Issues: Group II Written Notice (misuse of State property), Group II Written Notice (failure to follow policy), Transfer and Demotion; Hearing Date: 09/25/08; Decision Issued: 10/17/08; Agency: DOC; AHO: John V. Robinson, Esq.; Case No. 8840; Outcome: No Relief – Agency Upheld in Full; Amended Decision Issued 10/20/08; **Administrative Review: HO Reconsideration Request received 10/31/08; Reconsideration Decision issued 11/05/08; Outcome: Original Decision Affirmed; Administrative Review: EDR Admin Review Request received 10/31/08; EDR Ruling #2009-2147, 2009-2174 issued 03/13/09; Outcome: Remanded to AHO; Administrative Review: DHRM Admin Review Request received 10/31/08; DHRM Ruling issued 06/12/09; Outcome: AHO's decision affirmed; Remand Decision issued 01/18/10; Outcome: Original decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8840

Hearing Officer Appointment: May 19, 2008
Hearing Dates: September 25 and October 8, 2008
Decision Issued: October 17, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge (1) a Group II Written Notice: unauthorized use or misuse of state property, and (2) a Group II Written Notice: failure to follow applicable established written policy, transfer and demotion, both of which were issued on February 12, 2008 by Management of the Virginia Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A of February 25, 2008.

The hearing officer was appointed on May 19, 2008. The parties duly held the scheduled first pre-hearing telephone conference call at 10:00 a.m. on July 9, 2008. The Grievant, his attorney (the "Attorney"), the Agency's advocate (the "Advocate") and the hearing officer participated in the call.

The hearing had previously been continued by the hearing officer at the request of the Grievant and during the July 9, 2008 conference call, the parties scheduled the hearing for July 30, 2008. The parties agreed to and the hearing officer entered on July 10, 2008 a Protective Order to preserve confidentiality of certain records in the proceeding. At the request of the Grievant, the hearing officer issued certain document orders to the Agency. The Agency appealed certain of the hearing officer's document orders to the Virginia Department of Employment Dispute Resolution ("EDR") in an interim appeal dated July 29, 2008. The Grievant, by counsel, moved for a number of successive continuances of the hearing pending the decision by EDR but as reflected in the hearing officer's Decision Concerning Hearing on September 25, 2008, the Grievant ultimately decided to waive any right to a further continuance, electing instead to proceed to hearing on September 25, 2008, the date previously agreed upon by the parties as reflected in the hearing officer's Decision Granting Continuance and Fourth Amendments to Scheduling Order entered August 19, 2008.

The hearing on September 25, 2008 ran from approximately 9:00 a.m. to after 7:00 p.m. (with a half-hour break for lunch) when the hearing officer decided to continue it to a second day. The hearing reconvened on October 8, 2008 commencing at 9:00 a.m. and ending at approximately 2:30 p.m.

EDR issued its Compliance Ruling of Director, Ruling Number 2009-2087, on September 30, 2008. The Director in her final, non-appealable decision, upheld certain elements of the Agency's appeal concerning the hearing officer's ordered document production. On October 7, 2008, the Grievant wrote to the Director and this hearing officer stating that "the Department of Corrections (Agency) remains fully out of compliance with all of the Document Production Orders issued by the Hearing Officer and clarified in the final and non-appealable ruling of the EDR Director dated 9/30/08." As a remedy, the Grievant requests amongst other things "[t]hat as a result of the Agency's failure to comply with requirements of the Grievance Procedure without just cause, the issuance of a positive decision for the Grievant on all issues which have been qualified for hearing is appropriate."

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Attorney represented the Grievant and the Advocate represented the Agency. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency's binder (1 through 7) and all of the exhibits in the Grievant's binder (1-44).[1]

As referred to above, at the request of the Grievant, the hearing officer issued a number of orders for production of documents and twelve orders for witnesses. No open issues concerning non-attendance of witnesses remained by the conclusion of the hearing. After the hearing, the Grievant, by counsel, submitted a post-hearing brief of attached arguments to the hearing officer (the "Grievant's Brief").

APPEARANCES

Representative for Agency
Grievant
Witnesses

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

FINDINGS OF FACT

1. The grievant was employed by the Agency before the discipline of which he complains in this proceeding as a Psychology Associate, Senior at a correctional facility (the "Facility"). AE 5.

2. A Northrop Grumman computer site technician and information security officer for the Department (the "Tech"), located at the Department's headquarters, discovered that someone within the Department had hidden suspicious folders, which could nevertheless be accessed by other users of the computer system. AE 2A.

3. The Tech reported the discovery to his manager, the Chief of the Department's Special Investigations Unit, Office of the Inspector General (the "Chief") on July 24, 2007 and was told to look into the matter.

4. The Tech discovered that the suspicious file was created by the Grievant at the Facility. The Tech informed the Chief who immediately informed the Mental Health Program Director for the Agency (the "Director").

5. The Director promptly responded to the Chief "I believe this warrants a formal investigation. I am very concerned about what it may represent." AE 2A.

6. The matter was promptly assigned for investigation to a Special Agent in the Special Investigations Unit (the "Investigator").

7. The Investigator issued his Final Report on October 15, 2007, which was approved by the Senior Assistant Chief on November 13, 2007. AE 2.

8. As part of his investigation, the Investigator interviewed the Grievant on October 1, 2007. The Grievant signed a one page statement (the "Statement"), initialing all corrections and signing it because it is true and accurate. AE 2B.

9. The Statement provides in part as follows:

> I have reviewed excerpts from my computer account folders and other folders such as Humor, [Grievant] Personal and Book Titles and Interests. Most of the files within these folders I agree are not job related or relative to my function as a Psychologist here at the [Facility]. Following this interview I will immediately remove these files and folders from my [Department] computer account.
>
> I will also review my entire computer account to ensure that no personal information or files exist. Should I find

> [such] material I will remove it. Moreover, [the Investigator] has allowed me to review the Departmental policy 11-1 relative to improper use of the [Department] computer to ensure that I am aware of the policy.
>
> The information that I have documented in my Book Titles and Interesting folder regarding certain inmates does not represent confidential mental history or medical history information. Comments made regarding certain present and former employees are my personal comments and in no way indicative of any personal animosity whatsoever.

AE 2A.

10. The Grievant had approximately 5,193 files representing approximately 600 megabytes before he removed the personal files and folders from his Department computer account.

11. After the Grievant completed the exercise of removing his personal files and folders, there remained approximately 3,750 files, representing approximately 475 megabytes. Accordingly, the Grievant removed approximately 1,443 files representing approximately 125 megabytes or about 21% of his total files.

12. Such personal use by Grievant is not limited, occasional or incidental within the meaning and potential safe harbor of Department Operating Procedure Number 310.2VI(C). AE 3.

13. The subject personal files included items such as the following:

    a. Blowjob Etiquette (by a female)

        1. First and foremost, we are not obligated to do it.

        2. Extension to rule #1 – So if you get one, be grateful.

        3. I don't care WHAT they did in the porn video you saw, it is not standard practice to cum on someone's face.

        4. Extension to rule #3 – No, I DON"T have to swallow.

        5. My ears are NOT handles.

6. Extension to rule #5 – do not push on the top of my head. Last I heard, deep throat had been done. And additionally, do you really WANT puke on your dick?

7. I don't care HOW relaxed you get, it is NEVER OK to fart.

8. Having my period does not mean that it's "hummer week" – get it through your head – I'm bloated and I feel like shit so no, I don't feel particularly obligated to blow you just because YOU can't have sex right now.

9. Extension to #8 – "Blue Balls" might have worked on high school girls if you're that desperate, go jerk off and leave me alone with my Midol.

10. If I have to remove a pubic hair from my teeth, don't tell me I've just "wrecked it" for you.

11. Leaving me in bed while you go play video games immediately afterwards is highly inadvisable if you would like my behavior to be repeated in the future.

12. If you like how we do it, it's probably best not to speculate about the origins of our talent. Just enjoy the moment and be happy that we're good at it. See also rule #2 about gratitude.

13. No, it doesn't particularly taste good. And I don't care about the protein content.

14. No, I will NOT do it while you watch TV.

15. When you hear your friends complain about how they don't get blow jobs often enough, keep your mouth shut. It is inappropriate to either sympathize or brag.

16. Just because "it's awake" when you get up does not mean I have to "kiss it good morning."

b. A Man's thoughts on Fellatio AKA Rebuttal Etiquette (by a male)

1. First of all, yes you're obligated to do it. If you don't, we will find someone (younger, prettier and dirtier) who will.

2. Second, swallowing a teaspoon full of cream is a hell of a lot easier than licking a dead fish.

3. You want to talk about farting? Does the word "queef" mean anything to you?

4. I will use your ears as I see fit, don't worry about it and be thankful I'm not pulling your hair.

5. When you're on your period, stuffing something in your mouth is the only way to stop you from bitching and moaning. Suck it up!

6. Speaking of which, if you are bleeding for five straight days, you need all the fluids you can get. Trust me.

7. You bitch about the taste, but trust me when I tell you that we get the short end of the stick in flavor country.

8. At least there is no danger of a dick bleeding in your mouth.

9. Play with the balls.

10. No matter how good you think you are at it, we've had better.

11. Caress the ass, too. We like that!

12. Make hay when the sun shines. It's "wide awake" in the morning now, but when you get old & fat and looking for some action, I gah-ron-tee it'll be "sound asleep."

13. If you swallow, then you don't have to worry about getting any on your face, now will you?

14. The Grievant also had a document created and stored showing (a) "Book Titles and Interesting People"; (b) names and inmate numbers of inmates with inflammatory, disparaging and derogatory comments alongside; (c) names of Department staff with inflammatory, disparaging and derogatory comments alongside. AE 2(F); GE 3. The hearing officer has redacted names and inmate numbers in a sampling of a few of the comments:

> **Possible Titles**
>
> Waking the Sleeper
> The Wonton of Pain
> For My Own Well Binging
> Where have all the good voices gone ?
> No one said it was going to be easy
> Hard Time
> Life in the grey bar motel
> Inside
> Living life while doing life
> Cons & Characters
> Life don't stop when the gavel comes down
> Doing Time
> The Good, the Bad and the Simple
> Socially Challenged, Morally Bankrupt
>
> **INMATES**
>
> [Name & Inmate Number] (proof that you really can grow up, NOT)
>
> [Name & Inmate Number] ("I'm going to kill myself if you don't give me a cigarette") (his evil twin in the form of a gargantuan umbilical hernia is still attached to his massively fat frame and running his life from within)
>
> [Name & Inmate Number] (no habla Inglais… yeah right)
>
> [Name & Inmate Number] (the "Chimp Boy", calculated craziness)
>
> [Name & Inmate Number] (too weak to be good, too scared to be bad)

[Name & Inmate Number] (the CIA's only millionaire inmate operative)(what's a black man doing with a 'KKK License' and a 'Gold Social Security Card'?)

[Name & Inmate Number] ("digging for treasure" and other anal activities gone bad)

Staff

[Name & Title] (a brilliant physician but a lousy healer)

[Name & Title] (bit off more than he could chew)

[Name & Title] (her mouth wrote checks her talent couldn't cover)("I'm being perfectly facetious")

[Name & Title] Cream isn't the only thing to rise to the top

[Name & Title] it takes real skill and effort to avoid work as assiduously as that

15. The Department's Mental Health Clinical Supervisor (the "Supervisor") who is the Grievant's direct supervisor and who supervises six (6) facilities consulted with the Director, the Chief, the Employment Manager (the "Employment Manager") of the Human Resources Division in the Department and other appropriate Agency Management personnel to consider the results of the investigation and any corrective action alternatives available to the Department.

16. On January 31, 2008, the Supervisor and the Director met with the Grievant to consider his version of the facts and events and to discuss mitigating circumstances. The Grievant was informed of disciplinary action being considered including termination, suspension, demotion and transfer.

17. The Employment Manager recommended termination but after considering various corrective actions, the Director and the Supervisor decided based on mitigating factors, including the Grievant's 17 years of service to the Agency and his value and good work as a psychologist, to issue the two (2) Group II Written Notices.

18. On February 12, 2008, the Grievant met with management personnel, including the Supervisor, the Director and the Assistant Warden of the Facility, and was issued the two (2) Group II Written Notices as quoted below.

(1) Failure to follow applicable established written policy. Per Standards of Conduct (DOP 135.1) Section XI, Subsection B:1, - Failure to follow applicable established written policy. On 10/10/06, Grievant was issued a Group I Disciplinary action for prohibited computer access / usage – using a previous intern's logon and password with excessive incidental usage. On 5/18/07, Grievant was issued a counseling memo for violating e-mail usage by responding to a chain mail which was not for DOC business purposes. On 1/8/08, I reviewed the internal investigation dated 12/11/07, that was completed by the Inspector General's office, following an internal investigation at [Facility] of Grievant's shared folders on the DOC computer network. The investigation revealed a voluminous amount of personal documents, including one which was of a sexual nature, two psychological assessments completed on non-DOC clients, use of his DOC title in a personal letter, and documentation of clearly identifiable staff and inmates with personal and derogatory comments about them. Per DOP 310.2 Information Technology Security, the Logon Banner / Message indicates that among other activities "storing sexually explicit information is prohibited." This is the third event where disciplinary action has been taken regarding violating DOC computer usage policies and this third offense has been occurring for several years and during the previous two actions. The internal investigation documentation was provided to Grievant by the Special Investigations Unit for his review prior to the fact finding meeting on 1/31/08.

(2) Unauthorized use or misuse of state property. Per Standards of Conduct (DOP 132.1) Section XI, Subsection B.5 – Grievant conducted "unauthorized use or misuse of state property" (computer use and storage of materials). On 1/8/08, I reviewed the internal investigation dated 12/11/07, that was conducted by the Inspector General's office, following an internal investigation at [Facility] of Grievant's shared folders on the DOC computer network. The investigation revealed a voluminous amount of personal documents, including one which was of a sexual nature, two psychological assessments completed on non-DOC clients, use of his DOC title in a personal letter, and documentation of clearly identifiable staff and inmates with personal and derogatory comments about them. Per DOP 310.2 Information Technology Security, the Logon Banner / Message indicates that among other activities "storing sexually explicit information is prohibited." The internal investigation documentation was provided to Grievant by the Special Investigations Unit for his review prior to the fact finding meeting on 1/31/08.

19. The Grievant was demoted to Psychology Associate I with a 10% lower pay band and was transferred to a different correctional facility approximately 50 miles

away with a seasoned professional supervisor, whom the Supervisor determined to be a good fit under the circumstances.

20. Throughout this proceeding, including at the hearing, Grievant has forcefully argued his steadfast position that he has not committed any policy violation whatsoever and that he was absolutely shocked that Management was considering any disciplinary action at all.

21. A major part of Management's concern with Grievant's position is precisely that Grievant has refused and still refuses to accept any infraction of policy.

22. Because Grievant cannot see any merit in, or any reason for, the Agency's discipline against him, he contends that the disciplinary action taken against him was taken because of Grievant's assistance provided to his former subordinate at the Facility (the "Subordinate") in her pending grievance against the Agency.

23. However, the hearing officer finds that the Grievant is mistaken in his conviction that the Agency had no valid grounds to discipline him. Further, the hearing officer finds no merit in the Grievant's assertion that the Agency retaliated against him simply because he assisted the Subordinate in her pending grievance or that the disciplinary action taken by the Agency against the Grievant was a mere pretext to punish Grievant for so assisting the Subordinate.

24. The hearing officer finds that certain materials within his personal files of which the Agency complains are obscene material within the meaning of the definition in Section III in Department Operating Procedure Number 310.2 ("Policy 310.2").

25. The hearing officer finds that certain materials within his personal files of which the Agency complains are of a derogatory or inflammatory nature within the meaning of Section X(D)(3)(f) of Policy 310.2.

26. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.

27. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

28. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

29. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. The Grievant himself admits many elements of the Agency's case, including that he created, downloaded and/or stored the personal materials on the Department computer

system, that his personal files presented to him by the Investigator at his interview constituted a "large stack", that he received significant training and reminders concerning Policy 310.2 and that sharing the materials in the context of a state employee meeting would be inappropriate.

APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia,* the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 135.1 (GE 25). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infractions can clearly constitute two (2) Group II offenses as asserted by the Department.

SECOND GROUP OFFENSES (GROUP II).

A. These include acts and behavior that are more severe in nature and are such that an accumulation of two *Group II* offenses normally should warrant removal.

B. *Group II* offenses include, but are not limited to:

1. failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy; . . .

5. unauthorized use or misuse of state property or records.

Department Operating Procedure Number 135.1.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

Policy 310.2 provides in part as follows:

III. DEFINITIONS

Obscene material – Any material that "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."

XI. OFFICIAL USE

A. No user should have any expectation of privacy when using DOC Information Technology Systems. The Department has the right to monitor any and all aspects of DOC IT Systems such monitoring may occur at anytime, without notice and without the user's permission.

