Issues: Group III Written Notice (workplace harassment), Group III Written Notice (internet abuse, computer misuse) and Termination; Hearing Date: 07/31/08; Decision Issued: 09/19/08; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 8879, 8880; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 10/03/08; Reconsideration Decision issued on 10/07/08; Outcome: Original decision affirmed.**

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8879 / 8880**

Hearing Date: July 31, 2008
Decision Issued: September 19, 2008

## PROCEDURAL HISTORY

On March 25, 2008, Grievant was issued a Group III Written Notice of disciplinary action for inappropriate comments of a sexual nature and emailing a pornographic image. On March 25, 2008, Grievant was issued a Group III Written Notice of disciplinary action for viewing Internet sites during working hours that were of an adult/mature content (pornography). Grievant was removed from employment effective March 25, 2008.

On March 31, 2008, Grievant timely filed a grievance to challenge the Agency's actions. The outcomes of the Third Resolution Step were not satisfactory to the Grievant and he requested a hearing. On June 27, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 31, 2008, a hearing was held at the Agency's regional office.

## APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

## ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

2. Whether the behavior constituted misconduct?

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

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

## BURDEN OF PROOF

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

## FINDINGS OF FACT

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

The Department of Juvenile Justice employed Grievant as a Juvenile Corrections Sergeant at one of its Facilities. Grievant was a Unit manager. He had been employed by the Agency for approximately two years. Grievant began working for the Agency as a Correctional Juvenile Officer. Within approximately a year he was promoted to Sergeant on September 25, 2007.

Grievant works in a stressful environment. He sometimes attempts to reduce the stress on himself and others by making jokes and being lighthearted.

Grievant made several comments to the Counselor that the Counselor deemed offensive. For example, when the Counselor approached Grievant's unit, Grievant would sometimes say "[y]ou better announce yourself when you come up in here because you never know I might be naked."

On March 4, 2008, Grievant and the Counselor were walking to the Unit to provide treatment to residents. Grievant said to the Counselor, "Good treatment team, I would do like a baseball player and tap you on the butt, but that would be sexual

harassment." Grievant asked the Counselor why she did not go out with her co-workers anymore. The Counselor stated "[Ms. G] hasn't planned any outings in a while." Grievant said, "[w]e can have our own team building, so we can bond. We can go out to dinner and if you are interested in a little sex, we can do that too." The Counselor told Grievant that he was being inappropriate and he should watch what he says.

On March 5, 2008, while in Unit 20, the Counselor asked Grievant "Why is the unit so hot?" Grievant said, "It's the skylight, I turned the lights out so that it will cool off. Let me know if you get too hot, because I can take some ice out of the freezer and rub it on your nipples." The Counselor was offended by Grievant's comment.

On March 10, 2008, Grievant sent the Counselor and several other staff[1] an email that offended the Counselor. Attached to the email was a picture of one person performing oral sex on a male who is standing. The picture shows the left side of the male's body a few inches above and below his waist. It shows the right side of the other person's head from the neck to the top of the head. The male's penis is inside the other person's mouth. The picture has been altered to make it appear as if it were an x-ray image. For example, the skeletal part of the person's neck appears in the picture. On March 12, 2008, the Counselor forwarded the email to her supervisor. That supervisor spoke with the Superintendent about the email. The Agency initiated its investigation.

On March 14, 2008, the Superintendent gave Grievant a memorandum advising him that he was being placed on suspension pending the outcome of an investigation.

On March 15, 2008, Grievant sent a memorandum to the Counselor and the Superintendent offering his "sincere apology for the unfortunate error I made concerning the use of my computer and the offensive e-mail …. I did not mean to offend or cause uneasy feeling of any co-worker and realize that it was a tremendous mistake that will never occur again."[2]

Grievant has access to the Agency's computer system using a unique identification and logon password. The Database Administrator reviewed Grievant's computer account history from February 20, 2008 through March 10, 2008 to determine what websites he viewed. Grievant viewed websites that contained sexually oriented cartoons and pictures. He did not download any of those images and save them to the hard drive of his computer. The Database Administrator determined which pictures Grievant viewed by examining the URL identified in Grievant's Internet usage history. The Agency identified those images it considered inappropriate and presented them as evidence in Agency Exhibit 4.

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[1] Counselor E received the email from Grievant. Although she says she was not offended by the email, she deleted the picture and told Grievant that he should watch what he sends by email because it is monitored and he could get in trouble. Sergeant G received the email from Grievant. He deleted it and was not offended by it.

[2] Agency Exhibit 2.

