appeals to the other party and to the EDR Director. 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.[34]

[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

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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8466-R

Reconsideration Decision Issued: April 23, 2007

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.[35]

The Agency seeks reconsideration of the Hearing Decision. The Agency has submitted a brief in support of its position. Grievant's Counsel was afforded an opportunity to respond, but has not done so.

RECONSIDERATION WITH RESPECT TO FINDINGS OF FACT

As its first argument, the Agency discusses the role of the Inspector General's Office. The role and responsibility of the Inspector General's Office to investigate allegations of crimes is not in dispute. It is unclear why the Agency is arguing what is not in dispute. There is no doubt that Special Agent D has the authority to conduct an investigation; the issue of concern, however, is "how" he conducted his investigation of Grievant. The Agency cites as its authority a Hearing Officer Decision dated October 4, 2006 in case number 8434. Although case number 8434 exists, the language quoted by the Agency does not appear in that decision.

As its second argument, the Agency contends Grievant exaggerated her claim that she was interrogated for 2.5 hours by Special Agent D. The Agency relies on the time Grievant wrote on her statement. Grievant wrote the time as "12:30". The record

[35] Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended.

does not reflect the significance of Grievant's writing "12:30". There is no dispute that Grievant wrote "12:30" but it is unclear what Grievant meant by writing "12:30".

It is clear that Grievant was estimating the time Special Agent D interrogated her at 2.5 hours. It may be the case that the time was less than 2.5 hours but that it "felt" like 2.5 hours to Grievant. On the other hand, Special Agent D testified regarding the statement, "She wrote me a long statement that day. She sat there and **took quite a while**. (Emphasis added). She wrote a six page statement." Grievant's statement was in response to the questions Special Agent D asked her. Given the length of Grievant's statement, it is likely that Special Agent D's questioning involved many questions. If the Hearing Officer assumes for the sake of argument that Grievant's estimation of the length of her interrogation was overstated, this does not change the outcome of this case. Of particular concern is the fact that Special Agent D told Grievant he did not believe her and that she should "come clean now." Given Special Agent D's 21 years of experience as an investigator, he should have been able to identify witnesses who were lying to him or for whom he could not determine whether they were lying. Grievant was telling the truth, but Special Agent D told her he did not believe her and that she should "come clean now" as a technique to force Grievant to confess to something she did not do. This example shows Special Agent D did not merely question Grievant; his questioning was closer to an interrogation as was described by Grievant.

For its third argument, the Agency contends it is not credible that Grievant would forget to mention a question about the movie "Basic Instinct" until the grievance hearing. This argument fails because it is rare that all of the facts alleged by an employee prior to a grievance hearing are the only facts alleged by the employee during the hearing. During two parts of Grievant's testimony she testified Special Agent D mentioned the movie "Basic Instinct". She was credible each time she testified that Special Agent D had commented to her about "Basic Instinct".[36]

As its fourth argument, the Agency asserts that greater weight should be given to Special Agent D's testimony regarding his confrontation with Grievant at a local Wal-Mart.

Substantial and significant portions of Special Agent D's testimony were not credible. His demeanor varied as he discussed different facts and allegations. When he spoke about some facts (especially those facts not in dispute), his demeanor reflected truthfulness. When he spoke about other facts (often facts in dispute), his demeanor reflected an attempt to exaggerate what occurred or an expression of obvious untruthfulness.

A part of Special Agent D's testimony that lacked credibility was his account of meeting Grievant in the Wal-Mart. The Agency Advocate asked questions and Special Agent D responded as follows:

Q. What took place at the Wal-Mart concerning [Grievant]?

[36] The Agency contends Special Agent D denies making the comment. He testified after Grievant testified. During his testimony, he was not asked about this comment.