B. CTSU Security shall monitor use of all DOC Information Systems for any activity that may be in violation of state and/or Departmental policy and procedure. CTSU Security shall review all security settings, configurations, and patch management for security and violation of policy and procedure.

C. *Personal Use of the Computer and the Internet.* Personal use means use that is not job-related. Internet Use during work hours should be incidental and limited so as to not interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities. Personal use is prohibited if it:

1. Adversely affects the efficient operation of the computer system; or
2. Violates any provision of this procedure, any supplemental procedure 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* **COV** § 202-2827).

X. D. Unacceptable, Inappropriate and Unauthorized Usage.

1. DOC has no tolerance for employees, contractors and volunteers who use DOC Internet services and information technology (personal computers, networks, etc.) for unacceptable, inappropriate and unauthorized purposes. . .

3. f. Creation, transmission, retrieval or storage of material or messages of a libelous, defamatory, derogatory, inflammatory, discriminatory or harassing nature, including, but not limited to, those relating to race, ethnicity, national origin, religion, political affiliation, gender, and age, or physical, mental and emotional disability . . .

> j. Placing obscene material on DOC computer network, or use for access or distribution of sexually explicit, indecent or obscene material.

AE 3.

The Department Logon Banner which the Grievant sees regularly when he logs on to his assigned state computer (AE 2J) provides, in part, as follows:

> • The policy applies to all employees, interns, volunteers and contractors.
> • There is no expectation of privacy, monitoring may occur.
> • Certain activities are prohibited including but not limited to accessing, downloading, printing or storing sexually explicit information; downloading or transmitting threatening, obscene, harassing or discriminatory messages or images; uploading or downloading copyrighted material, and uploading or downloading access-restricted agency information contrary or in violation of policy.
> • User must maintain conditions of security.
> • Violations will be handled in accordance with the Standards of Conduct.

Va. Code § 2.2-2827 defines "sexually explicit content" as ". . . any description of . . . sexual conduct . . ." Va. Code § 18.2-390 defines "sexual conduct" to mean "actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast." Because of this definition within the definition, the hearing officer agrees with the Grievant that storing his personal materials which did not portray the necessary or simulated offending acts, did not violate this particular policy. However, the hearing officer finds unconvincing the arguments advanced by Grievant asserting that he did not violate the policies prohibiting creation or storage of material of a derogatory or inflammatory nature or placing obscene material on the Department computer network because he did not intend to distribute the materials or because his materials do not meet the policy and statutory definition of "storage". Policy 310.2(X)(D)(3)(f) and X(D)(3)(j). The hearing officer also finds that Grievant's personal use of the computer was not occasional, incidental and limited and, accordingly violated Policy 310.2 on this basis also.

Even after the Grievant was supposed to have deleted all the personal files from his computer, the Supervisor discovered what he classified as seven (7) additional inappropriate files including one of a sexual nature which showed a male's genitals fully exposed.

The Grievant has alleged retaliation but has failed to carry his burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant

must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse action; *See EDR Ruling Nos. 2005-1064, 2006-1169* and *2006-1283* and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and 1587, page 5 (June 25, 2007).

Concerning both Group II Written Notices, the Agency has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions.

The Agency has also clearly justified issuing the two (2) Group II Written Notices. Concerning the Grievant's failure to follow established written policy at the time of the present discipline, the Grievant had an active Group I Written Notice for prohibited computer access/usage in violation of the same Policy 310.2 and received a written counseling from the Supervisor on May 18, 2007 for violation of the same Policy 310.2. AE 5. Concerning the Grievant's unauthorized use/misuse of the computer the hearing officer will allow the volume and nature of the Grievant's personal materials to speak for themselves.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to the Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The grievant's apparent refusal to recognize and accept the seriousness of his violations of Agency policy and procedures preclude a lesser sanction. The hearing officer agrees.

Two (2) Group II Written Notices normally warrant termination of employment. In addition, the Grievant had, at the time of the discipline, an active Group I Written Notice for violation of the same policy. The Employment Manager argued for termination but the Director and the Supervisor mitigated and opposed termination despite the seriousness of the infractions.

At the hearing, the Grievant was not able to adduce evidence concerning exactly what responsive documents were in existence. The Agency did produce a two-page itemization of information in the roughly one-week period between the date of EDR's decision and the second day of the hearing. Part of the EDR decision favored the Agency. The Grievant acknowledged at the hearing that earlier he had received at least some helpful documents from the Agency, consisting of the Director's handwritten notes. As previously stated, the Grievant had earlier in the proceeding waived his right to a continuance to await the EDR decision, electing instead to proceed to the hearing on September 25, 2008. The hearing officer continued the hearing to a second day October 8, 2008, but stated that when the hearing reconvened, he would treat the situation as if we were resuming the hearing on the night of September 25, 2008.

Given the foregoing, while the hearing officer cannot condone any failure on the part of the Agency to comply with the hearing officer's orders, the hearing officer does not find the Agency's conduct to be so egregious as to warrant granting the Grievant relief on the merits of his Grievance, especially in a case like this where many of the necessary findings are not contested by the Grievant.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the two (2) Group II Written Notices and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly

discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8840

Hearing Officer Appointment: May 19, 2008
Hearing Dates: September 25 and October 8, 2008
Decision Issued: October 17, 2008
Amended Decision Issued: October 20, 2008

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge (1) a Group II Written Notice: unauthorized use or misuse of state property, and (2) a Group II Written Notice: failure to follow applicable established written policy, transfer and demotion, both of which were issued on February 12, 2008 by Management of the Virginia Department of Corrections (the "Department" or "Agency"), as described in the Grievance Form A of February 25, 2008.

The hearing officer was appointed on May 19, 2008. The parties duly held the scheduled first pre-hearing telephone conference call at 10:00 a.m. on July 9, 2008. The Grievant, his attorney (the "Attorney"), the Agency's advocate (the "Advocate") and the hearing officer participated in the call.

The hearing had previously been continued by the hearing officer at the request of the Grievant and during the July 9, 2008 conference call, the parties scheduled the hearing for July 30, 2008. The parties agreed to and the hearing officer entered on July 10, 2008 a Protective Order to preserve confidentiality of certain records in the proceeding. At the request of the Grievant, the hearing officer issued certain document orders to the Agency. The Agency appealed certain of the hearing officer's document orders to the Virginia Department of Employment Dispute Resolution ("EDR") in an interim appeal dated July 29, 2008. The Grievant, by counsel, moved for a number of successive continuances of the hearing pending the decision by EDR but as reflected in the hearing officer's Decision Concerning Hearing on September 25, 2008, the Grievant ultimately decided to waive any right to a further continuance, electing instead to proceed to hearing on September 25, 2008, the date previously agreed upon by the parties as reflected in the hearing officer's Decision Granting Continuance and Fourth Amendments to Scheduling Order entered August 19, 2008.

The hearing on September 25, 2008 ran from approximately 9:00 a.m. to after 7:00 p.m. (with a half-hour break for lunch) when the hearing officer decided to continue it to a second

day. The hearing reconvened on October 8, 2008 commencing at 9:00 a.m. and ending at approximately 2:30 p.m.

EDR issued its Compliance Ruling of Director, Ruling Number 2009-2087, on September 30, 2008. The Director in her final, non-appealable decision, upheld certain elements of the Agency's appeal concerning the hearing officer's ordered document production. On October 7, 2008, the Grievant wrote to the Director and this hearing officer stating that "the Department of Corrections (Agency) remains fully out of compliance with all of the Document Production Orders issued by the Hearing Officer and clarified in the final and non-appealable ruling of the EDR Director dated 9/30/08." As a remedy, the Grievant requests amongst other things "[t]hat in part as a result of the Agency's failure to comply with requirements of the Grievance Procedure without just cause, the issuance of a positive decision for the Grievant on all issues which have been qualified for hearing is appropriate."

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

At the hearing, the Attorney represented the Grievant and the Advocate represented the Agency. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency's binder (1 through 7) and all of the exhibits in the Grievant's binder (1-44).[2]

As referred to above, at the request of the Grievant, the hearing officer issued a number of orders for production of documents and twelve orders for witnesses. No open issues concerning non-attendance of witnesses remained by the conclusion of the hearing. After the hearing, the Grievant, by counsel, submitted a post-hearing brief of attached arguments to the hearing officer (the "Grievant's Brief").

APPEARANCES

Representative for Agency
Grievant
Witnesses

[2] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

FINDINGS OF FACT

30. The grievant was employed by the Agency before the discipline of which he complains in this proceeding as a Psychology Associate, Senior at a correctional facility (the "Facility"). AE 5.

31. A Northrop Grumman computer site technician and information security officer for the Department (the "Tech"), located at the Department's headquarters, discovered that someone within the Department had hidden suspicious folders, which could nevertheless be accessed by other users of the computer system. AE 2A.

32. The Tech reported the discovery to his manager, the Chief of the Department's Special Investigations Unit, Office of the Inspector General (the "Chief") on July 24, 2007 and was told to look into the matter.

33. The Tech discovered that the suspicious file was created by the Grievant at the Facility. The Tech informed the Chief who immediately informed the Mental Health Program Director for the Agency (the "Director").

34. The Director promptly responded to the Chief "I believe this warrants a formal investigation. I am very concerned about what it may represent." AE 2A.

35. The matter was promptly assigned for investigation to a Special Agent in the Special Investigations Unit (the "Investigator").

36. The Investigator issued his Final Report on October 15, 2007, which was approved by the Senior Assistant Chief on November 13, 2007. AE 2.

37. As part of his investigation, the Investigator interviewed the Grievant on October 1, 2007. The Grievant signed a one page statement (the "Statement"), initialing all corrections and signing it because it is true and accurate. AE 2B.

38. The Statement provides in part as follows:

> I have reviewed excerpts from my computer account folders and other folders such as Humor, [Grievant] Personal and Book Titles and Interests. Most of the files within these folders I agree are not job related or relative to my function as a Psychologist here at the [Facility]. Following this interview I will immediately remove these files and folders from my [Department] computer account.
>
> I will also review my entire computer account to ensure that no personal information or files exist. Should I find

> [such] material I will remove it. Moreover, [the Investigator] has allowed me to review the Departmental policy 11-1 relative to improper use of the [Department] computer to ensure that I am aware of the policy.
>
> The information that I have documented in my Book Titles and Interesting folder regarding certain inmates does not represent confidential mental history or medical history information. Comments made regarding certain present and former employees are my personal comments and in no way indicative of any personal animosity whatsoever.

AE 2B.

39. The Grievant had approximately 5,193 files representing approximately 600 megabytes before he removed the personal files and folders from his Department computer account.

40. After the Grievant completed the exercise of removing his personal files and folders, there remained approximately 3,750 files, representing approximately 475 megabytes. Accordingly, the Grievant removed approximately 1,443 files representing approximately 125 megabytes or about 21% of his total files.

41. Such personal use by Grievant is not limited, occasional or incidental within the meaning and potential safe harbor of Department Operating Procedure Number 310.2VI(C). AE 3.

42. The subject personal files included items such as the following:

    a. Blowjob Etiquette (by a female)

        1. First and foremost, we are not obligated to do it.

        2. Extension to rule #1 – So if you get one, be grateful.

        3. I don't care WHAT they did in the porn video you saw, it is not standard practice to cum on someone's face.

        4. Extension to rule #3 – No, I DON"T have to swallow.

        5. My ears are NOT handles.

6. Extension to rule #5 – do not push on the top of my head. Last I heard, deep throat had been done. And additionally, do you really WANT puke on your dick?

7. I don't care HOW relaxed you get, it is NEVER OK to fart.

8. Having my period does not mean that it's "hummer week" – get it through your head – I'm bloated and I feel like shit so no, I don't feel particularly obligated to blow you just because YOU can't have sex right now.

9. Extension to #8 – "Blue Balls" might have worked on high school girls if you're that desperate, go jerk off and leave me alone with my Midol.

10. If I have to remove a pubic hair from my teeth, don't tell me I've just "wrecked it" for you.

11. Leaving me in bed while you go play video games immediately afterwards is highly inadvisable if you would like my behavior to be repeated in the future.

12. If you like how we do it, it's probably best not to speculate about the origins of our talent. Just enjoy the moment and be happy that we're good at it. See also rule #2 about gratitude.

13. No, it doesn't particularly taste good. And I don't care about the protein content.

14. No, I will NOT do it while you watch TV.

15. When you hear your friends complain about how they don't get blow jobs often enough, keep your mouth shut. It is inappropriate to either sympathize or brag.

16. Just because "it's awake" when you get up does not mean I have to "kiss it good morning."

b. A Man's thoughts on Fellatio AKA Rebuttal Etiquette (by a male)

1. First of all, yes you're obligated to do it. If you don't, we will find someone (younger, prettier and dirtier) who will.

2. Second, swallowing a teaspoon full of cream is a hell of a lot easier than licking a dead fish.

3. You want to talk about farting? Does the word "queef" mean anything to you?

4. I will use your ears as I see fit, don't worry about it and be thankful I'm not pulling your hair.

5. When you're on your period, stuffing something in your mouth is the only way to stop you from bitching and moaning. Suck it up!

6. Speaking of which, if you are bleeding for five straight days, you need all the fluids you can get. Trust me.

7. You bitch about the taste, but trust me when I tell you that we get the short end of the stick in flavor country.

8. At least there is no danger of a dick bleeding in your mouth.

9. Play with the balls.

10. No matter how good you think you are at it, we've had better.

11. Caress the ass, too. We like that!

12. Make hay when the sun shines. It's "wide awake" in the morning now, but when you get old & fat and looking for some action, I gah-ron-tee it'll be "sound asleep."

13. If you swallow, then you don't have to worry about getting any on your face, now will you?

43. The Grievant also had a document created and stored showing (a) "Book Titles and Interesting People"; (b) names and inmate numbers of inmates with inflammatory, disparaging and derogatory comments alongside; (c) names of Department staff with inflammatory, disparaging and derogatory comments alongside. AE 2(F); GE 3. The hearing officer has redacted names and inmate numbers in a sampling of a few of the comments:

> **Possible Titles**
>
> Waking the Sleeper
> The Wonton of Pain
> For My Own Well Binging
> Where have all the good voices gone ?
> No one said it was going to be easy
> Hard Time
> Life in the grey bar motel
> Inside
> Living life while doing life
> Cons & Characters
> Life don't stop when the gavel comes down
> Doing Time
> The Good, the Bad and the Simple
> Socially Challenged, Morally Bankrupt
>
> **INMATES**
>
> [Name & Inmate Number] (proof that you really can grow up, NOT)
>
> [Name & Inmate Number] ("I'm going to kill myself if you don't give me a cigarette") (his evil twin in the form of a gargantuan umbilical hernia is still attached to his massively fat frame and running his life from within)
>
> [Name & Inmate Number] (no habla Inglais… yeah right)
>
> [Name & Inmate Number] (the "Chimp Boy", calculated craziness)
>
> [Name & Inmate Number] (too weak to be good, too scared to be bad)

[Name & Inmate Number] (the CIA's only millionaire inmate operative)(what's a black man doing with a 'KKK License' and a 'Gold Social Security Card'?)

[Name & Inmate Number] ("digging for treasure" and other anal activities gone bad)

Staff

[Name & Title] (a brilliant physician but a lousy healer)

[Name & Title] (bit off more than he could chew)

[Name & Title] (her mouth wrote checks her talent couldn't cover)("I'm being perfectly facetious")

[Name & Title] Cream isn't the only thing to rise to the top

[Name & Title] it takes real skill and effort to avoid work as assiduously as that

44. The Department's Mental Health Clinical Supervisor (the "Supervisor") who is the Grievant's direct supervisor and who supervises six (6) facilities consulted with the Director, the Chief, the Employment Manager (the "Employment Manager") of the Human Resources Division in the Department and other appropriate Agency Management personnel to consider the results of the investigation and any corrective action alternatives available to the Department.

45. On January 31, 2008, the Supervisor and the Director met with the Grievant to consider his version of the facts and events and to discuss mitigating circumstances. The Grievant was informed of disciplinary action being considered including termination, suspension, demotion and transfer.

46. The Employment Manager recommended termination but after considering various corrective actions, the Director and the Supervisor decided based on mitigating factors, including the Grievant's 17 years of service to the Agency and his value and good work as a psychologist, to issue the two (2) Group II Written Notices.

47. On February 12, 2008, the Grievant met with management personnel, including the Supervisor, the Director and the Assistant Warden of the Facility, and was issued the two (2) Group II Written Notices as quoted below.