## CONCLUSIONS OF POLICY

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

Hostile Work Environment

"The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer, on the basis of an individual's race, color, natural origin, age, sex, religion, disability, marital status or pregnancy." State policy defines sexual harassment as:

> Any unwelcome sexual advance, request for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, co-workers or non-employee (third party).
>
> - **Quid pro quo** – A form of sexual harassment when a manager/supervisor or a person of authority gives or withholds a work-related benefit in exchange for sexual favors. Typically, the harasser requires sexual favors from the victim, either rewarding or punishing the victim in some way.
>
> - **Hostile environment** – A form of sexual harassment when a victim is subject to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.

Grievant created a hostile work environment[4] with respect to the Counselor. His behavior was not welcome by the Counselor. He made sexual comments to the Counselor on a repeated basis. The email depicting oral sex the Grievant sent to the Counselor was sufficiently severe in itself to establish a hostile work environment. Grievant's behavior by an objective standard was sufficient to conclude that he created a hostile work environment for the Counselor.

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

[4] The Agency has a policy similar to DHRM Policy 2.30. The Agency's policy is Administrative Directive 05-004.04, Discrimination and Harassment. Under this policy, examples of conduct that constitutes sexual harassment include, "[s]exually explicit or suggestive pictures, cartoons, calendars or posters." Violation of the Agency's policy may result in "discharge from employment."

"Any employee who engages in conduct determined to be harassment, or who encourages such conduct by others, shall be subject to corrective action under Policy 1.60, Standards of Conduct, which may include discharge from employment."[5] Accordingly, the Agency's issuance to Grievant of a Group III Written Notice must be upheld.

Grievant contends that the Counselor is being untruthful. The Counselor's testimony, however, was credible. She did not display any obvious characteristics of someone who was lying. Grievant has not presented any motive for the Counselor to lie about him. No evidence of significant prior conflicts between Grievant and the Counselor was presented during the hearing. Grievant sent the Counselor and several other employees an email depicting oral sex. His action of sending a sexually explicit email is consistent with the Counselor's allegations that Grievant made sexually oriented comments to her.

Grievant contends that the Counselor also made a false allegation of sexual harassment against the Lieutenant. Insufficient evidence was presented to support this allegation.

Internet Usage

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

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

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

> Personal use means use that is not job-related. In general, incidental and occasional personal use of the Commonwealth's Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:

[5] DHRM Policy 2.30.

- 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.)

*Va. Code § 2827(B)* provides:

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

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

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

*Va. Code § 18.2-390* defines nudity as:

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

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

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

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

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

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

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

The amount of time of Grievant's personal use of the Agency's computers was not excessive. His use was incidental and occasional personal use. Some of the websites he viewed, however, are of concern.

Grievant viewed some but not all of the images presented by the Agency as evidence. The first is a cartoon image of one woman telling another woman that her husband wanted to buy a house because of the view. The view shown in the window appears to reflect a woman laying on her back. The image is so poorly drawn that it does not constitute nudity and, thus, cannot be a lewd exhibition of nudity.

The second image is of a carrot shaped in a form to display a penis. The image does not contain nudity and, thus, cannot be a lewd exhibition of nudity.

The third cartoon image is of a young woman wearing a bikini sitting on a wall. A little boy on one side of the wall pulls down the woman's bikini bottom to expose her buttocks. A man is taking a picture of the little boy and the woman's buttocks. The picture reflects nudity because it shows the woman's buttocks. The focus of the picture is the woman's buttocks. The image is a lewd exhibition of nudity.

Grievant did not see the fourth image which is an image of a cactus.

The fifth cartoon image shows a movie projector showing an image on a screen in a darkened room. Four men are looking at the screen. On the screen is a drawing of a woman's body from her thighs up to part of her head. The image shows her breasts. The image is poorly drawn. It is not sufficient to rise to the level of nudity and, thus, it cannot be considered a lewd exhibition of nudity.

Grievant did not see this sixth image. This image shows a woman on a golf course.

The seventh image is a drawing of a human brain. A closer view of the brain shows images of humans engaging in sexual behavior. The image is poorly drawn. It does not rise to the level of nudity, and thus, cannot be considered a lewd exhibition of nudity.

The eighth image is entitled "Brain Of The Typical Male". It shows a man's head as if the viewer can look inside to see his brain. A closer look at the brain shows images of female bodies. The image is poorly drawn. It does not rise to the level of nudity, and thus, cannot be considered a lewd exhibition of nudity.

The ninth image is entitled "The Perfect Woman". It shows a woman's legs, pubic area, and breasts. The image contains nudity because it shows a woman's breast and pubic area. The focus of the image is the woman's breast and pubic area and, thus, the image is a lewd depiction of nudity.