A. I went to Wal-Mart one day to purchase some things for here in the office.[37]
Q. Were you alone? Were you by yourself then?
A. Yes. *** When I approached the check out, the clerk turned and it was [Grievant]. I said hello to [Grievant]. She turned to another employee and [made] some comment about taking care of me or something, I didn't know specifically what she said. And then she ran away. I told the employee that replaced her that I thought that was very rude and unprofessional.

Special Agent D's demeanor revealed he knew when he approached the check out that the clerk was Grievant, even though his words suggested otherwise. This conclusion is consistent with Grievant's testimony that several other check out lines did not have people standing in lines and Special Agent D passed those lines to get to Grievant's check out line.

The Agency disputes that when Special Agent D "flipped out" that this demonstrated harassment. Although Special Agent D "flipped out" after Grievant had another employee take over for her, whether he "flipped out" is not the harassment. Special Agent D knew that Grievant did not wish to encounter him. Special Agent D could have gone to other check out lines but instead chose Grievant's check out line in order to upset her. There was no reason for Special Agent D to select Grievant's check out line other than to harass and intimidate her.

As its fifth argument, the Agency disputes whether Special Agent D glared at Grievant during the Facility's anniversary luncheon. This is another example where Grievant's testimony was not credible. The Agency Advocate questioned questions and Special Agent D responded as follows:

Q. Did you stare at [Grievant] during the lunch?
A. Naw
Q. Do you know if you looked her way. Do you remember?
A. I have no idea. I can't honestly tell you, I guess she was there. I presume she was there.

Special Agent D's demeanor showed that he knew Grievant was in attendance at the luncheon and that he stared at her despite his denial. His testimony was untruthful.[38] This conclusion was confirmed by the credible testimony of Counselor A. Although Counselor A was one of Grievant's co-workers and, in general, viewed Grievant's favorably, her testimony was credible.[39] The Agency contends, "[t]o suggest his mere

[37] No evidence was presented nor is there any reason to believe that Special Agent D's job duties included purchasing items for the Agency.

[38] The Agency Counsel's brief states, "I submit that Agent D may have been facing Grievant and that was unacceptable to her." If Special Agent D was merely facing Grievant as suggested in the brief, Special Agent D would have testified to that effect. Instead, Special Agent D exaggerated his testimony to suggest he did not know if Grievant was in the room.

[39] The Agency argues Grievant could have moved to another seat if she was uncomfortable. No evidence was presented to support this conclusion. Were there any empty seats? Would she have

presence in the room constitutes offensive behavior that creates a hostile work environment is a misapplication of policy." Special Agent D's presence in the room, however, is not the offensive behavior. Special Agent D's offensive behavior was glaring at Grievant during much of the luncheon. His objective was to intimidate Grievant and he accomplished that objective.

RECONSIDERATION WITH RESPECT TO LEGAL ANALYSIS

The Agency contends the Hearing Officer erred as a matter of law when ruling that the Department of Corrections through its agents, violated Grievant's Constitutional right to personal liberty by asking her personal questions about her private life and sexual behaviors. In short, the Agency argues that the principles outlined in Lawrence v. Texas and Martin v. Ziherl do not apply to Grievant.

Lawrence v. Texas, 539 U.S. 558 (2003), involved the application of criminal statutes to individuals engaged in homosexual behavior. In Martin v. Ziherl, 269 Va. 35 (2005), the Virginia Supreme Court extended the principles of Lawrence v. Texas to cases involving the application of civil statutes to individuals engaged in heterosexual behavior.

The Agency argues that the "Court in Lawrence was careful to stress that its decision was premised on the threat of criminal prosecution – a real and tangible threat to one's freedom." This argument fails. If Lawrence was premised on the threat of criminal prosecution, then the Virginian Supreme Court erred when it extended the principles espoused in Lawrence to the application of **civil** statutes.[40] A careful reading of Lawrence shows that it was premised on protecting against "unwarranted government intrusions."[41] The Court wrote:

> In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.[42]

In Lawrence, the defendants were "punished" by the application of a criminal sentence. In Martin, the plaintiff was "punished" by the denial of a civil remedy. In

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disrupted the program had she moved? Absent evidence answering these questions, there is no reason to adopt the Agency's argument that Grievant should have moved if she felt uncomfortable.