(1) Failure to follow applicable established written policy. Per Standards of Conduct (DOP 135.1) Section XI, Subsection B:1, - Failure to follow applicable established written policy. On 10/10/06, Grievant was issued a Group I Disciplinary action for prohibited computer access / usage – using a previous intern's logon and password with excessive incidental usage. On 5/18/07, Grievant was issued a counseling memo for violating e-mail usage by responding to a chain mail which was not for DOC business purposes. On 1/8/08, I reviewed the internal investigation dated 12/11/07, that was completed by the Inspector General's office, following an internal investigation at [Facility] of Grievant's shared folders on the DOC computer network. The investigation revealed a voluminous amount of personal documents, including one which was of a sexual nature, two psychological assessments completed on non-DOC clients, use of his DOC title in a personal letter, and documentation of clearly identifiable staff and inmates with personal and derogatory comments about them. Per DOP 310.2 Information Technology Security, the Logon Banner / Message indicates that among other activities "storing sexually explicit information is prohibited." This is the third event where disciplinary action has been taken regarding violating DOC computer usage policies and this third offense has been occurring for several years and during the previous two actions. The internal investigation documentation was provided to Grievant by the Special Investigations Unit for his review prior to the fact finding meeting on 1/31/08.

(2) Unauthorized use or misuse of state property. Per Standards of Conduct (DOP 135.1) Section XI, Subsection B.5 – Grievant conducted "unauthorized use or misuse of state property" (computer use and storage of materials). On 1/8/08, I reviewed the internal investigation dated 12/11/07, that was conducted by the Inspector General's office, following an internal investigation at [Facility] of Grievant's shared folders on the DOC computer network. The investigation revealed a voluminous amount of personal documents, including one which was of a sexual nature, two psychological assessments completed on non-DOC clients, use of his DOC title in a personal letter, and documentation of clearly identifiable staff and inmates with personal and derogatory comments about them. Per DOP 310.2 Information Technology Security, the Logon Banner / Message indicates that among other activities "storing sexually explicit information is prohibited." The internal investigation documentation was provided to Grievant by the Special Investigations Unit for his review prior to the fact finding meeting on 1/31/08.

48. The Grievant was demoted to Psychology Associate I with a 10% lower pay band and was transferred to a different correctional facility approximately 50 miles

away with a seasoned professional supervisor, whom the Supervisor determined to be a good fit under the circumstances.

49. Throughout this proceeding, including at the hearing, Grievant has forcefully argued his steadfast position that he has not committed any policy violation whatsoever and that he was absolutely shocked that Management was considering any disciplinary action at all.

50. A major part of Management's concern with Grievant's position is precisely that Grievant has refused and still refuses to accept any infraction of policy.

51. Because Grievant cannot see any merit in, or any reason for, the Agency's discipline against him, he contends that the disciplinary action taken against him was taken because of Grievant's assistance provided to his former subordinate at the Facility (the "Subordinate") in her pending grievance against the Agency.

52. However, the hearing officer finds that the Grievant is mistaken in his conviction that the Agency had no valid grounds to discipline him. Further, the hearing officer finds no merit in the Grievant's assertion that the Agency retaliated against him simply because he assisted the Subordinate in her pending grievance or that the disciplinary action taken by the Agency against the Grievant was a mere pretext to punish Grievant for so assisting the Subordinate.

53. The hearing officer finds that certain materials within his personal files of which the Agency complains are obscene material within the meaning of the definition in Section III in Department Operating Procedure Number 310.2 ("Policy 310.2").

54. The hearing officer finds that certain materials within his personal files of which the Agency complains are of a derogatory or inflammatory nature within the meaning of Section X(D)(3)(f) of Policy 310.2.

55. The Department has fully accounted for all mitigating factors in determining the corrective action taken concerning the Grievant.

56. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

57. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

58. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. The Grievant himself admits many elements of the Agency's case, including that he created, downloaded and/or stored the personal materials on the Department computer

system, that his personal files presented to him by the Investigator at his interview constituted a "large stack", that he received significant training and reminders concerning Policy 310.2 and that sharing the materials in the context of a state employee meeting would be inappropriate.

APPLICABLE LAW, ANALYSIS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia,* the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 135.1 (GE 25). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infractions can clearly constitute two (2) Group II offenses as asserted by the Department.

SECOND GROUP OFFENSES (GROUP II).

C. These include acts and behavior that are more severe in nature and are such that an accumulation of two *Group II* offenses normally should warrant removal.

D. *Group II* offenses include, but are not limited to:

1. failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy; . . .

5. unauthorized use or misuse of state property or records.

Department Operating Procedure Number 135.1.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

Policy 310.2 provides in part as follows:

III. DEFINITIONS

Obscene material – Any material that "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."

XII. OFFICIAL USE

D. No user should have any expectation of privacy when using DOC Information Technology Systems. The Department has the right to monitor any and all aspects of DOC IT Systems such monitoring may occur at anytime, without notice and without the user's permission.

E. CTSU Security shall monitor use of all DOC Information Systems for any activity that may be in violation of state and/or Departmental policy and procedure. CTSU Security shall review all security settings, configurations, and patch management for security and violation of policy and procedure.

F. *Personal Use of the Computer and the Internet.* Personal use means use that is not job-related. Internet Use during work hours should be incidental and limited so as to not interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities. Personal use is prohibited if it:

1. Adversely affects the efficient operation of the computer system; or
2. Violates any provision of this procedure, any supplemental procedure 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* **COV** § 202-2827).

X. D. Unacceptable, Inappropriate and Unauthorized Usage.

1. DOC has no tolerance for employees, contractors and volunteers who use DOC Internet services and information technology (personal computers, networks, etc.) for unacceptable, inappropriate and unauthorized purposes. . .

3. f. Creation, transmission, retrieval or storage of material or messages of a libelous, defamatory, derogatory, inflammatory, discriminatory or harassing nature, including, but not limited to, those relating to race, ethnicity, national origin, religion, political affiliation, gender, and age, or physical, mental and emotional disability . . .

> j. Placing obscene material on DOC computer network, or use for access or distribution of sexually explicit, indecent or obscene material.

AE 3.

The Department Logon Banner which the Grievant sees regularly when he logs on to his assigned state computer (AE 2J) provides, in part, as follows:

> • The policy applies to all employees, interns, volunteers and contractors.
> • There is no expectation of privacy, monitoring may occur.
> • Certain activities are prohibited including but not limited to accessing, downloading, printing or storing sexually explicit information; downloading or transmitting threatening, obscene, harassing or discriminatory messages or images; uploading or downloading copyrighted material, and uploading or downloading access-restricted agency information contrary or in violation of policy.
> • User must maintain conditions of security.
> • Violations will be handled in accordance with the Standards of Conduct.

Va. Code § 2.2-2827 defines "sexually explicit content" as ". . . any description of . . . sexual conduct . . ." Va. Code § 18.2-390 defines "sexual conduct" to mean "actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast." Because of this definition within the definition, the hearing officer agrees with the Grievant that storing his personal materials which did not portray the necessary or simulated offending acts, did not violate this particular policy. However, the hearing officer finds unconvincing the arguments advanced by Grievant asserting that he did not violate the policies prohibiting creation or storage of material of a derogatory or inflammatory nature or placing obscene material on the Department computer network because he did not intend to distribute the materials or because his materials do not meet the policy and statutory definition of "obscene". Policy 310.2(X)(D)(3)(f) and X(D)(3)(j). The hearing officer also finds that Grievant's personal use of the computer was not occasional, incidental and limited and, accordingly violated Policy 310.2 on this basis also. Of course, the hearing officer also rejects the other innumerable arguments made by Grievant which Grievant asserts excuse or permit his actions and/or insulate him from any discipline by the Agency.

Even after the Grievant was supposed to have deleted all the personal files from his computer, the Supervisor discovered what he classified as seven (7) additional inappropriate files including one of a sexual nature which showed a male's genitals fully exposed.

The Grievant has alleged retaliation but has failed to carry his burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse action; *See EDR Ruling Nos. 2005-1064, 2006-1169* and *2006-1283* and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and 1587, page 5 (June 25, 2007).

Concerning both Group II Written Notices, the Agency has articulated and proven by overwhelming evidence legitimate, non-retaliatory reasons for its actions.

The Agency has also clearly justified issuing the two (2) Group II Written Notices. Concerning the Grievant's failure to follow established written policy at the time of the present discipline, the Grievant had an active Group I Written Notice for prohibited computer access/usage in violation of the same Policy 310.2 and received a written counseling from the Supervisor on May 18, 2007 for violation of the same Policy 310.2. AE 5. Concerning the Grievant's unauthorized use/misuse of the computer the hearing officer will allow the volume and nature of the Grievant's personal materials to speak for themselves.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to the Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The grievant's apparent

refusal to recognize and accept the seriousness of his violations of Agency policy and procedures preclude a lesser sanction. The hearing officer agrees.

Two (2) Group II Written Notices normally warrant termination of employment. In addition, the Grievant had, at the time of the discipline, an active Group I Written Notice for violation of the same policy. The Employment Manager argued for termination but the Director and the Supervisor mitigated and opposed termination despite the seriousness of the infractions.

At the hearing, the Agency did produce a two-page itemization of information in the roughly one-week period between the date of EDR's decision and the second day of the hearing. Other than this itemization, at the hearing, the Grievant was not able to adduce meaningful evidence concerning exactly what sought responsive documents were in existence. Part of the EDR decision favored the Agency. The Grievant acknowledged at the hearing that earlier he had received at least some helpful documents from the Agency, consisting of the Director's handwritten notes. As previously stated, the Grievant had earlier in the proceeding waived his right to a continuance to await the EDR decision, electing instead to proceed to the hearing on September 25, 2008. The hearing officer continued the hearing to a second day October 8, 2008, but stated that when the hearing reconvened, he would treat the situation as if we were resuming the hearing on the night of September 25, 2008.

Given the foregoing, while the hearing officer cannot condone any failure on the part of the Agency to comply with the hearing officer's orders, the hearing officer does not find the Agency's conduct to be so egregious as to warrant granting the Grievant relief on the merits of his Grievance, especially in a case like this where many of the necessary findings are not contested by the Grievant.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the two (2) Group II Written Notices and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

4. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

5. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

6. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8840

Hearing Officer Appointment: May 19, 2008
Hearing Dates: September 25 & October 8, 2008
Original Decision Issued: October 17, 2008
and reissued October 20, 2008
Review Decision Issued: November 5, 2008

ISSUES

The Virginia Department of Employment Dispute Resolution's ("EDR") Rules for Conducting Grievance Hearings (the "Rules") provide that the hearing officer's decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision (Rules, Section VII). The grievant has raised all of the three types of review in this proceeding:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request;

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management ("DHRM"). This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with the grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 East Main, Suite 400, Richmond, Virginia 23219 or faxed to (804) 786-0111.

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the DHRM Director or the EDR Director. Rules, Section VII.

The hearing officer should issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request. Rules, Section VII.

The hearing officer received the grievant's Request for Hearing Officer to Reconsider his Decision on October 31, 2008. Accordingly, the deadline for the hearing officer's reconsideration decision is November 17, 2008. Of course, the grievant's challenges concerning the hearing officer's "[f]ailure to enforce the mandates of the grievance process", "[f]ailure to render an impartial and objective decision" and similar challenges that the hearing officer has not complied with the grievance procedure, do not fall within the jurisdiction of the hearing officer but, pursuant to the Rules, are within the purview of the Director of EDR once the hearing officer has issued his decision concerning reconsideration. Similarly, any of the grievant's challenges on review concerning the hearing decision being inconsistent with state or agency policy are within the exclusive purview of the Director of DHRM.

DECISION

In his request to reconsider the decision, the grievant has not offered any probative newly discovered evidence. Similarly, the grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request. The evidence presented by the Agency at the hearing was credible and compelling. For the reasons provided herein, the hearing officer hereby denies the grievant's request for reconsideration directed to him and hereby affirms his decision that the Agency has met its burden of proving by a preponderance of the evidence that the discipline was warranted and appropriate.

APPEAL RIGHTS

The hearing officer attaches hereto and incorporates herein Section VII of the Rules.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
Department of Corrections
June 12, 2009

The grievant has requested that the Department of Human Resource Management (DHRM) conduct an administrative review of the hearing decision in Grievance No. 8840. For the reason stated below, the DHRM will not interfere with the hearing decision. The agency head of the DHRM, Ms. Sara Redding Wilson, has asked that I respond to this request for an administrative review.

FACTS

The Department of Corrections employed the grievant as a Psychologist II until he was issued two Group II Written Notices and demoted to a Psychologist I with a pay reduction. In addition, he was transferred to another facility. The disciplinary actions were related to his storage of personal, non-work related files on the agency's computer system.

DISCUSSION

On February 12, 2008, the Department of Corrections officials took disciplinary action against the grievant which consisted of issuing two Group II Written Notices, demotion and transfer to another facility. He filed a grievance to have the disciplinary action reversed. When he did not receive the relief he sought through the management steps, he asked that his grievance be heard by a hearing officer. In a decision dated October 17, 2008, the hearing officer upheld the disciplinary action. The grievant requested that the hearing officer reconsider his decision and requested administrative reviews from the Department of Employment Dispute Resolution and the Department of Human Resource Management. In a ruling dated March 13, 2009, the Director of the Department of Employment Dispute Resolution remanded the decision to the hearing officer and directed that he respond more fully to at least 11-12 issues raised by the grievant in his appeal.

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. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is beyond reasonableness, he may reduce the discipline. 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 his appeal to this Agency and the EDR, among other things, the grievant contends that DOC officials exceeded the provisions of DHRM Policy 1.60 when they demoted and transferred him to another facility. In the original decision, the hearing officer concurred with DOC's application of Policy 1.60. Accordingly, the hearing officer has deferred responding to EDR's directive remanding the decision to him until DHRM rules on this issue because DHRM's determination regarding the proper application of Policy 1.60 may have an impact on the hearing officer's pending ruling. While this Agency normally issues its rulings after all other administrative appeals have been addressed, in this instance DHRM will make an exception. As such, this ruling concludes this Agency's involvement in this matter.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, "It is the policy of the Commonwealth objective to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness. Attachment A, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, the provisions of DHRM's Policy No. 3.05, Compensation, are applicable here.

The Department of Human Resource Management's Policy No. 1.60, in relevant part, states, "**Group II Offense -** Offenses in this category includes acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations if policies, procedures, or laws….A second active Group II Notice normally should result in termination; however, when mitigating circumstances exist, an employee may be suspended for up to 30 workdays and/or demoted or transferred with reduced responsibilities and a disciplinary salary action; or transferred to an equivalent position in a different area with no change in salary."

In the instant case, the evidence supports that the grievant was issued two Group II Written Notices, demoted to a lower job level and transferred to another work location 82 miles away. The grievant contends that if an employee is not dismissed after receiving two active Group II Written Notices, that if there are mitigating circumstances, he may be suspended for up to 30 days and/or demoted or transferred with reduced responsibilities and a disciplinary salary action but **not** both, demoted and transferred. This Agency disagrees with the grievant's interpretation. According to DHRM Compensation Policy No. 3.05, a demotion, either for performance or

disciplinary reasons, is a management initiated assignment of an employee to the same or lower Pay Band with less job responsibilities that results in a minimum of a 5% reduction in base pay. In applying the provisions of Policy 1.60, a reduction of responsibilities is a demotion. Policy 1.60 clearly permits an employee to be "transferred with reduced responsibilities and a disciplinary salary action." Therefore, this Agency has no reason to interfere with this part of the hearing officer's decision.

_____

Ernest G. Spratley

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 8840

Hearing Officer Appointment: May 19, 2008
Hearing Dates: September 25 and October 8, 2008
Original Decision Issued: October 17, 2008
Original Decision Re-Issued: October 20, 2008
Remand Decision Issued: January 18, 2010

FINDINGS OF FACT

1. The Grievant was employed by the Agency before the discipline of which he complains in this proceeding (the "Discipline") as a Psychology Associate, Senior at a correctional facility (the "Facility"). AE 5.

2. The Grievant at the time of the Discipline had been so employed at the Facility for approximately 17 years. Tape 4B.

3. In approximately 1990/1991, the Grievant was employed as a staff level psychologist at the Facility. Tape 4B.

4. In approximately 1994, the Grievant was promoted to chief psychologist at the Facility. Tape 4B.

5. At the time of the Discipline, the Grievant was the Mental Health Department Chair and served at the Facility as the Senior Representative for the Mental Health Department in the general population and in segregation settings. Tape 4B.

6. The Grievant's direct supervisor is the Department's Mental Health Clinical Supervisor (the "Supervisor") and the Grievant's second level supervisor is the Mental Health Program Director for the Agency (the "Director"). Tape 4B.

7. The Supervisor met the Grievant in approximately August 2004 and at the time of the Discipline had served as the Grievant's direct supervisor for approximately 3-4 years. Tape 1B and Tape 4B.

8. At the time of the hearing in September 2008, the Warden of the Facility (the "Warden") had served as warden at the Facility for approximately 2 ½ years. Tape 5A.