Grievant did not see the tenth image which is an image of a woman on currency.

The eleventh image shows a sinking ship with a man floating on top of an inflatable female doll. The man's buttocks are exposed. The image display is nudity because the man's buttocks are shown. However, the focus of the image is not the man, but rather it is the plastic doll. The plastic doll is not clothed but it does not display nudity because it is not a woman. This image cannot be considered a lewd exhibition of nudity.

The twelfth image consists of a video clip. Grievant did not view the video clip.

The Agency has presented sufficient evidence to show Grievant used the Agency's computers to view images containing a lewd exhibition of nudity. Thus,

Grievant violated DHRM policy 1.75. Violation of DHRM Policy 1.75 can be a Group I Group II, or Group III offense depending on the behavior.

Grievant did not download the images and save them to the hard drive of his computer. Grievant did not send the images to other employees.[6] Grievant had to click on the images in order to view them. He did not necessarily know that the images would contain sexually explicit nudity prior to viewing them.

A lewd exhibition of nudity can be established through drawings or photographs. The "shocking nature" of drawings may be less than that of photographs. In this case, Grievant viewed cartoons. Although the cartoons depicted humans, their physical features were somewhat distorted thereby reducing the impact of the sexuality and nudity shown. When all of these factors are considered, the Agency has presented sufficient evidence to support only a Group II Written Notice and not a Group III Written Notice. The Group III Written Notice given to Grievant for his Internet usage must be reduced to a Group II Written Notice.

The Agency removed Grievant from employment. This removal is supported by the first Group III Written Notice. It is also supported by the accumulation of a Group III Written Notice and a Group II Written Notice. Accordingly, Grievant's removal from employment must be upheld.

Mitigation

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution…."[7] Under the *Rules for Conducting Grievance Hearings,* "[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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

[6] Although Grievant sent an email with a picture of two people engaging in oral sex, that picture was part of the disciplinary action giving rise to the first Group III. The Agency did not consider it with respect to the second Group III offense and, thus, the Hearing Officer will not consider that image with regard to the second Group III Written Notice.

[7] *Va. Code § 2.2-3005.*

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for creating a hostile work environment is **upheld**. The Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action for violating DHRM Policy 1.75 is **reduced** to a Group II Written Notice. The Agency's removal of Grievant from employment is **upheld**.

## APPEAL RIGHTS

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

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

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

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

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

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

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

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.[8]

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

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.
Hearing Officer

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

# *COMMONWEALTH of VIRGINIA*

## *Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8879 / 8880-R**

Reconsideration Decision Issued: October 7, 2008

**RECONSIDERATION DECISION**

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

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant contends that the Counselor was not credible because she had been suspended from her employment pending charges in the local Juvenile and Domestic Relations Court brought by another male employee at the Facility with whom she had a personal relationship. The Hearing Officer assessed the Counselor's credibility during the hearing. The charges against the Counselor were pending. She had not been convicted of the charges at the time of the hearing. It would be inappropriate for the Hearing Officer to presume that the Counselor would be convicted. The charges, if proven, would certainly reflect on the Counselor's character with respect to following the law. The character at issue, however, was not the Counselor's character in general but

rather her character for truthfulness. Even those convicted of crimes are capable of telling the truth. During the hearing, the Counselor's demeanor was consistent with someone telling the truth.

Grievant objects to being denied access to the Counselor's personnel file prior to the hearing. Discovery is not permitted under the Grievance Procedure. The Hearing Officer, however, may order the production of relevant documents reasonably identified and in existence at the time of the request. Permitting Grievant to examine the personnel file of the Counselor would not be appropriate because it would be discovery. The Agency denied that the Counselor filed a sexual harassment complaint against others at the Facility. Grievant's allegation was that the Counselor went to the Lieutenant's home and harassed him. No evidence has been produced to show that the Counselor filed a complaint against the Lieutenant. In fact, it appears the Lieutenant objected to the Counselor's behavior and criminal charges were brought against her. Nevertheless, if the Hearing Officer assumes the Counselor filed a sexual harassment complaint against the Lieutenant, it would not be sufficient to override her credible testimony. It is certainly possible for an employee to be sexually harassed by more than one employee at a facility. It would not be logical to assume that an individual was not telling the truth simply because she filed two sexual harassment complaints.

Grievant cites EDR Case Number 5187 in support of his position. Hearing Officer decisions are not administrative precedent. Grievant's arguments are not persuasive. The Counselor's testimony was credible and Grievant's behavior towards her was clearly offensive and prohibited by State policy.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied.**

## APPEAL RIGHTS

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

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

Judicial Review of Final Hearing Decision

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

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.
Hearing Officer