[40] The Agency cites Paul v. Davis, 424 U.S. 693, 713 (1976) in support of its conclusion that "courts have been careful to limit the elements of an actionable claim to avoid the use of 'liberty interest' as a source of federal tort to address any claims against state employees or officials." Paul v. Davis is not applicable in this case for several reasons including that it was written prior to Lawrence v. Texas, and the facts of this grievance are materially different from the facts in Paul v. Davis.

[41] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[42] Id. at 562.

Grievant's case, she was "punished" by government humiliation. The Department of Corrections extracted details of Grievant's private sexual behavior and used the information for its own purposes. The Department of Corrections placed Grievant in the position of having to work in the same agency as another employee (Special Agent M) who knew the most intimate details of her private life without any constraints on Special Agent M's usage of the information. In Lawrence, the U.S. Supreme Court wrote that the "stigma this criminal statute … imposes, moreover, is not trivial."[43] The stigma that may result from truthfully answering the questions asked by Special Agent M also is not trivial.

The U.S. Supreme Court articulated the circumstances under which its opinion may not apply. The Court emphasized that:

> The present case does not involved minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[44]

The Lawrence Court acknowledged the effect of unwarranted government intrusion on one's employment. The Court noted, "the Texas criminal conviction carried with it other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example."[45]

For the sake of simplicity, the Hearing Decision addressed Grievant's rights as outlined in Lawrence v. Texas and Martin v. Ziherl, but additional constitutional considerations exist to define the Agency's inappropriate intrusion.

A Constitutional right of privacy also provides a basis to support the Hearing Decision. In Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), the court found that polygraph questions inquiring into an employee's sexual behavior violated the employee's right to privacy. The employee was a clerk for the police department who applied for a promotion to be a police officer. As part of the selection process, the employee was required to take a polygraph examination. On the questionnaire the employee filled out before the examination, she reported that she had been pregnant and had suffered a miscarriage. The polygraph examiner questioned the employee about this and asked who was the father of the child. The employee revealed that the father was a former police officer in the police department. Upon further questioning, the employee revealed that the father was actually a married officer still with the police department. The employee testified that she was asked questions about her sexual activities including when she first had sex and with whom. The polygraph examiner found the employee to be truthful.

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[43] Id. at 575.

[44] Id. at 578.

[45] Id. at 576.

In Thorne, the Ninth Circuit noted that the Constitution protects two kinds of privacy interests – one being the individual interest in avoiding disclosure of personal matters. Id. at 468. This strain of privacy right is rooted in cases holding that basic matters such as contraception, abortion, marriage, and family life are protected by the Constitution from unwanted intrusion. Id. (citing Kelley v. Johnson, 425 U.S. 238, 244 (1970); Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Griswold v. Connecticut, 381 U.S. 479 (1965).

The Thorne court noted that the "more fundamental the rights on which the state's activities encroach, the more weighty must be the state's interest in pursuing that course of conduct." 726 F.2d at 469. The right to privacy is a fundamental right, and thus the state has the burden of establishing that its sexual inquiry is justified by narrowly tailored and legitimate interests. Id. In the present case, the Agency argues that the sexual control questions were necessary because they make the subject uncomfortable and more likely to lie, which in turn provides more accurate results. Grievant's privacy interest in her consensual sexual behavior is highly fundamental. The Agency has established a legitimate interest in seeking accurate polygraph results, but it has not established that its interest outweighs Grievant's interest in privacy – especially given that the polygraph results cannot be used as evidence of guilt. Likewise, the Agency has not established that intruding into a subject's sexual behavior is a narrowly tailored means for accomplishing its interest. If the accuracy of the polygraph results depend on coercing the subject to lie during the control questions, topics other than sexual behavior could also be effective.