9. Accordingly, at the time of management's issuance of the two (2) Written Notices and the Warden's arranged security escort of the Grievant from the Facility in February 2008, when the Grievant was transferred to another Agency facility, the Warden was relatively new at the Facility, having been there just less than two (2) years. Tape 5A; GE 43.

10. A Northrop Grumman computer site technician and information security officer for the Department (the "Tech"), located at the Department's headquarters, discovered that someone within the Department had hidden suspicious folders, which could nevertheless be accessed by other users of the computer system. AE 2A.

11. The Tech reported the discovery to his manager, the Chief (the "Chief") of the Department's Special Investigations Unit, Office of the Inspector General ("Internal Affairs" or "IA") on July 24, 2007 and was told to look into the matter.

12. The Tech discovered that the suspicious file was created by the Grievant at the Facility. The Tech informed the Chief who immediately informed the Director.

13. On July 25, 2007, the Director promptly responded to the Chief "I believe this warrants a formal investigation. I am very concerned about what it may represent." AE 2A.

14. Accordingly, in July of 2007, the Director was treating this as a very serious matter, way before any hint to management of the grievance filed by the Grievant on behalf of his former subordinate at the Facility (the "Subordinate") on January 24, 2008. AE 2A; GE 43.

15. The matter was promptly assigned for investigation to a Special Agent in the Special Investigations Unit (the "Investigator").

16. The Investigator issued his Final Report on October 15, 2007, which was approved by the Senior Assistant Chief on November 13, 2007 (the "Report"). AE 2.

17. On December 13, 2007, the Inspector General of Internal Affairs initialed the Report, signifying her approval. AE 2.

18. On December 18, 2007, the Deputy Director initialed the Report. AE 2.

19. On January 4, 2008, the Grievant received a memo from the Director stating that the Director is reviewing the final draft of the Report. GE 43.

20. On January 7, 2008, the Grievant requested a copy of the Report from IA. GE 43.

21. On January 10, 2008, the Grievant received a copy of the Report. GE 43.

22. The Supervisor and the Director have no control over IA or when the Inspector General or other required signatories approve the Report. Tape 9A.

23. Special agents for Internal Affairs are busy folks as law enforcement officers and criminal matters such as stabbings or the death of an inmate are assigned a higher priority and take precedence over operational investigations which do not involve crimes.

24. Accordingly, any delay in obtaining the Report by the Supervisor and the Director was not due to their indifference to the investigation and their not treating the Grievant's violations of policy seriously, as asserted by the Grievant, but rather was due to valid extraneous factors totally beyond the control of the Supervisor and the Director. Tape 9A.

25. As part of his investigation, the Investigator interviewed the Grievant on October 1, 2007. The Grievant signed a one page statement (the "Statement"), initialing all corrections and signing it because it is true and accurate. AE 2B.

26. The Statement provides in part as follows:

> I have reviewed excerpts from my computer account folders and other folders such as Humor, [Grievant] Personal and Book Titles and Interests. Most of the files within these folders I agree are not job related or relative to my function as a Psychologist here at the [Facility]. Following this interview I will immediately remove these files and folders from my [Department] computer account.
>
> I will also review my entire computer account to ensure that no personal information or files exist. Should I find [such] material I will remove it. Moreover, [the Investigator] has allowed me to review the Departmental policy 11-1 relative to improper use of the [Department] computer to ensure that I am aware of the policy.

> The information that I have documented in my Book Titles and Interesting folder regarding certain inmates does not represent confidential mental history or medical history information. Comments made regarding certain present and former employees are my personal comments and in no way indicative of any personal animosity whatsoever.

AE 2B.

27. The Grievant in his case-in-chief testified that VITA (as defined below), in a large project, had duplicated the Grievant's entire Agency Shared Folder/Account, including the Grievant's hidden files which were the subject of the IA investigation (the "Account"). Tape 5B.

28. Earlier in the hearing, the Supervisor had testified that the Supervisor had reviewed the Account and that there were over 5,000 files representing approximately 560 megabytes in the Account.

29. During the Agency's case-in-chief, upon being asked what percentage of the Account either in size or number of files was personal, the Supervisor could not say but the Supervisor testified that a "significant amount" of the Account was personal and not work related. Tapes 2A and 2B.

30. The Grievant agreed during his case-in-chief that there were about 5,000 files in the Account. Tape 4B and Tape 9A.

31. Again, during his case-in-chief, the Grievant testified to the effect:

> "Now, bear in mind that testimony's been given that there were 5,000 [files in the Account] and they're not sure what percentage of these were work-related. The vast, vast, vast majority, I would personally estimate over 90% if not more, or greater, were directly work-related. *Very few* were personal out of that amount. It was a large folder . . ."

(Emphasis supplied). Tape 5B.[3]

32. During the rebuttal portion of the Agency's case, the Supervisor, who testified credibly and confidently, had the opportunity to walk the parties through a reasonably specific and accurate calculation of the number of non-work related or

[3] There was no court reporter or transcript in this proceeding, only audio tapes. The quotes are the hearing officer's best interpretations of what was said with square brackets used to denote parts of the tape which were not fully clear to the hearing officer or to conform to definitions, or to preserve confidentiality, etc., where appropriate.

personal files which the Grievant had stored in the Account and the hearing officer's related findings are contained in the next four paragraphs. Tape 10A. The Supervisor's rebuttal testimony in this regard was in no way materially impeached or refuted by the Grievant or his Attorney during the hearing.

33. The Grievant had approximately 5,193 files representing approximately 600 megabytes before he removed the personal files and folders from his Department computer account.

34. After the Grievant completed the exercise of removing his personal files and folders, there remained approximately 3,750 files, representing approximately 475 megabytes. Accordingly, the Grievant removed approximately 1,443 files representing approximately 125 megabytes or about 21% of his total files.

35. Clearly, both in terms of number of files and megabyte size of storage volume, the personal use by the Grievant was significant, as represented by the Supervisor during the hearing.

36. Such personal use of the Agency computer by the Grievant is by no stretch of the imagination "limited" within the meaning of Department Operating Procedure Number 310.2VI(C). AE 3.

37. The subject personal files included items such as the following:

a. Blowjob Etiquette (by a female)

1. First and foremost, we are not obligated to do it.

2. Extension to rule #1 – So if you get one, be grateful.

3. I don't care WHAT they did in the porn video you saw, it is not standard practice to cum on someone's face.

4. Extension to rule #3 – No, I DON"T have to swallow.

5. My ears are NOT handles.

6. Extension to rule #5 – do not push on the top of my head. Last I heard, deep throat had been done. And additionally, do you really WANT puke on your dick?

7. I don't care HOW relaxed you get, it is NEVER OK to fart.

8. Having my period does not mean that it's "hummer week" – get it through your head – I'm bloated and I feel like shit so no, I don't feel particularly obligated to blow you just because YOU can't have sex right now.

9. Extension to #8 – "Blue Balls" might have worked on high school girls if you're that desperate, go jerk off and leave me alone with my Midol.

10. If I have to remove a pubic hair from my teeth, don't tell me I've just "wrecked it" for you.

11. Leaving me in bed while you go play video games immediately afterwards is highly inadvisable if you would like my behavior to be repeated in the future.

12. If you like how we do it, it's probably best not to speculate about the origins of our talent. Just enjoy the moment and be happy that we're good at it. See also rule #2 about gratitude.

13. No, it doesn't particularly taste good. And I don't care about the protein content.

14. No, I will NOT do it while you watch TV.

15. When you hear your friends complain about how they don't get blow jobs often enough, keep your mouth shut. It is inappropriate to either sympathize or brag.

16. Just because "it's awake" when you get up does not mean I have to "kiss it good morning."

b. A Man's thoughts on Fellatio AKA Rebuttal Etiquette (by a male)

1. First of all, yes you're obligated to do it. If you don't, we will find someone (younger, prettier and dirtier) who will.

2. Second, swallowing a teaspoon full of cream is a hell of a lot easier than licking a dead fish.

3. You want to talk about farting? Does the word "queef" mean anything to you?

4. I will use your ears as I see fit, don't worry about it and be thankful I'm not pulling your hair.

5. When you're on your period, stuffing something in your mouth is the only way to stop you from bitching and moaning. Suck it up!

6. Speaking of which, if you are bleeding for five straight days, you need all the fluids you can get. Trust me.

7. You bitch about the taste, but trust me when I tell you that we get the short end of the stick in flavor country.

8. At least there is no danger of a dick bleeding in your mouth.

9. Play with the balls.

10. No matter how good you think you are at it, we've had better.

11. Caress the ass, too. We like that!

12. Make hay when the sun shines. It's "wide awake" in the morning now, but when you get old & fat and looking for some action, I gah-ron-tee it'll be "sound asleep."

13. If you swallow, then you don't have to worry about getting any on your face, now will you?

38. The Grievant also had a document created and stored showing (a) names and inmate numbers of inmates with derogatory comments alongside; and (b) names of Department staff with derogatory comments alongside. AE 2(F); GE 3. The hearing officer has redacted names and inmate numbers in a sampling of a few of the comments:

INMATES

[Name & Inmate Number] (proof that you really can grow up, NOT)

[Name & Inmate Number] (when divorce is not an option; dying for attention]

[Name & Inmate Number] ("I'm going to kill myself if you don't give me a cigarette") (his evil twin in the form of a gargantuan umbilical hernia is still attached to his massively fat frame and running his life from within)

[Name & Inmate Number] (no habla Inglais… yeah right)

[Name & Inmate Number] (the "Chimp Boy", calculated craziness)

[Name & Inmate Number] (too weak to be good, too scared to be bad)

[Name & Inmate Number] (the CIA's only millionaire inmate operative)(what's a black man doing with a 'KKK License' and a 'Gold Social Security Card'?)

Staff

[Name & Title] (a brilliant physician but a lousy healer)

[Name & Title] it takes real skill and effort to avoid work as assiduously as that

39. The Grievant was interviewed by the Investigator on October 1, 2007. The Investigator printed out excerpts of the Grievant's personal documents from the Account and allowed the Grievant to review them. Tape 1A. The Investigator testified that the excerpts were about ten (10) inches thick.

40. The Grievant admitted the documents presented to him by the Investigator on October 1, 2007, were "a large stack of documents." The Grievant admitted that each document was a personal document for the Grievant's personal use. Tape 4B.

41. The Grievant admitted to the Investigator that the documents were his personal documents and that he had created and stored them. Tape 1A.

42. During the interview, the Grievant and the Investigator referenced the fellatio documents and other examples in the Report. AE2.

43. On cross-examination on the second day of the hearing, the Grievant admitted that the investigation revealed a "*voluminous amount*" of his personal documents, including one of a sexual nature, two psychological assessments on non-DOC clients, use of his DOC title in a personal letter, and documentation of clearly identifiable staff and inmates with personal comments about them. The Grievant denied the latter comments were derogatory. Tape 9A.

44. The psychological assessments were for non-DOC, personal business clients of the Grievant, who were students at an academy and who were described by the parties at the hearing as minors, although one apparently may have been 18 at the time of the hearing. AE 2F.

45. The Grievant acknowledged to the Investigator at the time of the interview that the personal documents were inappropriate to be on a state computer. Tape 1B.

46. The Grievant admits that he received annual training concerning the Department's information technology ("IT") policies and that he is familiar with all the policies. Tape 4B.

47. During his case-in-chief, his Attorney asked the Grievant a question to the effect:

> ". . . Prior to the time you knew you were under investigation and I guess that was some time in mid- to late-2007, when do you think you reviewed the policies?"

The Grievant responded to the effect:

> "On an ongoing basis as a supervisor, I'm responsible for being aware of policies that would impact your daily functioning and the functioning of your subordinates."

Tape 4B.

48. The Grievant also admitted that he was reminded of the IT policies daily when he signed on to the computer, seeing the Logon Banner. AE 2J.

49. The Grievant admitted that all four of the staff in the Mental Health Department had full access to the Account and that a computer savvy individual, if he knew there were hidden folders, could get around the security measure to access the Grievant's hidden folders. Tape 4B.

50. The Grievant admitted that certain of the Grievant's personal documents within the Account were attachments which he detached from e-mails and stored.

51. The Grievant admits that other of his personal documents within the Account were created by him, saved and stored by him on the Agency computer.

52. The Grievant testified at the hearing that immediately following his interview with the Investigator, within the hour, he went through his hidden folders to remove his personal materials. Tape 4B.

53. In his signed Statement (AE 2B), the Grievant had specifically undertaken in writing that "[f]ollowing this interview I will immediately remove these files and folders from my [Department] computer account. I will also review my entire computer account to ensure that no personal information or files exist. Should I find [such] material I will remove it." AE 2B.

54. At the hearing, in his case-in-chief, the Grievant testified that he thought he had reviewed everything and cleared out everything which anyone could misconstrue or which could be found inappropriate. Tape 4B.

55. One of the major components of the Grievant's assertion that the Agency retaliated against him in the implementation of the Discipline is that the Grievant was locked out of his former Agency computer account by the Supervisor and the Director, which prevented him from accessing work-related files, e-mails, etc. Tape 8B.

56. However, the Grievant admits that the Agency had in the interim established for his use a completely new, empty account with a new user id and a new password. Tape 8B.

57. The Grievant complains that over the month after his disciplinary transfer to his new facility within the Agency, the Supervisor and the Director were given "gate keeper" access to his State Agency computer files. Tape 8B.

58. During the hearing, the Supervisor presented a perfectly good and cogent explanation for this procedure.

59. The Grievant had represented to management that he had in October 2007 removed from his Account all of his personal files. Tape 8B.

60. As part of his due diligence before the Grievant's disciplinary transfer to the new Agency facility, the Supervisor sought and was granted authority by VITA to check the Account to see whether the Grievant had done what the Grievant represented in a signed writing to management he had done, namely "ensure that no personal information or files exist." AE 2B; Tape 8B.

61. Upon beginning his initial due diligence review of the Account, the Supervisor quickly found a document which appeared inappropriate and which raised

questions in the Supervisor's mind as to whether the Grievant had done what he testified at the hearing he thought he had done and what he unequivocally represented to management in the Statement he would do. Tape 8B.

62. The Grievant was restricted from accessing the Account while the Supervisor undertook a more detailed review of the remaining 3,750 files in the Grievant's Account. Tape 8B.

63. In fact, the Supervisor's concerns proved well-founded.

64. Even after the Grievant was supposed to have deleted all of the personal files from his computer, the Supervisor discovered what he classified as seven (7) inappropriate files, including one of a sexual nature which showed a male's genitals fully exposed. Tape 8B.

65. Accordingly, rather than management withholding his work-related State Agency computer files from the Grievant to retaliate against him and for absolutely no reason, as the Grievant asserts, the Grievant himself was the root of the problem in the first place for having put clearly inappropriate personal files in his Account in violation of policy and for not having subsequently removed all of them as he unequivocally undertook to do and testified at the hearing he thought he had done.

66. In his case-in-chief the Grievant testified that he did not recall downloading and storing any videos or music, even while recognizing that there had been prior testimony during the hearing that there was a video in the Account. Tape 4B.

67. On rebuttal, the Supervisor clearly showed through his testimony and with reference to AE 2E and AE 7 that, in fact, the Account housed five (5) video files and one (1) audio file. AE 2E and AE 7.

68. The Attorney objected to the hearing officer hearing any rebuttal evidence concerning the additional personal files discovered by the Supervisor in the Account after the Discipline because such personal files could not be used to support the Discipline and the two (2) Written Notices. Tape 9B.

69. The hearing officer noted the objection and agreed with the Attorney's position but nevertheless admitted the testimony for unrelated rebuttal purposes, specifically to rebut the Grievant' assertion that the Agency had no valid reason to deny him access to the Account and was merely retaliating against him and also to rebut the Grievant's assertion that there were "very few" personal files in the Account. Accordingly, this evidence was used by the hearing officer for rebuttal purposes only and not in his analysis concerning whether the employee engaged in the behavior described in the Written Notice, etc. Tape 9B.

70. The Supervisor who supervises six (6) facilities, consulted with the Director, the Chief, the Employment Manager (the "Employment Manager") of the Human Resources Division in the Department and other appropriate Agency Management personnel to consider the results of the investigation and any corrective action alternatives available to the Department.

71. On January 31, 2008, the Supervisor and the Director met with the Grievant to consider his version of the facts and events and to discuss mitigating circumstances. The Grievant was informed of disciplinary action being considered including termination, suspension, demotion and transfer.

72. Of course, at this due process meeting on January 31, 2008, the Grievant had the opportunity, if he so elected, to raise any mitigating factors in his favor which he wanted management to consider. This is one of the major reasons and purposes for a due process meeting. GE 25, page 5, AE 6, page 5. Grievant testified that he is familiar with the pertinent Agency policies and procedures, which would include the Standards of Conduct.

73. The Employment Manager recommended termination but after considering various corrective actions, the Director and the Supervisor decided based on mitigating factors, including the Grievant's 17 years of service to the Agency and his value and good work as a psychologist, to issue the two (2) Group II Written Notices.

74. Accordingly, Management considered mitigation and in fact mitigated the Discipline. As further discussed later herein, based on the seriousness of the violations of policy and the other factors specified below in this Decision, Management could have issued a Group III Written Notice and related termination or could have discharged the Grievant pursuant to the two (2) Group II Written Notices it did elect to issue. AE 1.

75. One of the Grievant's positions concerning mitigation is that representatives of Management should have considered many more factors in their mitigation analysis. The Grievant did not testify at the hearing specifically what these factors are that Management should have considered at the due process meeting. As EDR pointed out in its Ruling, "[t]he grievant appears to argue that it is part of the agency's burden to establish that it has taken similar action in other cases. That it is not the case; it is the grievant's burden to prove such mitigating or retaliatory factors." Ruling at 5. The Grievant admits in the quote at **page 33** that he knew that one of the purposes of the due process meeting on January 31, 2008 was to consider mitigating factors. *See also* GE 43.

76. There was nothing preventing and the Grievant, of course, could have himself specifically raised at the due process meeting any potential mitigating factors he wanted Management to address. The Written Notices specifically mention the

Grievant's length of service and good work performance as having been considered by Management in mitigation. AE 1.

77. The Grievant also admitted during the hearing that the Supervisor and the Director could have considered other mitigating factors outside his presence. Tape 9A.

78. On February 12, 2008, the Grievant met with management personnel, including the Supervisor, the Director and the Assistant Warden of the Facility (the "Assistant Warden"), and was issued the two (2) Group II Written Notices as quoted below.

(1) Failure to follow applicable established written policy. Per Standards of Conduct (DOP 135.1) Section XI, Subsection B:1, - Failure to follow applicable established written policy. On 10/10/06, Grievant was issued a Group I Disciplinary action for prohibited computer access / usage – using a previous intern's logon and password with excessive incidental usage. On 5/18/07, Grievant was issued a counseling memo for violating e-mail usage by responding to a chain mail which was not for DOC business purposes. On 1/8/08, I reviewed the internal investigation dated 12/11/07, that was completed by the Inspector General's office, following an internal investigation at [Facility] of Grievant's shared folders on the DOC computer network. The investigation revealed a voluminous amount of personal documents, including one which was of a sexual nature, two psychological assessments completed on non-DOC clients, use of his DOC title in a personal letter, and documentation of clearly identifiable staff and inmates with personal and derogatory comments about them. Per DOP 310.2 Information Technology Security, the Logon Banner / Message indicates that among other activities "storing sexually explicit information is prohibited." This is the third event where disciplinary action has been taken regarding violating DOC computer usage policies and this third offense has been occurring for several years and during the previous two actions. The internal investigation documentation was provided to Grievant by the Special Investigations Unit for his review prior to the fact finding meeting on 1/31/08.

(2) Unauthorized use or misuse of state property. Per Standards of Conduct (DOP 135.1) Section XI, Subsection B.5 – Grievant conducted "unauthorized use or misuse of state property" (computer use and storage of materials). On 1/8/08, I reviewed the internal investigation dated 12/11/07, that was conducted by the Inspector General's office, following an internal investigation at [Facility] of Grievant's shared folders on the DOC computer network. The investigation revealed a voluminous amount of personal documents, including one which was of a sexual nature, two psychological assessments completed on non-DOC clients, use of his

DOC title in a personal letter, and documentation of clearly identifiable staff and inmates with personal and derogatory comments about them. Per DOP 310.2 Information Technology Security, the Logon Banner / Message indicates that among other activities "storing sexually explicit information is prohibited." The internal investigation documentation was provided to Grievant by the Special Investigations Unit for his review prior to the fact finding meeting on 1/31/08.

79. The Grievant was demoted to Psychology Associate I with a 10% lower pay band and was transferred to a different correctional facility approximately 50 miles away with a seasoned professional supervisor, whom the Supervisor determined to be a good fit under the circumstances. The Standards of Conduct allow for both demotion and transfer: See AE 6 at VIII(C) and the DHRM Ruling (as defined below).

80. Throughout this proceeding, including at the hearing, the Grievant has forcefully argued his steadfast position that he has not committed any policy violation whatsoever and that he was absolutely shocked that Management was considering any disciplinary action at all. However, when first confronted by the Investigator with the Agency's discovery of all of the Grievant's personal documents stored on the Agency computer at the Grievant's interview on October 1, 2007, the Grievant admitted to the Investigator that the voluminous amount of personal materials were inappropriate to be on a State computer and the Grievant agreed to remove them. This admission, made at a time before the Grievant had much opportunity to develop his *ex post facto* explanations and rationalizations, undercuts and undermines the Grievant's own asserted position that he could not conceive of the Agency taking any disciplinary action and that any disciplinary action by management is totally unfounded.

81. A major part of Management's concern with the Grievant's position is precisely that Grievant ostensibly has refused and still refuses to accept any infraction of policy or even countenance the idea of it. On page 31 of his Remand Brief, the Grievant states that "[t]he Agency has presented absolutely no evidence that their actions were reasonable and consistent with any law or policy."

82. Because Grievant now alleges that he cannot see any merit in, or any reason for, the Agency's discipline against him, he contends that the disciplinary action taken against him was taken because of the Grievant's assistance provided to the Subordinate in her grievance against the Agency.

83. However, the hearing officer finds that the Grievant's position is undermined by his admission to the Investigator and, in any event, the Grievant is mistaken in his conviction that the Agency had no valid grounds to discipline him. Further, the hearing officer finds no merit in the Grievant's assertion that the Agency

retaliated against him simply because he assisted the Subordinate in her pending grievance or that the disciplinary action taken by the Agency against the Grievant was a mere pretext to punish Grievant for so assisting the Subordinate.

84. In its Policy Ruling dated June 12, 2009 (the "DHRM Ruling"), the Department of Human Resource Management ("DHRM") stated in *dicta* (the "Dicta") that "In the instant case, the evidence supports that the grievant was issued two Group II Written Notices, demoted to a lower job level and transferred to another work location 82 miles away."

85. In response to a question from his Attorney, the Grievant answered with words to the effect:

> ". . . But there's no accounting for taste and my taste . . . is not necessarily going to run to other people's taste. Some people will find what I find to be amusing not amusing at all. Some people will find what I believe to be a political stance to be offensive."

Tape 4B.

86. In his case-in-chief on the first day of the hearing, the Attorney questioned the Grievant regarding the Agency's position that the comments created and stored on the Agency computer by the Grievant concerning specifically identified inmates and staff at the Facility are derogatory. Tape 5B.

87. The Grievant responded to the effect:

> "It could be derogatory if it was shared with somebody, if it was presented to someone. It was not."

Tape 5B.

88. While DHRM is the most authoritative and final arbiter concerning matters of policy, in its Ruling, EDR has agreed with the hearing officer that "[Agency] policy language prohibiting *mere creation or storage* of 'material or messages of a libelous, defamatory, derogatory, inflammatory, discriminatory or harassing nature' would appear to encompass the Grievant's alleged misconduct, if the files are found to meet the definition of one or more of those terms." Emphasis supplied; Ruling at 9. DHRM's Dicta also support the hearing officer's interpretations of policy. This is significant because where the Grievant has made admissions under oath in the hearing, qualified only by what the hearing officer understands to be his position regarding interpretation of Agency policy that items need to be disseminated, shared with somebody, presented to someone, etc. to constitute a violation of policy or to be "derogatory," etc., these admissions have

more probative weight concerning the content of what is being admitted by the Grievant and the Grievant's asserted qualification to the admission concerning the policy necessity for distribution or availability for access by others can be largely disregarded.

89. Upon being questioned whether some of the Grievant's comments regarding staff and inmates are derogatory, the Grievant admitted that "[t]hey are derogatory from another's perspective." Tape 5B.

90. The Grievant admitted that he understood the definition of "derogatory" to be "insulting or hurtful." Tape 5B.

91. The Grievant also volunteered an admission to the following effect concerning the comments he created and stored regarding staff and inmates:

> ". . . It would be quite different and quite a violation if I had in any one of these references that having been expressed by the site tech and passed around, yes, that would have been hurtful and that would have been wrong. I agree with and acknowledge that would have been a violation. . ."

Tape 5B.

92. The comments are derogatory with the names and inmate numbers redacted. Of course, the redactions in the Agency exhibit binder are effected to preserve the privacy of the individual inmates and staff to whom they refer. In all likelihood, the comments would be even more derogatory to persons who actually knew the individuals or to the individuals themselves.

93. The Supervisor testified about one example he found particularly derogatory and offensive:

> "[Name & Inmate Number] (when divorce is not an option; dying for attention)"

AE 2(F); GE 3.

94. The Supervisor explained that this particular individual had killed his wife and had gone on a hunger strike, eventually dying. Tape 2B.

95. On cross-examination, the Grievant acknowledged that the Supervisor had testified he was offended by the comments and admitted to the effect that if he posted those comments on his office door or disseminated them "then I would have been in violation of policy." Tape 9A.

96. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright. The Grievant himself admits many elements of the Agency's case, including that he created, downloaded and/or stored the "voluminous" personal materials on the Department computer system, that his personal files presented to him by the Investigator at his interview constituted a "large stack", that he received significant training and reminders concerning Policy 310.2 and that sharing the materials in the context of a state employee meeting would be inappropriate.

97. The hearing officer also makes additional findings of fact in the following section of this Remand Decision.

APPLICABLE POLICY AND LAW, ANALYSIS, ADDITIONAL FINDINGS AND DECISION

The General Assembly enacted the *Virginia Personnel Act, Va. Code* § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Va. Code § 2.2-3000(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Department's Standards of Conduct (the "SOC") are contained in the Operating Procedure Number 135.1 (AE 6; GE 25). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Pursuant to the SOC, the Grievant's infractions can constitute two (2) Group II offenses, as asserted by the Department.

> SECOND GROUP OFFENSES (GROUP II).
>
> E. These include acts and behavior that are more severe in nature and are such that an accumulation of two *Group II* offenses normally should warrant removal.
>
> F. *Group II* offenses include, but are not limited to:
>
> 1. failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy; . . .
>
> 5. unauthorized use or misuse of state property or records.

Department Operating Procedure Number 135.1. AE 6; GE 25.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances.

The hearing officer now has had more time to review and consider the IT policies of the Agency and while he was not persuaded at the hearing that the correct interpretation of the policy is that advanced by the Advocate on behalf of the Agency, the hearing officer is now so persuaded. The Director also reminds the hearing officer in the Ruling that "[a]n agency's interpretation of its own policies is generally afforded great deference." The hearing officer hereby decides that he erred in his Original Decision in not showing sufficient deference to the Agency's interpretation of its own policies and the hearing officer hereby corrects such error in this Remand Decision, which of course supersedes the Original Decision.

During cross-examination of the Grievant, the Advocate, read into the record a pertinent part of the user agreement, an attachment to Department Operating Procedure Number 310.2

(effective September 1, 2004) INFORMATION TECHNOLOGY SECURITY ("Policy 310.2"). The user agreement requires any Agency employee to agree to the policy to the following effect:

> "I understand and agree that all computer resources and equipment are the property of DOC and shall be used for official business only and are not for personal use."

Tape 9B.

The Grievant admitted that he was aware of the agreement. The Agency did not have this "user agreement" as one of its exhibits for the hearing but, fortunately, the Grievant has included as one of his exhibits "Exhibit 28" which the Grievant identifies as "DOC Procedure 310.2 Att. 6."

This Information Technology Security Agreement provides in part as follows:

> **Information Technology Security Agreement**
>
> As an employee of the Virginia Department of Corrections (DOC), I acknowledge that I have been granted access to automated systems, including licensed software, hardware, and data of DOC.
>
> ***I further acknowledge*** that data contained in and accessed using the information systems and network of DOC, and information systems at the Virginia Information Technologies Agency (VITA) are the property of the Commonwealth of Virginia. This includes all systems and data used to conduct the business of the DOC, regardless of where the system or data resides. I shall not disclose, provide, or otherwise make available, in whole or in part, such information other than to other employees or consultants of the DOC to whom such disclosure is authorized. Such disclosure shall be in confidence for purposes specifically related to the business of the DOC and the Commonwealth.
>
> ***I agree*** that logon IDs and passwords are not to be shared among employees. If I must share my logon ID or password while getting help or troubleshooting a problem, I understand it is my responsibility to change my password immediately after receiving this help.
>
> ***I understand and agree*** that all computer resources and equipment owned by DOC are to be used for official business only, and are not for personal use. I understand that DOC reserves the right to monitor, access and disclose, at its discretion, any communications using its system and, therefore, I should have no expectation of

> privacy. I also understand it is my responsibility to protect the data and systems from damage or destruction, both tangible and intangible.
>
> ***I agree*** that my obligations with respect to the confidentiality and security of all information disclosed to me shall survive the termination of any agreement, relationship, or employment with the DOC.
>
> ***I shall take all appropriate action***, whether by instruction, agreement or otherwise, to ensure the protection, confidentiality, and security of the information and automated systems, to satisfy my obligations under this Agreement. I will report all violations or suspected violations of information security immediately to my supervisor and the Information Security Officer.
>
> ***I acknowledge*** that I have read, and will comply with the DOC *Information Technology Security Procedure 310.2*. Use of the computer resources and equipment with knowledge of this procedure will be deemed consent to this procedure. This Agreement shall be interpreted in accordance with the laws of the Commonwealth of Virginia . . .
>
> ***I further acknowledge*** the data contained in and accessed using the information systems and network of DOC, and the information systems at the Virginia Information Technologies Agency (VITA) is the property of the Commonwealth of Virginia. I understand that I have an obligation to take every effort to protect the data and system of the Department of Corrections and the Commonwealth of Virginia. This includes all systems and data used to conduct the business of DOC, regardless of where the system or data resides. I shall not disclose, provide, or otherwise make available, in whole or in part, such information other than to other employees or consultants of DOC to whom such disclosure is authorized. Such disclosure shall be in confidence for purposes specifically related to the business of DOC and the Commonwealth.

Emphasis supplied. GE 28.

Accordingly, the starting point for the policy is that personal use of the Agency computer, information systems, network, computer resources and equipment, is strictly prohibited by policy unless otherwise expressly and specifically permitted by policy.

This policy is not surprising because it is consistent with and furthers the purpose and the goals of the policy:

I. PURPOSE

> To protect the Virginia Department of Correction's data/information from loss, unauthorized use, modification, disclosure, or reproduction and to ensure the implementation of, and compliance with, controls, standards, and procedures. This procedure ensures that all data and information, and the means by which they are created, gathered, processed, transmitted, communicated, and retained are identified, classified, controlled, and safeguarded.

Policy 310.2 AE 3; GE 27.

Obviously, if the starting point for the policy was personal use is permitted except where expressly and specifically prohibited or even if the policy was incidental, occasional and limited personal use is permitted, as asserted by the Grievant, it would be much more difficult for the Agency to achieve its policy goals of ensuring "that all data and information, and the means by which they are created, gathered, processed, transmitted, communicated, and retained are identified, classified, controlled, and safeguarded".

This latter point is amply demonstrated by this very proceeding where a lot of time and energy has been spent by both parties deliberating and debating whether the Grievant's personal use of the computer, etc. was "incidental and limited" pursuant to the Agency's policy and also "occasional" pursuant to DHRM Policy 1.75.

The applicable Agency policy defines the Internet as follows:

> **Internet** – A global collection of interconnected computer networks used cooperatively by people who share a wide variety of resources (research and archived data, publications, news, weather, electronic mail, etc.) and capabilities including "e-government", communications and entertainment. No one is in charge of, or owns, the Internet. Access is typically gained through one of a number of Internet Service Providers.

Accordingly, the Agency policy clearly differentiates and draws a distinction between "all computer resources and equipment owned by DOC" and the Internet, which no one owns or is in charge of.

By policy, the Grievant has been required and is required, annually, to undergo annual IT Security Awareness training and as part of this annual training to read the Agency Information Technology Security Agreement (GE 28), which clearly provides: "**I understand and agree** that all computer resources and equipment owned by DOC are to be used for official business

only, and are not for personal use." Policy 310.2 IV(F); GE 27 and AE 3. This very same policy provision provides that "By completing the training and reading the DOC Information Security Agreement the user agrees to all of the terms of the agreement." *Id.* By this mechanism, the provisions of the attachment are incorporated by reference into the policy. The Grievant admitted he received training and knew the policy, which was one of his exhibits (GE 27).