The Agency makes much of the fact that Grievant consented to the polygraph test. However, Grievant consented to questions that she thought were related to the investigation – she did not consent to the intrusion that actually occurred. The Agency also points out that Grievant was free to walk out at any time during the examination. While this may be true, it ignores the realities of such an action. Special Agent D had advised Grievant that he did not believe her denial of having engaged in a sexual relationship with an inmate. Refusing to consent to the test or walking out of the test would have been interpreted by Special Agent D and the Agency as an admission of guilt or wrongdoing. Grievant did not have the option of "passing" on the offensive questions asked. The investigation against Grievant would have intensified if she had walked out of the polygraph. Grievant did not consent to taking the polygraph as it was given by the Agency.

The plaintiff in Thorne was faced with a similar dilemma – although she signed forms indicating that she could refuse to answer questions, she was also warned that such a refusal would be interpreted as an indication of emotional or sexual problems. Id. at 468-69. The court found it clear that the plaintiff's participation in the polygraph was a necessary condition of her employment, and that employees are not required to forego their constitutionally protected rights to gain the benefits of employment. Id.

In Hester v. City of Milledgeville, 777 F.2d 1492 (11th Cir. 1985), the Court held:

> The "individual interest in avoiding disclosure of personal matters, "*Whalen v. Roe, 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 62 (1977)*, is protected by the "confidentiality strand" of the constitutional right to privacy. *Plante v. Gonzalez, 575 F.2d 1119, 1132 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S. Ct. 1047, 59 L.Ed. 2d 90 (1979).* In *Plante,* we held that the constitutionality of state action alleged to have violated this right to confidentiality must be determined by use of a balancing test: by "comparing the interests [the action] serves with those its hinders."

The Hester Court found that the polygraph control questions asked of firefighters did not violate their right of privacy because they were "only a limited intrusion into the sphere of confidentiality."[46] The Court pointed out that the, "questions were general in nature, were asked for a specific, limited purpose, and, although potentially embarrassing, **avoided the issues such as those related to marriage, family and sexual relations generally considered to be the most personal**."[47] (Emphasis added). The Court reasoned, "there might well be a point at which a control question is so embarrassing for specific, or concerns so personal a matter, as to render the question unconstitutional even when asked for a proper purpose."[48]

The questions asked of Grievant in this grievance such as, **[the questions posed are redacted for the reasons set forth in EDR Ruling 2007-1549, 2007-1550]**-clearly are beyond the bounds of a "limited intrusion into the sphere of confidentiality" and are "so personal a matter, as to render the questions unconstitutional even when asked for a proper purpose."

Neither the Virginia state courts nor the Fourth Circuit have definitively addressed this issue with respect to polygraph questions.[49] In Denzler v. Henrico County School Board, 27 Va. Cir. 486 (1984), the Circuit Court of Henrico County touched on the privacy issue relating to polygraphs. In Denzler, the plaintiff was a school teacher who was fired for refusing to take a polygraph test. The plaintiff alleged that the order to take a polygraph test violated his right to privacy. The court noted that in some situations, the nature of the employment justifies the use of the polygraph *if the questions are*

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[46] Id. at 1497.

[47] Id. at 1497.

[48] Id. at 1497.

[49] In Walls v. City of Petersburg, 805 F.2d 188 (4th Cir. 1990), the Forth Circuit Court of Appeals addressed whether the City had violated an employee's constitutional right of privacy by requiring the employee to complete a questionnaire asking her if she had "ever had sexual relations with a person of the same sex?' Id. at 190. The Court concluded that the City had not violated the employee's right of privacy. The Walls case does not resolve the issue in this grievance, however, because the Fourth Circuit Court of Appeals based its decision on Bowers v. Hardwick, 478 U.S. 186 (1986). Bowers held that the due process clause of the Federal Constitution's *Fourteenth Amendment* did not (1) confer a fundamental right upon homosexuals to engage in consensual sodomy, or (2) invalidate a Georgia statute that criminalized acts of consensual sodomy--regardless of whether the participants were of the same sex--even when the acts in question occurred in the privacy of the home. Bowers was reversed by the decision in Lawrence v. Texas.

relevant to the employment. Id. at 489. In the present case, the challenged questions were not relevant to Grievant's employment, nor were they relevant to the investigation.