Policy 310.2 also provides in part as follows:

> III. DEFINITIONS
>
> **Obscene material** – Any material that "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."
>
> VI. OFFICIAL USE
>
> G. No user should have any expectation of privacy when using DOC Information Technology Systems. The Department has the right to monitor any and all aspects of DOC IT Systems such monitoring may occur at anytime, without notice and without the user's permission.
>
> H. CTSU Security shall monitor use of all DOC Information Systems for any activity that may be in violation of state and/or Departmental policy and procedure. CTSU Security shall review all security settings, configurations, and patch management for security and violation of policy and procedure.
>
> I. *Personal Use of the Computer and the Internet.* Personal use means use that is not job-related. Internet Use during work hours should be incidental and limited so as to not interfere with the performance of the employee's duties or the accomplishment of the unit's responsibilities. Personal use is prohibited if it:

1. Adversely affects the efficient operation of the computer system; or
2. Violates any provision of this procedure, any supplemental procedure 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* **COV** § 202-2827).

X. INTERNET SERVICES USAGE.

D. Unacceptable, Inappropriate and Unauthorized Usage.

1. DOC has no tolerance for employees, contractors and volunteers who use DOC Internet services and information technology (personal computers, networks, etc.) for unacceptable, inappropriate and unauthorized purposes. . .

3. Specific unacceptable, inappropriate and unauthorized usages of Internet services include, but are not limited to:

a. Violations of federal or state laws or departmental policies or procedures.

b. For-profit activities, excluding those directly related to the DOC's charter, mission, goals and purposes, or employees' job responsibilities and activities.

c. Private business, including commercial advertising.

f. Creation, transmission, retrieval or storage of material or messages of a libelous, defamatory, derogatory, inflammatory, discriminatory or harassing nature, including, but not limited to, those relating to race, ethnicity, national origin, religion, political affiliation, gender, and age,

or physical, mental and emotional disability . . .

j. Placing obscene material on DOC computer network, or use for access or distribution of sexually explicit, indecent or obscene material.

XXI. SECURITY AWARENESS TRAINING.

A. The Commonwealth of Virginia (COV) Information Technology Resource Management (ITRM) Standard **SEC2001-01.1** requires that all state agencies establish and maintain an IT security awareness program to ensure that all individuals are aware of their security responsibilities and know how to fulfill them.

B. All employees assigned a DOC IT Systems account are **REQUIRED** to take annual IT Security Awareness Training (SAT). . .

L. ***Employees who take IT Security Awareness Training are required to read the DOC Information Security Agreement contained in the training. By completing the training the employee acknowledges that he or she agrees with all stipulations in the Security Agreement and will abide by the agreement. Failure to abide by the agreement will be a violation of the Employee Standards of Conduct and the employee may be subject to disciplinary action.***

AE 3. (Emphasis supplied.)

The Department Logon Banner which the Grievant sees regularly when he logs on to his assigned state computer (AE 2J) provides, in part, as follows:

- The policy applies to all employees, interns, volunteers and contractors.
- There is no expectation of privacy, monitoring may occur.
- Certain activities are prohibited including but not limited to accessing, downloading, printing or storing sexually explicit information; downloading or transmitting threatening, obscene, harassing or discriminatory messages

or images; uploading or downloading copyrighted material, and uploading or downloading access-restricted agency information contrary or in violation of policy.

- User must maintain conditions of security.
- Violations will be handled in accordance with the Standards of Conduct.

DHRM Policy No. 1.75 (eff. 08/01/01) governs Use of Internet and Electronic Communication Systems ("Policy 1.75"). GE 22. Policy 1.75 provides as follows:

USE OF INTERNET AND ELECTRONIC COMMUNICATION SYSTEMS

APPLICATION: All state employees, including employees of agencies exempt from coverage of the Virginia Personnel Act.

PURPOSE

To establish a policy for use of the Internet and the state's electronic communication systems for state agencies and their employees. *This policy establishes minimum standards. Agencies may supplement this policy as they need or desire, as long as such supplement is consistent with this policy. . .*

GENERAL PROVISIONS FOR USE OF INTERNET AND ELECTRONIC COMMUNICATION SYSTEMS

All users must follow this policy *and any additional policy that may be adopted by the agency or institution of the Commonwealth where the user is working.*

Business Use

Agency-provided computer systems that allow access to the Internet and electronic communication systems are the property of the Commonwealth and are provided to facilitate the effective and efficient conduct of State business. Users are permitted access to the Internet and electronic communication systems to assist in the performance of their jobs. *Each agency or institution of the Commonwealth may adopt its own policy setting forth with specificity the work-related purposes for which such equipment and access are provided.*

Personal Use

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.)

NOTE: Users employing the Commonwealth's Internet or electronic communication systems for personal use must present their communications in such a way as to be clear that the communication is personal and is not a communication of the agency or the Commonwealth.

No Expectation of Privacy

No user should have any expectation of privacy in any message, file, image or data created, sent, retrieved or received by use of the Commonwealth's equipment and/or access. Agencies have a right to monitor any and all aspects of their computer systems including, but not limited to, sites, instant message systems, chat groups, or news groups visited by agency users, material downloaded or uploaded by agency users, and e-mail sent or received by agency users. Such monitoring may occur at any time, without notice, and without the user's permission.

In addition, electronic records may be subject to the Freedom of Information Act (FOIA) and, therefore, available for public distribution.

Prohibited Activities

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 . . .*

AGENCY RESPONSIBILITIES

Agencies may develop a written policy, consistent with this policy which supplements or clarifies specific issues for the agency. With regard to use of the Internet and electronic communications, agencies are responsible for: . . .

NOTE: Agencies also may develop procedures by which a user must actively acknowledge reading the policy before access to the system will be granted.

VIOLATIONS

Violations of this policy ***must*** be addressed under Policy 1.60, Standards of Conduct Policy, or appropriate disciplinary policy or procedures for employees not covered by the Virginia Personnel Act. *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 policy.*

AUTHORITY

This policy is issued by the Department of Human Resource Management pursuant to the authority

provided in Chapter 12, Title 2.2, § 2.2-1201 of the Code of Virginia and § 2.2-2827 et. seq.

Further, The Acts of the Assembly 1999, c. 384, cl.2, provides: "That the heads of state agencies whose officers and employees are exempt from the Virginia Personnel Act pursuant to § 2.2-2905 shall adopt the acceptable Internet use policy required by this act to be developed by the Department of Human Resource Management *and may supplement the Department's policy with such other terms, conditions, and requirements as they deem appropriate."*

INTERPRETATION The Director of the Department of Human Resource Management is responsible for official interpretation of this policy, in accordance with § 2.2-1201 of the Code of Virginia.

GE 22 (Emphasis supplied.)

The Department's policies have already received a preliminary review from DHRM and are presumed to be valid. Interpretation of policy is itself a policy matter and subject to the final say of DHRM. *Virginia State Police v. Barton*, 39 Va.App. 439, 573 S.E.2d 319 (2002). This hearing officer is required to use the standards and policies of the employing agency when deciding a case. This is not to say that only *agency* policy should be considered by this hearing officer because there is also state policy promulgated by DHRM. Agencies "are authorized to develop human resource policies that do not conflict with state policies or procedures." DHRM Policy 1.01. Such agency specific policies may be more restrictive than DHRM policy, so long as they do not conflict with DHRM policy. *See* DHRM Ruling re: Case # 5610. Furthermore, agencies are encouraged to seek guidance and assistance from DHRM when developing agency-specific policies or guidelines. DHRM Policy 1.01. Thus, while agency policies are generally presumed to comport with DHRM policy, if the hearing officer finds a conflict between DHRM and agency policy, the hearing officer must confine his policy deliberations to DHRM policy only.

In this case, the Agency which after all has jurisdiction over many prison facilities and for which security (including computer and Internet security) is a paramount concern, has adopted, pursuant to DHRM Policy 1.75, a written policy consistent with Policy 1.75, which in certain respects is more restrictive and which also supplements or clarifies specific issues for the Agency. For example, while the Agency did adopt into policy a definition of "obscene", it specifically has not adopted the DHRM Policy 1.75 definition of "sexually explicit content." Accordingly, and by way of example, the hearing officer in interpreting *Agency* as opposed to DHRM policy will use a dictionary definition for "sexually explicit content" or, more precisely as the Agency calls it "sexually explicit material."

Va. Code § 2.2-2827 defines "sexually explicit content" as ". . . any description of . . . sexual conduct . . ." Va. Code § 18.2-390 defines "sexual conduct" to mean "actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast." Because of this definition within the definition, the hearing officer agrees with the Grievant's argument (but only with respect to DHRM as opposed to Agency policy) that pursuant to DHRM policy as opposed to *Agency* policy, to violate DHRM Policy 1.75 policy by being "sexually explicit content," the materials must portray the necessary or simulated offending acts.

However, this is not the case concerning interpretation of "sexually explicit material" in the *Agency* policy. Such meaning must be decided by the words' plain, ordinary meaning. Chambers Twentieth Century Dictionary ("Chambers") defines "sexual" as "of, by, having, characteristic of, sex, one sex or other, or organs of sex." Webster's Ninth New Collegiate Dictionary ("Webster's") defines "sex," amongst other things, as: "sexually motivated behavior", "sexual intercourse" or "genitalia." Chambers defines "explicit" as "not implied merely, but distinctly stated: plain in language: outspoken: clear: unreserved." The hearing officer finds that the Agency properly concluded that the fellatio documents quoted above are indeed not merely implied but distinctly stated, clear depictions of sexual intercourse or sexually motivated behavior and therefore meet the definition of "sexually explicit material." The Grievant was charged with storing sexually explicit information in each Written Notice and, accordingly, violated the policy.

Interpretation of policy is itself a policy matter and, ultimately, DHRM will have the final word on all matters of "policy." *Barton, supra.* EDR makes final decisions on "procedure" and the hearing officer, provided he has acted in accordance with the grievance procedure, finds facts.

The above analysis concerning the definition of "sexually explicit material" demonstrates the hearing officer's understanding of the interplay between DHRM Policy 1.75 and Agency Policy 310.2. The analysis is also relevant for another reason relating to the hearing officer's required mitigation analysis discussed below.

The hearing officer has now shown the appropriate deference to the Agency's interpretation of its IT policies and has accepted and agreed with the Agency's position that we begin with the Agency's policy that no personal use of the Agency's computer resources and equipment owed by the Agency is permitted unless otherwise expressly and specifically permitted by policy. The mere fact that the Grievant stored personal documents on his state computer constitutes the violation of policy. Each time the Grievant stored any personal document on the Agency computer, this constituted in and of itself a separate and distinct violation of policy. It is understandable that the Grievant did not understand this policy exactly. After all, the hearing officer got it wrong in his Original Decision and from his review of EDR decisions, other hearing officers have in the past not understood the Agency policy of prohibition against personal use of the Agency computer unless specifically allowed.

Personal use of the Internet (and of the state computer to access the Internet, as the heading suggests) is permitted provided it is not otherwise specifically prohibited by policy or in violation of policy. The Grievant relies on Section VI(C) for his assertion that the Agency's **computer resources and equipment owned by the Agency** can be used for incidental and limited personal use. However, that is not what the policy says. To begin with the policy reiterates that "[p]ersonal use means use that is not job-related." Section VI(C) of the policy then addresses the type of personal use being permitted subject to the further qualifications in the section and in policy, namely Internet Use. The section concerns internet use not computer use (other than computer use presumably to access the Internet): "***Internet Use*** during work hours should be incidental and limited so as . . ." (Emphasis supplied) AE 3.

Under the hearing officer's corrected interpretation of Agency policy, which is consistent with DHRM policy, every time the Grievant created and stored a personal document utilizing the Agency's computer resources and equipment owned by the Agency, the Grievant violated Policy 310.2. Furthermore, storage of a personal document on the Agency's computer resources and equipment represents an ongoing and continual violation of policy, 24 hours per day and 7 days per week ("24/7"), until the offending unauthorized personal document is finally removed from the Agency computer system.

The Grievant admits that he created and stored personal documents on the Agency's computer resources and equipment. The Grievant admits, as the Written Notices allege, that the personal documents were "voluminous" in amount. The Grievant admits that numerous personal documents have been stored 24/7 on the Agency's computer resources and equipment owned by the Agency from October 22, 1990 to October 1, 2007, some 17 years. GE 31. The Agency has thus established numerous ongoing violations of its IT policies over a long period of time by the Grievant.

While the violations and the seriousness of the violations of policy are established above, the hearing officer will nevertheless proceed to examine the Grievant's own theory as to why there was absolutely no legitimate basis at all upon which management could have concluded he violated any policy. The Grievant testified to the effect that not in his "wildest dreams" could he conceive of management considering termination of his employment. Tape 5B. This analysis is appropriate for the hearing officer's required mitigation analysis. If the Grievant was operating under a reasonable albeit mistaken interpretation of policy when he committed and, by storing, continued to commit, the policy infractions, the hearing officer understands this could conceivably constitute a mitigating factor in favor of the Grievant who also contends that if the Supervisor and the Director had considered additional mitigating factors, which the Grievant contends that they should have, management might not have been able to impose much if any discipline at all. Tape 9A.

The hearing officer finds that if the sole issue in this proceeding was the interpretation of "sexually explicit content", the Grievant's mistaken interpretation (which was mistakenly shared by the hearing officer in his Original Decision) would have been understandable and defensible

albeit wrong and could constitute a mitigating factor. However, the Grievant's interpretation of policy is undermined by the very position he adopts.

Even assuming, for argument's sake, that Section VI(C) of Policy 310.2 covers the Agency's computer resources and equipment owned by the Agency, by its very terms Section VI(C) provides that "[p]ersonal use is prohibited if it . . . [v]iolates any provision of this procedure . . . or any other policy, regulation, law or guideline as set forth by local, State of Federal law."

Section X of Policy 310.2 also covers Internet Services Usage. Section X(C) deals with "Acceptable, Appropriate and Authorized Usage" of the Internet. Section X(C)(5) clarifies that use of Internet services is a privilege that can be revoked. Section X(D) covers "Unacceptable, Inappropriate and Unauthorized Usage."

Section X(D)(1) clearly notifies the Grievant that:

> DOC has no tolerance for employees, contractors and volunteers who use DOC Internet services and information technology (personal computers, networks, etc.) for unacceptable, ***inappropriate*** and unauthorized purposes. (Emphasis supplied.)

Section X(D)(4) provides a non-exclusive, specific listing of clearly identified policy violations which include in Section X(D)(4)(f) "[c]reation, transmission, retrieval or storage of material or messages of a libelous, defamatory, derogatory, inflammatory, discriminatory or harassing nature, including, but not limited to, those relating to race, ethnicity, national origin, religion, political affiliation, gender, and age, or physical, mental and emotional disability"; and in Section X(D)(4)(j) "placing obscene material on DOC computer network, or use for access or distribution of sexually explicit, indecent or obscene material."

It is important to note that under the policy it is the use of the Agency's computer resources and equipment and/or the Internet for unacceptable, <u>inappropriate</u> and unauthorized purposes which is banned. The examples are merely non-exclusive illustrations given. The Grievant admitted to the Investigator during his interview on October 1, 2007 that the personal documents were inappropriate to be on a state computer and agreed to remove them all, testifying at the hearing that he thought he had done so. By the time of the hearing, the Grievant apparently had changed his position, testifying for example that there was nothing inappropriate about the two (2) fellatio documents and that they did not rise to the level of "sexually explicit content." Tape 5B.

Throughout the hearing the Grievant asserted that he knew the policies well. DHRM Policy 1.75 (GE22) reminds the Grievant that "electronic records may be subject to the Freedom of Information Act ("FOIA") and, therefore, available for public distribution." Given this reminder alone, it is not surprising that the Grievant was initially willing to admit that his personal documents, including the fellatio documents, were not appropriately stored on the Agency computer. The Grievant has now changed his position and testified in the hearing that

he only removed the documents not because the personal documents were inappropriate but so as not to incur the further ire of management.

The hearing officer finds unconvincing the arguments advanced by Grievant asserting that he did not violate the policies prohibiting creation or storage of material of a derogatory nature on the Department computer network because he did not intend to distribute the materials or because his materials do not meet the policy definition of "derogatory". Policy 310.2(X)(D)(3)(f). This is addressed in greater detail below.

Each Written Notice identifies one of the explanations of the evidence "clearly identifiable staff and inmates with personal and derogatory comments about them." Toward the beginning of his cross-examination when questioned by the Advocate, the Grievant admitted all elements of this charge except that the comments were derogatory. Chambers defines "derogatory" as "detracting: injurious." Webster's defines it as provided in the Grievant's First Brief. Chambers defines "injurious" as "hurtful," which correlates with the definition provided by the Grievant at the hearing. Tape 5B; **paragraph 90 above**. Accordingly, the Grievant's personal comments about inmates and staff are derogatory, being hurtful or disparaging about the persons to whom they refer. Essentially the Grievant has admitted this under oath during the hearing; *see, e.g.*, findings paragraphs 86-96. The hearing officer has not undertaken any clarification concerning "inflammatory" because adopting the strict scrutiny approach to each Written Notice of the Director, the hearing officer finds that "inflammatory" was not referenced in the Written Notice.

The applicable *Agency* policy provides that personal use must be "incidental and limited." DHRM provides for "occasional." Chambers defines "limited" as "within limits: narrow: restricted." Chambers defines "incidental," amongst other things, "occasional; casual." Accordingly, there was nothing limited or incidental about the Grievant's storage of personal documents on the State computer, with which he was charged in each Written Notice. Such storage was admittedly "voluminous," 24/7 for an extremely long period and by no means narrow, occasional, etc.

Concerning EDR case number 5610, DHRM recognized that the agency in that case could, consistent with DHRM Policy 1.75, adopt a zero tolerance standard for personal use of the internet. DHRM also accepted the hearing officer's statement that DHRM Policy 1.75 does not require a showing that an employee's performance was adversely affected. It only requires a showing that the use was more than incidental or occasional.

In *Burchell v. Unemployment Compensation Bd. of Review,* 843 A.2d 1082 (2004 Pa.Commw.), the Court in a well reasoned decision recognized that the focus is the express language of the rule and that the rule is violated when the employer's property (in this case a laptop computer) is used in an unauthorized manner. The Court also recognized that in light of the claimant's/grievant's "clear deviation from the reasonable standard of behavior that employer had a right to expect, evidence that the rule was not uniformly enforced would not change the result . . ."

In EDR Case No. 8520-R, a case involving the Agency and Policy 310.2 IXA, the hearing officer found that "even if grievant is correct and others do not log off unattended computers, that does not excuse his violation of the policy."

The Grievant has alleged retaliation but has failed to carry his burden of proof in this regard. An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; *See Va. Code § 2.2-3004(A)(v) and (vi)* (2) suffered a materially adverse action; *See EDR Ruling Nos. 2005-1064, 2006-1169* and *2006-1283* and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561* and 1587, page 5 (June 25, 2007). This is addressed in greater detail below.

The Director has remanded the retaliation issue in order for the hearing officer to provide more detail. Ruling at 6-7. During the hearing his Attorney asked the Grievant a question to the following effect:

> Q: What's the basis for your belief that you were retaliated against?

The Grievant responded to the following effect:

> A: **The largest, the biggest thing, the reason I believe I was retaliated against, because** when all of this kicked off, when this flurry of activity occurred, it occurred relatively soon following the hiring interview of [the Subordinate].

The Attorney then asked to the following effect:

> Q: And when you say "flurry of activity", what do you mean?

The Grievant responded to the effect:

> A: Uh, the notification that they, uh, were suddenly reviewing the investigative report, the notification following that they were considering disciplinary action, the notification following **that they wanted to hold a due process meeting to consider mitigating factors** and possible disciplinary action they were going to take and subsequently and after that, the actual imposition of discipline, all of which occurred in the span of, from my

> perspective, from the notification to due process meeting, uh, 3-4 weeks.

Tape 8B (Emphasis supplied.)

To prevail on his claim of retaliation at hearing, the Grievant bears the burden of proving, by a preponderance of the evidence, that (1) he engaged in a protected activity; (2) he suffered a materially adverse action; and (3) a casual link exists between the materially adverse action and the protected activity; in other words, that Management took a materially adverse action because he engaged in the protected activity.

The Grievant participated in the panel interview which became the basis for the Subordinate's grievance on November 30, 2007. The Grievant delivered the Subordinate's grievance (which he filed on behalf of his Subordinate) to the Supervisor on January 24, 2008. The Grievant continued to materially assist the Subordinate with her grievance process thereafter. The Grievant's assistance to the Subordinate in her grievance against the Agency constitutes a protected activity.

The Agency issued the two (2) Group II Written Notices to the Grievant on February 12, 2008. Accordingly, the Grievant suffered a materially adverse action, two (2) Group II Written Notices, a demotion and a disciplinary transfer to another Agency facility.

However, the hearing officer finds and decides that the Grievant has not borne his burden of proving by a preponderance of the evidence that a causal link exists between the two (2) Group II Written Notices, demotion and disciplinary transfer and the protected activity.

While the Grievant asserts that the above "flurry of activity" concerning the Discipline was "[t]he largest, the biggest thing, the reason I was retaliated against," this does not end the hearing officer's remand analysis because the Director has also remanded the proceeding to the hearing officer to address in more detail in this Remand Decision, the Grievant's assertion that the Agency "effectuated the disciplinary actions in an improper manner" (Ruling at 8). The Grievant also alleges "mistreatment, discriminatory, unprofessional and demeaning management" (Ruling at 5) and "harassment," "following the issuance of the Written Notices" (Ruling at 5) which constitute retaliation in the "agency's implementation of the disciplinary actions" ("Retaliation in Implementation") Ruling at 5.

When during the examination of witnesses portion of the hearing (as opposed to closing argument) the Grievant, by counsel, began to spend a good bit of time engaged in legal argument, to move matters along, the hearing officer said he would be happy to receive legal argument in any format, but obviously intended the legal argument to address the issues raised by the Grievant prior to and at the hearing. Tape 8A. The ten (10) C90 tapes of the hearing represent just less than fifteen (15) hours of hearing time (less than one-half of side B of tape 10 is recorded).

The Director has recognized in her rulings that such argument is not evidence and the recently decided U.S. Supreme Court case of *Melendez-Dias v. Massachusetts*, 129 S.Ct. 2527 (2009) reminds us of the importance of sworn testimony under oath which is subject to cross-examination and for which the grievance procedure and rules provide. Of course, opposing parties should also be made aware of and have an opportunity to respond to any new issue raised. The Agency has not submitted any briefs and no opportunity at the pre-Original Decision stage was provided for any reply. Accordingly, the hearing officer offered both parties the opportunity to brief the remand, obviously within the framework of the remand established by the Director which governs the remand and which is discussed in greater detail below. The Director has not reopened the hearing for the taking of any additional evidence.

Accordingly, the hearing officer was not expecting new legal issues or arguments to be raised which had not been raised at or prior to the hearing. *A fortiori*, this is the case concerning the Remand Brief.

Fortunately, in the Ruling, the Director has clarified that "if any of the grievant's arguments were not presented at hearing or in a brief during the hearing phase (including post-hearing, prior to the issuance of the decision), they need not be addressed." This clearly provides the context and framework for the Grievant's Second Brief. Similarly, to the extent the Grievant has purported through any brief to weave unsworn testimony not subject to cross-examination into the record, the hearing officer has treated and will continue to treat, in any future remands, unless instructed otherwise by the Director, the same as argument and not as evidence. The hearing officer also understands that under the rules of the remand and the framework wisely established by the Director in the remand, any argument in the Remand Brief can be ignored by the hearing officer if not previously raised.

That said, the exercise of identifying new versus prior argument is a challenge in itself and the hearing officer hereby states that he in no way intends to waive or divert from the Director's framework in this or any future remands if he mistakenly addresses a new issue or argument. As previously stated, the hearing was not reopened by the Director for the taking of any additional evidence and the hearing officer communicated this to the parties on a number of occasions.

The Director has recognized the need for finality in her Rulings and one example will demonstrate why if such a common sense approach is not adopted, this proceeding will take a lot longer to get to the courts. On page 53 of his Second Brief, the Grievant complains that the hearing officer inappropriately dismissed the bulk of his witnesses. While the hearing officer does not believe the record supports this contention, such a review is unnecessary.

In his independent legal research, the hearing officer discovered Compliance Ruling of Director, Ruling No. 2009-2266 (March 27, 2009) in which the Director dismissed this precise issue as previously raised by the Grievant for the first time before EDR. The Director dismissed the Grievant's new issue precisely because it was not previously raised to EDR on administrative review. Accordingly, not only is the Grievant still raising with the hearing officer new issues but he is also raising an issue which has been previously dismissed by EDR and which is not subject

to further appeal. As the Director reminded the Grievant in both Ruling No. 2009-2266 and in the remand Ruling, "The Department's rulings on matters of compliance are final and nonappealable." Ruling at 2; Ruling No. 2009-2266 at 2.

The Agency chose not to submit any briefs. The Grievant's First Brief is 30 pages while the Grievant's Second Brief is 72 pages (not including the attachments which take it to just over 100 pages; the attachment entitled "DOC's Violations of Policy, Procedures and Code" is 18 pages). The hearing officer has not intentionally addressed any new issues or arguments raised for the first time in the Second Brief. In the Ruling, the Director recognized that there were only a "few issues" which the hearing officer had "not specifically addressed" in the Original Decision. Logic would dictate that remands and successive remands should get shorter in numbers of issues and arguments raised by the Grievant to be addressed by the hearing officer and not longer.

In his appeal concerning "Issues" to the Director, the Grievant described the issues as "• Failure to address or rule on all Grievance Issues (Form A)." Thus, when asked by his Attorney about the basis for his belief the Agency retaliated against him, the Grievant gave as the main reason the timing issue discussed above in the traditional retaliation analysis. Tape 8B. The Grievant also asserted that the Agency's delay in bringing the disciplinary action against him constituted retaliation. Tape 8B. The hearing officer has addressed this assertion in his findings **paragraphs 11-24** above and concludes that these facts do not constitute retaliation by the Agency against the Grievant.

The Grievant also testified on direct examination specifically about each of the issues raised on his Form A. Tape 8B. The issues on his Form A are the issues which the Grievant asserts, in his "Request to Director EDR" of October 31, 2008 (the "EDR Appeal"), that the hearing officer failed to address or rule on. The retaliation and Retaliation in Implementation Issues are conceivably raised from the Grievant's viewpoint in most or all of the 13 Issues on the Form A.

Because the Grievant has also asserted that the hearing officer in his Original Decision did not "address or rule on all Grievance Issues (form A), the hearing officer will address each issue on the Form A, in turn, noting in particular any application to Retaliation in Implementation not otherwise addressed herein.

As the Director stresses in the Ruling, it is important to note that the Grievant bears the burden of proof concerning any affirmative claims he makes regarding retaliation or Retaliation in Implementation. Concerning Issue Number 1 on the Form A, the record does not specify exactly what the Grievant considers to constitute "unlawful retaliation and harassment in the form of threats of disciplinary action." The due process meeting did involve management notifying Grievant of a wide range of disciplinary actions they were considering. See GE 43. There was nothing improper with this, that is one of the purposes of a due process meeting.

Next in Issue Number 1 on the Form A, the Grievant alleges "unlawful retaliation and harassment in the form of actual demotion." The hearing officer (and apparently based on the

Dicta, DHRM also) has found that the demotion was supported by the evidence and warranted and appropriate. The Grievant simply has not proven how the actual demotion constitutes "unlawful retaliation and harassment," especially under these circumstances.

Finally, the Grievant asserts in Issue Number 1 that management engaged in "unlawful retaliation and harassment" in the form of "reduction in pay and transfer for assisting another in protesting improper and potentially unlawful actions via the grievance process." The Grievant did argue that the Agency could not both demote and transfer him under policy. DHRM has upheld the hearing officer's determination that the Agency could do so. *See* DHRM Ruling. It could be that the Grievant is arguing here that the Agency was engaging in "unlawful retaliation and harassment" when it reduced his pay and transferred him. The hearing officer decides that applicable Agency policy clearly allows the Agency to both reduce the Grievant's pay and transfer him provided the disciplinary action is found by the hearing officer, in his assessment of the evidence, to be warranted and appropriate under the circumstances and provided, further, that the Agency's discipline was consistent with law (e.g., free of unlawful retaliation) and policy (e.g. properly characterized as a Group I, II or III offense).

The hearing officer has previously decided that the Grievant's assistance provided to the Subordinate in her grievance is obviously a "protected activity." Both the Supervisor and the Director testified credibly that they had no problem with the Grievant helping the Subordinate with her grievance. It is important to note that Mr. D also provided material assistance to the Subordinate in her grievance. Mr. D had been the Subordinate's first supervisor, before the Grievant, when the Subordinate first came to the Mental Health Unit of the Facility. In fact, when asked by the Attorney whom of the Grievant and Mr. D had assisted her more with her grievance, the Subordinate responded it was a "toss-up." Tape 8B.

Mr. D appeared as a witness on behalf of the Grievant on both hearing days. The Grievant testified at the hearing that he was not aware of any retaliation against Mr. D because of the assistance Mr. D rendered to the Subordinate in her grievance. Tape 8B. This is noteworthy for the following reason. The Grievant asserts that while the "point persons" acting on behalf of management to "harass" him were the Supervisor and the Director, the Grievant asserts they were not acting in isolation but rather in consultation with almost 44 other people. Tape 8B.

Accordingly, if Management were disciplining the Grievant simply for assisting the Subordinate with her grievance, it is incongruous that no retaliation against Mr. D is even suggested. The fact is, even though the Subordinate testified that she received pretty much equal assistance from both Mr. D and the Grievant, Mr. D was not disciplined because he did not store personal documents on the Agency computer, as he testified at the hearing. This was the proximate cause for the discipline against the Grievant, who did so.

The Warden had only worked at the Facility at the time of the issuance of the two (2) Written Notices to the Grievant for less than two (2) years. While the Grievant asserts that he never saw anyone who had not been discharged escorted by security out of the Facility during his 17 years with the Agency, the focal point should be this particular Warden at the time, who in

this case had not been at the Facility very long. *See, Brown v. Va. Dept. of Tpt.*, 2009 U.S.Dist. LEXIS 12462 (2009); EDR Ruling 2010-2368.

At the hearing, the Warden testified that he was brought in at the tail-end of the investigation. At the hearing, the Warden's tone was not such that he had been offended by the Grievant, but rather somewhat disinterested in and removed from the whole Grievant matter. The Warden did not exhibit any retaliatory animus or animosity toward the Grievant and was not one of the Staff Members referred to in GE 3. For example, the Warden explained that he had no input concerning the particular disciplinary actions taken by Management against the Grievant and that he was otherwise occupied and so arranged for the Assistant Warden to sit in on the meeting with the Grievant on February 12, 2008. Tape 5A.

The Warden testified credibly that in the exercise of his professional discretion over control of the security of the Facility, it was "standard procedure" to use a security escort in cases of terminations and disciplinary transfers and to refuse reentry after the person left. Tape 5A. The Warden also articulated a plausible reason for this procedure to the effect that the Warden did not want people who had access to the computers to go back in and delete any files or to take out of the Facility anything that didn't belong to them.

Mr. D, the Grievant's own witness, testified that when the Grievant's possessions were assembled for him the day after the Grievant was escorted from the Facility, they were wrapped in plastic. The Warden testified that the Grievant's possessions were supposed to be placed in a protected area, not in the weather and appeared oblivious that they had been left in the rain in the parking lot. Obviously, there was an institutional, bureaucratic miscommunication and error rather than an intent on the part of the Warden to destroy the Grievant's items, as the Grievant asserts or implies.

The Grievant complains that "his" staff had been assembled in an adjoining building overlooking the building the Grievant was in and the parking lot and implies this was done by management to see the Grievant being escorted out. However, the flaw with this assertion by the Grievant is that it presupposes that Management knew the Grievant would decline the opportunity to retrieve his possessions, which the Grievant asserted would take a long time.

Further, the Grievant admits that Management wanted the Grievant to start at his new facility the next day. The Grievant asked Management whether he could start the following week and this request was granted. This is not the action of a management bent on retaliation.

The Warden's testimony at the hearing was not materially impeached or in some cases even challenged by the Attorney.

Issue Nos. 2-4 have been addressed in this Remand Decision.

Concerning Issue No. 5, the hearing officer decides that the Agency complied with the notice and other requirements required by policy. The Warden had the authority and properly exercised his authority to bar the Grievant's re-entry to the Facility for security reasons. This

prerogative belongs to the Warden in his running of the security and operational affairs of the Facility.

Concerning Issue No. 6, in the Dicta, DHRM recognizes that the Agency can "force a transfer to a facility in excess of 50 miles distance." DHRM Ruling. Issue 7 on the Form A has been covered herein.

Concerning Issue 8, the Grievant asserts that the Warden cannot take any action that is not also supported by policy and/or precedent. *See, also* Tape 8B. If the Grievant is asserting that by policy or precedent every action has to be specifically authorized in writing, the hearing officer disagrees. Such a project is unfathomable because no one could anticipate all of the situations any Warden could encounter and in any event policies clearly allow for non-exclusive lists of illustrations, such as what is "inappropriate" to be on a state computer or what could constitute a Group II offense. The Warden has broad authority and discretion vested in him to take whatever action he believes is necessary and appropriate at the Facility, as long as it is not in violation of policy or otherwise prohibited by law.

EDR states that Issues 9-10 are non-issues and so apparently does a Virginia federal court: *Laremont-Lopez v. Va. Dept. of Health*, 2007 U.S.Dist. LEXIS 24689 (Norfolk Division); Ruling at 4.