In Denzler, the court went on to reject the privacy claim because they found no public policy in Virginia against the use of polygraph examinations. Id. Importantly, the court did take notice of a Virginia statute which recognizes the use of polygraph tests as a condition of employment, but makes questions relative to sexual activities improper. Id. This statute is *Va. Code § 40.1-51.4:3*. The statute reads, "No employer shall as a condition of employment, require a prospective employee to answer questions in a polygraph test concerning the prospective employee's sexual activities unless such sexual activity of the prospective employee has resulted in a conviction…."

While the Denzler court may be correct that there is no public policy against the use of polygraph examinations in general (at least for the public work sector), it is arguable that *§ 40.1-51.4:3* articulates a public policy against polygraph questions that relate to sexual activity. Even though the statute expressly applies to the testing of prospective employees as a condition of employment, the purpose of the statute is equally applicable to current employees undergoing an investigation. Thus, it is reasonable to conclude that if the Virginia Supreme Court or the Fourth Circuit addressed the issue, they could find that the right to privacy prohibits control questions that are sexual in nature but irrelevant to the purpose of the test.

RECONSIDERATION WITH RESPECT TO PUBLISHING POLYGRAPH QUESTIONS

The Agency asks that the Hearing Decision be redacted to remove the questions Special Agent M asked of Grievant. The Agency fears that if the questions remain in the published decision, "the security of those questions will be compromised and a new set would have to be developed for future use."

The Hearing Officer finds that no credible evidence has been presented to suggest that exposure of the polygraph questions would likely or possibly result in a material change in the Agency's legitimate claim to provide security to its employees, inmates, and the public. Special Agent M testified that one of the reasons he drafted the questions was to cause the person being examined to "shut down" and "lie" about some of the questions. There is no reason to believe the Agency cannot develop a set of equally shocking questions that do not involve the intrusion into an employee's Constitutional rights.[50] The Agency's request is denied. The Hearing Decision will remain as written.

RECONSIDERATION WITH RESPECT TO POLICY ANALYSIS

The Agency argues in its brief that the Hearing Officer's "ruling that Grievant was subjected to a hostile work environment is erroneous as a matter of law." (Emphasis

[50] In addition, the Chief of the Special Investigations Unit testified that as a result of Grievant's case, he would personally review the questions to be asked by a polygraph examiner in investigations involving sexual behavior. There is no reason to believe the Chief of the Special Investigations Unit would mandate future use of the questions asked by Special Agent M.

added). The Agency's first sentence of its argument regarding hostile environment shows its arguments are flawed. The Hearing Officer did not apply federal law in the Hearing Decision.[51] The Hearing Officer applied State policy.

Several of the terms used by the Department of Human Resource Management in its workplace harassment policy are similar to terms used in Title VII law. That similarity does not mean that DHRM has adopted Title VII law as its State policy governing workplace harassment. If DHRM had adopted Title VII law as State policy, it would not have been necessary to draft a separate policy.[52]

Va. Code § 2.2-1201(13) authorizes the Department of Human Resource Management to "[d]evelop state personnel policies and, after approval by the Governor, disseminate and interpret state personnel policies and procedures to all agencies." In addition, the "Director of the Department [of Human Resource Management] shall have the **final authority** to establish and interpret personnel policies …." (Emphasis added).

In Murray v. Stokes, 237 Va. 653, 657 (1989), the Virginia Supreme Court examined the Virginia Personnel Act and held:

> judicial review of the interpretation of the personnel policy regarding employee compensation by the Director of the Department of Personnel and Training is precluded under the Virginia Personnel Act.