The grievance process is not the appropriate forum for Issues 11-12 on Form A and the Grievant has not carried his burden based on the evidence in the record concerning this issue in any event. Ruling at 5.

Concerning Issue No. 13, the hearing officer is not aware of and the Grievant does not cite to any authority or policy which would require the Agency to allow the Grievant to work on his grievance appeal process more than four (4) hours per week. This would appear to be an item left to the sound discretion of the particular supervisor or management team based on the operational needs of the facility. Furthermore, nothing in Agency Policy 135.1 or in DHRM Policy 1.60 provides consequences to an agency for its failure to comply with every detail of the procedures prior to meting out discipline.

The hearing officer does not find any DHRM policy or EDR procedure unconstitutional. However, the hearing officer also does not believe that it is his function to decide such matters. If the Director wants a detailed constitutional analysis, EDR can always remand to the hearing officer.

The rest of the Grievant's arguments can be addressed with reference to the recent decision of the Supreme Court of Virginia in *Va. Polytechnic Instit. and State Univ. v. Quesenberry* (2009). In *Quesenberry*, which involved the university's anti-discrimination and harassment prevention policy, the Court emphasized that the Court of Appeals had strayed from *Barton*, which constituted "the proper review process" and had erred in applying an analysis grounded on "sexual harassment" claims brought under Title VII. The Court emphasized that the focus must be the state agency's "exclusive right" to manage its affairs and operations, as

provided by Va. Code § 2.2-3004(B). State agencies, pursuant to this exclusive right to manage, can and do in the Commonwealth formulate more stringent policies than otherwise provided by applicable law. This is appropriate and contemplated under the statutory framework and grievance procedure.

The hearing officer will now address the Director's remand to the hearing officer concerning the Grievant's alleged document noncompliance by the Agency. Ruling at 2-4.

In this regard the hearing officer wishes to call the attention of the Director to a critical fact which is missing from the Director's analysis regarding what the Director characterizes as "the agency's refusal to provide the actual documents" and provide only in its production to the Grievant a compilation or listing. Ruling at 3.

The pertinent facts are as follows:

1. By letter dated July 10, 2008 to the hearing officer, the Attorney acting for and on behalf of the Grievant, requested that the hearing officer issue an order for numerous documents, including in no. 7 of her request "[c]opies of all records of proposed and/or implemented discipline of any other Agency employee for the preceding three years (2005-present) pertaining to *Storage of Personal Documents on the State's Computer*. (Previous request No. 13)." The Grievant was copied on the request.

2. In his Decision concerning Order for Documents and Amendments to Scheduling Order entered July 14, 2008 for the reasons provided in this Decision, the hearing officer sustained the Agency's objections to the request and refused to issue this particular order for documents. Decision at 3. The hearing officer's Decision was sent by e-mail and U.S. first class mail, postage prepaid, to both the Attorney and the Grievant.

3. By facsimile letter to the hearing officer dated July 14, 2008, the Attorney submitted a "revised/refined" request no. 7 to the hearing officer:

> **REVISED REQUEST FOR DOCUMENTS NO. 7**: Copies of the Individual Written Notices of all other Agency employees for the preceding three years (2005-present) pertaining to Misuse of the Computer and/or Storage Of Personal Documents On the State's Computer. **(In lieu of providing individual copies, the Agency may elect to compile a listing in database form).**

Emphasis supplied.

The Grievant was shown as copied by the Attorney on the facsimile transmission cover page to the hearing officer.

4. The hearing officer's First Supplemental Order for Production of Documents entered July 18, 2008 was attached to, and incorporated by reference into the hearing officer's Second Decision Concerning Order for Documents and Second Amendments to Scheduling Order entered July 18, 2008. The hearing officer issued the Grievant's requested order for production of documents in substantially the same form as the Grievant requested:

> Copies of the Individual Written Notices of all other Agency employees for the preceding three years (2005-present) pertaining to Misuse of the Computer and/or Storage Of Personal Documents On the State's Computer. **(In lieu of providing individual copies, the Agency may elect to compile a listing in database form)**.

The hearing officer sent the First Supplemental Order for Production of Documents to the Attorney and to the Grievant by both e-mail and U.S. first class mail, postage prepaid.

In her Compliance Ruling of Director, Ruling Number 2009-2087 (September 30, 2008), amongst other things, the Director upheld the Agency's objection and narrowed the scope of the hearing officer's orders from agency-wide to the mental health unit/division and also employees of the Facility (at 2-3).

During the second day of the hearing, after the Grievant received production of GE 44 from the Agency, the Grievant represented that he did not agree to any compilation. Tape 8A. The hearing officer said he would have to check the record to see whether the order allowed for a compilation. The Attorney later repeated the Grievant's assertion that the Grievant had not agreed to a compilation. Of course, when the hearing officer checked the record, the hearing officer saw that it was the Grievant himself, by counsel, who included in his own request the specific and express dispensation to the Agency to "compile a listing". This is the crucial fact the hearing officer wishes to call to the attention of the Director as EDR has clearly listened to all of the ten (10) C90 tapes of the hearing (just short of fifteen (15) hours) and may have been misdirected by the Grievant's representation. Additionally, the record is very large with (as EDR notes) an Order for Production of Documents, First Supplemental Order for Production of Documents, Second Supplemental Order for Production of Documents, related correspondence, decisions, etc.

The discipline described in GE 44 for 2006 covered "[a]cknowledged use to access the DOC computer located in an office shared by the [Facility] mental health staff by using a previous intern's user name and password after she completed her internship training. Violation of Policy 310.2 – Technology Management." AE 5. As the Grievant was one of the recipients of this discipline, he was already well aware of the facts and circumstances surrounding it. In any event, the Subordinate and Mr. D who were both members of the Facility mental health staff in 2006 and who appeared as witnesses for the Grievant on both hearing days, could have

answered any questions on this subject about which they had relevant knowledge. Mr. D did testify he was disciplined for this episode.

GE 44 is the only arguable noncompliance by the Agency which the evidence supports. Under these circumstances, the hearing officer does not find it appropriate to draw an adverse inference against the Agency.

The Grievant's legal argument regarding the sameness or the similarity of the "conduct" charged by the two (2) Written Notices, which allege separate disciplinary offenses probably represents the Grievant's best argument for obtaining his sought relief of reinstatement to his former position. In the event only one (1) Group II Written Notice can be upheld, clearly the discipline will be excessive, as the Grievant alleges.

This in turn might turn on whether this issue is a matter of "procedure" subject to the purview of EDR or a matter of "policy" subject to DHRM. DHRM has not yet finally ruled on this issue or on any other issue other than the issue in the DHRM Ruling. However, the Dicta supports the hearing officer's position that this matter is more appropriately regarded and dealt with as a matter of policy.

DHRM developed the Written Notice Form which is a crucial and integral part of any discipline by any agency, including the Agency. GE 25. The Written Notice Form is referenced throughout and is attachment #3 to Operating Procedure 135.1, the Facility's and the Agency's Standards of Conduct. GE 25. DHRM establishes policy for the form of the Written Notice and mandates what a Written Notice can and must contain. The Facility's and Agency's policy is consistent with DHRM policy.

On the face of the Written Notice, including each of the two (2) Written Notices issued in this proceeding the following excerpt appears:

> **Section II – Offense**
>
> Type of Offense: (Check one) and include Offense Category (See Addendum for Written Notice Offense Codes/Categories)
>
> ___ Group I _____ __X__ Group II ____ ___Group III _____
>
> Nature of Offense and Evidence: **Briefly describe the offense and give an explanation of the evidence.** (Additional documentation may be attached.)

Emphasis supplied.

The SOC provide in part concerning the Written Notice as follows:

> **Disciplinary action** – An action taken in response to an employee's behavior. Disciplinary actions may range from the issuance of an official *Written Notice* only (*see Attachment #3*), to issuance of a *Written Notice* and termination. . .
>
> C. Disciplinary action refers to a formal corrective measure based on a violation of established Standards of Conduct that includes discussion of the offense, an explanation of the evidence, due process, and issuance of a *Written Notice* (*see Attachment #3 and Sections X through XII of this procedure*). . .
>
> A. Prior to any disciplinary demotion, transfer, suspension, or disciplinary removal actions, an employee shall be given:
>
> 1. an oral or written notice of the offense;
>
> 2. an explanation of the agency's evidence in support of the charge; and
>
> 3. a reasonable opportunity to respond (due process). . .
>
> C. The *Written Notice Form* confirming the cause and nature of the disciplinary demotion, transfer, or suspension, or removal action shall be provided to the employee.
>
> D. All written notices shall include a reference to the employee's right to grieve.

GE 25.

Accordingly, DHRM policy and the face of the Written Notice itself, requires that "the evidence" supporting the two (2) different offenses charged in this case be laid out in the Written Notice. The policy does not say the evidence supporting the two different offenses cannot be the same. Any due process concerns should be dispelled in this proceeding because the Grievant himself deleted from his Account 1,443 files containing admittedly "voluminous" personal documents, each and everyone of which constituted a separate violation of policy subject to potential discipline. The Grievant admitted to the Investigator the personal documents were inappropriate and should have been well aware by the time the Written Notices were issued and certainly by the time of the hearing of the Agency's position, having also gone through the Investigative interview on October 1, 2007 with the Investigator and having reviewed a large stack of personal documents which the Agency contended were inappropriate to be on a state computer.

The Director has previously recognized that ". . . to the extent [a party] alleges that the hearing decision is inconsistent with the Standards of Conduct, that is a question of policy and more properly an issue for DHRM." Ruling Number 2009-2091 (October 14, 2008) at 9, as DHRM indicates in the Dicta.

Obviously, DHRM may ultimately present additional reasons why the "evidence" supports the issuance of the two (2) Group II Written Notices.

The hearing officer will now address the remand concerning the Grievant's argument that he was not charged with storing "obscene materials" in the Written Notices. The hearing officer has reviewed the record and concludes that the Grievant's argument is correct and must be sustained. The Written Notice does not mention such a charge and the hearing officer could not find any evidence in the record which would cure such a deficiency prior to hearing, in accord with the Director's Ruling 2007-1409.

Concerning the Grievant's failure to follow established written policy at the time of the present discipline, the Grievant had an active Group I Written Notice for prohibited computer access/usage in violation of the same Policy 310.2 and received a written counseling from the Supervisor on May 18, 2007 for violation of the same Policy 310.2. AE 5.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to the Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

At the hearing, the Agency did produce a two-page itemization of information in the roughly one-week period between the date of EDR's decision and the second day of the hearing. Other than this itemization, at the hearing, the Grievant was not able to adduce meaningful evidence concerning exactly what sought responsive documents were in existence. Part of the EDR decision favored the Agency. The Grievant acknowledged at the hearing that earlier he had received at least some helpful documents from the Agency, consisting of the Director's handwritten notes.

The Grievant asserts that the Department failed to properly consider mitigating circumstances. DHRM has previously ruled that there is no requirement under an earlier version

of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, September 19, 2007. *See also, Jacobs v. VEC*, 69 Va.Cir 66 (2005), which held that the agency's consideration of mitigating factors is permissive not a mandate.

However, this DHRM ruling does not negatively impact the Grievant's position under the facts and circumstances of this proceeding because under Va. Code § 2.2-3005, this hearing officer is charged with the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution". EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating factors in disciplining the Grievant, including his long and exemplary service to the Department over approximately 17 years.

The normal sanction for two (2) Group II violations is termination but the Department, based on its assessment of mitigating factors, decided not to end the Grievant's employment but only to demote him to a Psychology Associate I at a ten percent (10%) lower pay band and to transfer him.

Accordingly, because the Department assessed mitigating factors and in fact mitigated the discipline, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified all of the mitigating factors below, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. The items specifically referenced on the Written Notice and in this Remand Decision as constituting mitigating factors.

2. The Grievant's good service to the Agency over 17 years;

3. The fact that the Grievant's items, which he went to pick up from the Facility the day after he had been demoted and transferred, were left in the rain (wrapped in plastic) in the Facility's parking lot and not in a protected area out of the weather, as the Warden had intended;

4. The Agency has not caught and disciplined, where appropriate, all of the employees who are still using their computers for personal uses which have not been specifically and expressly permitted by policy;

5. The Agency has not caught and disciplined, where appropriate, all of the employees who are still using their computers for things specifically and expressly prohibited by policy;

6. The fact that the Written Notices could have been better drafted;

7. The fact that the policy is very broad;

8. The fact that the Investigative Report could have been better drafted and could have presented more detailed analysis of the asserted policy violations;

9. The fact that the Agency could with more rigorous controls sooner have discovered and could, concomitantly, sooner have addressed with the Grievant, the nature and extent of the Grievant's violations of policy;

10. Subject to the qualification in the next sentence, the Grievant and certain members of the Mental Health Unit at the Facility had been previously counseled and/or disciplined for violations of Policy 310.2. This is considered a mitigating factor only in the sense that even more so, the Grievant and members of his Mental Health Unit should have attracted the attention of management for additional training or other remedial measures concerning Policy 310.2 so as to diminish the risk of future policy violations;

11. Under the unit management system of the Facility and the Agency, the Director and the Supervisor are responsible for supervision of clinical issues and the Warden is in charge of operations, administration and security of the Facility. The coordination of these two functions could have been better in this proceeding;

12. GE 36, including the Grievant's performance evaluations 2002-2007;

13. The hearing officer finds that the Grievant's interpretation of policy is incorrect and the Dicta indicates that DHRM agrees. However, one item bears further comment. The hearing officer does not agree with Grievant's argument on page

71 of 72 of his Second Brief that because of the asserted ambiguity with the policy, the Agency's imposition of the Discipline involving demotion **and** transfer should be a mitigating factor, when DHRM has ruled that the Agency's action was perfectly in accordance with policy. However, in the event that EDR rules this should be a mitigating factor, the hearing officer has determined that including this as a mitigating factor would not change the outcome of his mitigation analysis;

14. No one else in the Facility or the Mental Health Unit of the Agency has been charged with or found liable for violation the Department's policy against downloading and storing personal documents on the state computer;

15. Some of the documents sought by the Grievant from the Supervisor had been destroyed. While this obviously potentially impeded the Grievant's presentation of his case, the evidence, however, did not in any way suggest that such document destruction constituted spoliation or was otherwise improper;

16. The Agency's prior discipline and counseling of the Grievant concerning violations of Policy 310.2 did not specifically concern the policy prohibiting storing of personal documents;

17. The Grievant in his performance evaluations has never been rated below "meets expectations" his whole career; and

18. The Grievant's entire prior disciplinary history over 17 years is relatively innocuous, although it does involve an active Group I (at the time of the Discipline) for violation of Policy 310.2, which active Group I (as the hearing officer discusses in more detail below) under the facts and circumstances of this proceeding, constitutes an aggravating factor.

For purposes of his analysis and this Remand Decision, the hearing officer considers only the following aggravating factors:

1. The "voluminous" amount of personal documents stored on the Grievant's state computer.

2. The long period for which many of the Grievant's personal document were stored on the computer.

3. The storage of derogatory comments about clearly identifiable staff and inmates.

4. The Grievant's admissions during the hearing.

5. The storage of the two (2) fellatio jokes, which were clearly inappropriate and in violation of policy and which constitute "sexually explicit material", also in violation of policy.

6. The fact that the Grievant received extensive training and reminders (via the Logon Banner) concerning the IT policies and their importance.

7. The fact that the Grievant had an active Group I Written Notice (at the time of the discipline) for prohibited computer access/storage in violation of Policy 310.2. The hearing officer does not accept the Grievant's argument that this should not constitute an aggravating factor because it did not involve specifically downloading and storing personal documents. (The hearing officer has, however, taken this latter argument into consideration as a mitigating factor.)

8. The fact that the Grievant had received a written counseling from the Supervisor on May 18, 2007 for violation of the same Policy 310.2. The hearing officer does not accept the Grievant's argument that this should not constitute an aggravating factor because it did not involve specifically downloading and storing personal documents. (The hearing officer has, however, taken this latter argument into consideration as a mitigating factor.)

9. The fact that the Grievant had been advised by management that all his personal documents stored on the state computer were potentially subject to FOIA requests for public documents and the fact that the Grievant was aware of this because he testified he was familiar with all of the IT policies.

10. The fact that security (including IT security) is a paramount concern at the Facility.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense

> under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The offenses here were very serious and could have resulted in termination of the Grievant's employment either pursuant to a Group III Written Notice or pursuant to the two (2) Group II Written Notices which were issued by Management.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness, particularly when the above aggravating factors are accounted for in the determination.

Pursuant to the Director's remand, the hearing officer decides for each offense specified in each Written Notice that the Agency has proven by a preponderance of the evidence that (i) the Grievant engaged in the behavior described in the Written Notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in issuing the two (2) Group II Written Notices is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

7. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

8. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

9. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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

5. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

6. 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.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).