It would be reversible error for a Circuit Court to substitute federal Title VII law in the place of State policy and then apply that federal law to State grievances. If this would be an error for a Circuit Court, surely it would be an error for a Hearing Officer to substitute federal Title VII law for DHRM policy.

The question in grievance hearings is what is the DHRM policy and how would DHRM likely interpret that policy. If a Hearing Officer misinterprets DHRM Policy and the matter is appealed to DHRM, DHRM would have the final authority regarding that interpretation.

This Hearing Officer's interpretation of DHRM Policy 2.30 is based on the plain wording of the policy and over six years of observing what various State agencies allege to be workplace harassment and how DHRM treated those sustained allegations on appeal. Based on this, it is clear that one of the primary objectives of DHRM Policy 2.30

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[51] Compare the issue of whether a hostile environment was created with the issue of whether Grievant's rights of liberty and privacy were violated. With respect to Grievant's rights of liberty and privacy, the Hearing Officer solely applied federal and State case law. With respect to workplace harassment, the Hearing Officer applied solely DHRM Policy 2.30 and did not apply federal statute or case law. The Hearing Officer could not have erred as a matter of law with respect to the workplace harassment issue because the Hearing Officer did not apply law as part of resolving that issue.

[52] The Agency argues DHRM Policy 2.30 "reflects the judicially developed principles of unlawful workplace harassment as applied to claims of discrimination brought under Title VII of the Civil Rights Act of 1964, as amended." To the extent the Agency asserts that DHRM as adopted Title VII law, the Agency has not presented any interpretation drafted by DHRM supporting such a conclusion.

is to prevent certain behavior in the workplace. Sometimes that behavior is sufficiently egregious as to create liability under federal Title VII law, but behavior that falls short of being contrary to Title VII law may remain contrary to DHRM Policy 2.30 and, thus, provide a basis to discipline an employee.

This concept can be expressed another way. If an employee created a hostile work environment as defined under federal discrimination law, that employee's behavior would also likely be a violation of DHRM Policy 2.30. The reverse, however, is not true.[53] An employee who violates DHRM Policy 2.30 may or may not be acting contrary to federal discrimination law. The question of what behavior is sufficient to justify disciplinary action under State policy is different[54] from what behavior is sufficient to justify an Agency's legal liability under federal discrimination law.[55]

Another example of how the State grievance policies differ from federal discrimination law is illustrated by the Agency's brief. The framework for proving whether an employee has acted contrary to DHRM Policy 2.30 is defined by the Department of Employment Dispute Resolution. The EDR Director may rely upon whatever sources she chooses, but her Ruling sets forth the standard under the Grievance Procedure. As part of the Ruling qualifying this grievance for hearing, the EDR Director wrote that Grievant must show conduct "imputable on some factual basis to the agency."

The Agency argues that the "proper test is whether Agent D has the authority to affect the substantive terms of Grievant's employment in terms of any tangible job benefit. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 762-5 (1998). Despite Agent D's authority as a law enforcement officer, his authority over Grievant is limited to his role as an investigator. He cannot evaluate her performance, award or punish her in terms of her assignments or otherwise dictate the terms of her employment."

The standard articulated by the Agency may apply in federal discrimination law, but it does not set the standard for the application of DHRM Policy 2.30 under the

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[53] In many instances, DHRM Policy 2.30 is designed to check employee behavior prior to that employee creating a larger problem for the Agency that may place the Agency in legal jeopardy.

[54] One of the primary differences is that federal discrimination law seeks to resolve the issue of whether an employer (the agency) is liable for damages to an employee suffering discrimination. An agency seeking to discipline an employee for acting contrary to DHRM Policy 2.30 is not seeking to determine or establish that it is liable to the employee suffering discrimination. An agency applying DHRM Policy 2.30 is attempting to punish and prohibit an employee who is discriminating from engaging in future discrimination.

[55] If an agency could not discipline an employee for creating a hostile work environment unless the employee acted in a manner contrary to federal law, the agency would be in a position of being unable to correct inappropriate behavior by employees so that the agency could avoid liability for sexual harassment. In other words, the agency would not be able to take precautionary discipline in order to avoid possible future agency liability for gender discrimination; otherwise, the issuance of disciplinary action under Policy 2.30 would be tantamount to an admission of liability on the existence of actionable harassment. There is nothing under DHRM Policy 2.30 or DHRM Policy 1.60 that would support such a conclusion.

burden of proof framework defined by the EDR Director. If the Agency's view were correct, it would mean only supervisors with the authority to evaluate, etc. could be disciplined[56] (or held accountable) for violating DHRM Policy 2.30. DHRM clearly intended DHRM Policy 2.30 to apply to all State employees.

The Agency's arguments are designed to prove that Special Agent D did not act contrary to federal Title VII law. The Agency cites numerous cases interpreting federal discrimination law. The issue of whether Special Agent D violated federal Title VII law is not before the Hearing Officer. Thus, arguments showing that Special Agent D did not violate federal discrimination law are meaningless. What the Agency has not presented is any evidence of DHRM appeal decisions defining Policy 2.30 contrary to this Hearing Officer's interpretation.

Grievant has established[57] a hostile work environment under policy by showing that the Special Agent D's conduct was 1) unwelcome, 2) based on Grievant's sex, 3) sufficiently severe or pervasive, and 4) imputable to the Agency on some factual basis.

The Agency argues element number 2 has not been satisfied because, "it is simply not reasonable to conclude that the alleged reference to an actress' sexually tinged role in a movie when interviewing a woman about her own sexual behavior shows any hostility by Agent D to women." If Special Agent D's comment about Sharon Stone in the movie "Basic Instinct" does not reveal what he was thinking when he was interrogating Grievant, then what does it show? The Agency has offered no plausible explanation as to why Special Agent D would make such a comment. The movie "Basic Instinct"[58] is much more well known and talked about for the scene in which Sharon Stone exposes her genitalia while being questioned by an investigator. Thus, a reasonable person would understand the reference to the movie to be sexual and degrading – almost a solicitation for inappropriate behavior. If Grievant had been male, it is unlikely Special Agent D would have made such a remark.

The Agency argues element 3 is not met because Special Agent D's behavior was not sufficiently severe and pervasive. As discussed in the original Hearing Decision and above, Special Agent D's behavior was sufficiently severe and pervasive as to trigger a violation of DHRM Policy 2.30. Whether Special Agent D's behavior was sufficiently severe and pervasive as to trigger liability under federal discrimination law is not before the Hearing Officer.

The Agency argues element 4 is not met because Special Agent D's behavior "is not vicariously imputable to the Agency." The key word in the Agency's argument is

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[56] DHRM Policy 1.60 provides that violating DHRM Policy 2.30 can be a Group I, Group II, or Group III offense depending on the nature of the violation.

[57] Grievant has presented sufficient evidence to support the conclusion that the Special Agent D engaged in workplace harassment as measured by Grievant's subjective assessment as well as from the prospective of an objective reasonable person.

[58] In the context of the movie, the title "Basic Instinct" is a euphemism for sexual desire.

"liability." Liability for civil damages is not an issue in the application of State policy. Liability would only be an issue under federal discrimination law.

In conclusion, the Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied.**

APPEAL RIGHTS

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

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

Judicial Review of Final Hearing Decision

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

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8466-R2

Second Reconsideration Decision Issued: August 10, 2007

SECOND RECONSIDERATION DECISION

On January 26, 2007, the Hearing Officer issued the original Hearing Decision. On April 23, 2007, the Hearing Officer issued the first Reconsideration Decision in response to the Agency's request. On August 9, 2007, the EDR Director issued Ruling No. 2007-1549 and 1550 remanding the case to the Hearing Officer because "the order must be modified to make it clear the grievant's right to a witness of choice is not without limits."[59]

As part of the original Hearing Decision, the Hearing Officer ordered the Agency as follows:

> The Agency is ordered to cease the hostile work environment it has created for Grievant. The Agency is ordered to refrain from further creating or promoting a hostile work environment for Grievant. To accomplish this, the Agency is ordered to prohibit Special Agent D from interacting with Grievant absent extraordinary circumstances requiring interaction for legitimate business needs of the Agency. Grievant shall be permitted to have a witness of her own choosing when such extraordinary interactions are necessary.

Upon consideration of the EDR Director's Ruling, that order is modified to add the following language:

> Grievant's "witness of her own choosing" shall be an individual selected by Grievant who is employed at the same Facility where Grievant works and

[59] Page 10 of the EDR Directors Ruling No. 2007-1549 and 1550.

available to serve as a witness within three workdays of the Agency's request to Grievant for Special Agent D to interact with Grievant.

APPEAL RIGHTS

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

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

Judicial Review of Final Hearing Decision

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

S/Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

September 20, 2007

Deputy Director for Human Resources
Department of Corrections
P.O. Box 26963
Richmond, VA 23262

Grievant

RE: **In the matter of Department of Corrections Case No. 8466**

Dear :

The agency head of the Department of Human Resource Management (DHRM) has asked that I respond to the Department of Corrections' (DOC) request for an administrative review of the hearing officer's decision in the above referenced case.

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the instant case, DOC is asking that DHRM "find that the hearing officer's blanket prohibition against the use of questions inquiring into the sexual habits of the grievant be reversed as being inconsistent with state personnel policy." We note that DOC filed a request for reconsideration on the above matter but the hearing officer denied the request in his reconsideration decision.

It is indisputable that, under the Code of Virginia, the investigators in the Department of Corrections have the authority to investigate criminal matters within the prisons. Also, DOC Procedure 10-4 establishes "the duties and responsibilities of the Internal Affairs Unit under the Office of the Inspector General and departmental support in reporting violations, protecting evidence and assisting investigators." In the instant case, there is no evidence to indicate that DOC's authority to either investigate such matters or to make inquiries regarding employees' work-related sexual behavior has been challenged. Rather, the issue is whether certain questions are so invasive that their use violated the grievant's Constitutional liberty interest in privacy.

> We are aware that the Director of EDR addressed the issue of the grievant's Constitutional liberty interest in her ruling dated August 9, 2007. That ruling states, in part, "...The hearing officer's order to refrain from inquiring into the grievant's private consensual sexual relationships was based solely on a legal

> determination that the agency violated the grievant's Constitutional liberty interest in privacy. If the agency challenges this legal determination with the circuit court and prevails, the hearing officer's *order* to refrain from such questioning will presumably be set aside by the court (absent a decision by the circuit court implementing the hearing officer's *recommendation* to refrain from such questioning), because the *order* is based solely on law. If the order is set aside, the agency will be free to so inquire for legitimate reasons in the future. The agency's ability to question the grievant would be subject to certain limitations… On the other hand, if the circuit court upholds the hearing officer's conclusion that questioning the grievant about her private consensual sexual relationships violates the grievant's liberty interest, clearly the order to refrain from such questioning would be enforceable."

The issue DOC raised in its challenge does not represent a policy application or policy interpretation concern. However, DHRM holds that during the course of an investigation an agency may ask certain questions, including sex-related questions, as long as the questions are related to conducting the agency's business and free from invasive and offensive intrusions into an employee's consensual, lawful, sexual behavior and relationships. In the instant case we have no authority to rule on whether certain questions that were asked violated the grievant's Constitutional liberty interest in privacy. As such, this agency has no authority to intervene in this matter.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services

c: Director, DHRM
Director, EDR
Hearing Officer