Issue: Group III Written Notice with demotion, pay reduction and transfer (failure to follow policy); Hearing Date: 06/10/16; Decision Issued: 06/13/16; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10802; Outcome: Partial Relief; **Administrative Review: EDR AR Request received 06/27/16; EDR Ruling No. 2016-4384 issued 08/04/16; Outcome: Remanded for clarification; Remand Decision issued 08/17/16; Outcome: Original decision affirmed; Administrative Review: DHRM AR Request on original decision received 06/27/16; Administrative Review: DHRM AR Request on remand decision received 08/25/16; DHRM Policy Review Ruling issued 09/13/16; Outcome: Remanded again to AHO for clarification; Second Remand Decision issued 09/16/16; Outcome: Original decision and First Remand Decision affirmed; Administrative Review: DHRM AR Request on Second Remand Decision received 09/30/16; Outcome: Decision of AHO reversed. Group II with Demotion will stand (10/26/16); Third Remand Decision issued 12/01/16; Hearing Decision amended per DHRM Director's directive.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10802

Hearing Date: June 10, 2016
Decision Issued: June 13, 2016

PROCEDURAL HISTORY

Grievant was a lieutenant with the Department of Corrections ("the Agency"), with service since 1998, having risen from officer, to sergeant, to lieutenant. On February 8, 2016, the Agency issued to the Grievant a Group III Written Notice, for violation of Operating Procedure 101.3, *Standards of Ethics and Conflict of Interest*, relating to a consensual personal relationship with an officer. The discipline was mitigated from termination to demotion to officer, 10% pay reduction, and transfer to another location. The Grievant has a prior, active Group II Written Notice for failure to follow proper procedure for offender supervision.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On May 2, 2016, the Office of Employment Dispute Resolution, Department of Human Resource Management ("EDR"), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for June 10, 2016, the first date available for the parties, on which date the grievance hearing was held, at the Agency's designated location.

The Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's exhibits as numbered. On motion of the Grievant, the Agency's Exhibit No. 6, Operation Procedure 101.3, was supplemented with a later issued replacement policy, renumbered Operating Procedure 135.3. The operable provisions of the policy were unchanged. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Through his grievance filings and presentation, the Grievant requested reduction of the Written Notice, reinstatement to his position and restoration of salary reduction.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. However, § 5.8 states *"[t]he employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline*." A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

APPLICABLE LAW AND OPINION

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).

Code § 2.2-3000 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.

The Agency relied on its *Standards of Conduct*, Operating Procedure 135.1, which defines Group III Offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant termination. The purpose of the policy is stated:

> The purpose of this policy is to set forth the Commonwealth's Standards of Conduct that the Department of Corrections must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace or outside the workplace when the conduct impacts an employee's ability to do his or her job, or influences the agency's overall effectiveness.

Agency Exh. 7. Violation of Operating Procedure 101.3 (135.3), as it pertains to relationships between supervisors and subordinates may be a Group I, Group II, or Group III offense, depending on its effect on the work environment. Agency Exh. 6.

Operating Procedure 101.3 (135.3), at IV.F.2 provides:

> Dating or intimate romantic relationships between supervisors and subordinates undermines the respect for supervisors with the other staff, undermines the supervisor's ability to make objective decisions, may result in favoritism or perceived favoritism, may lower morale among co-workers, or open supervisors to future charges of harassment or retaliation claims. Additionally, supervisory/ subordinate relationships may bring about complaints from co-workers and create a liability for the DOC.
>
> a. Supervisors are prohibited from dating or engaging in personal romantic or sexual relationships with subordinates. Initiation of, or engagement in an intimate romantic or sexual relationship with a subordinate is a violation of the *Standards of Conduct* and will be treated as a Group I, Group II, or Group III offense depending on its effect on the work environment.
>
> b. A subordinate includes anyone in a supervisor's direct chain of command. If the unit head determines that the routine work environment is adversely affected by the romantic, intimate, or sexual relationship of a supervisor and subordinate who is in an indirect line of supervision (i.e. corrections officer and sergeant on different shifts and breaks), such relationships may be deemed inappropriate for the workplace and may be grounds for discipline under the Operating Procedure 135.1, *Standards of Conduct*.
>
> c. All employees are responsible for compliance with this operating procedure regarding consensual personal relationships in the workplace. The Organizational Unit Head will determine the appropriate disciplinary action to be taken and the reassignment or transfer of the supervisor or employee to alleviate the supervisor/subordinate work problems the relationship may create.
>
> d. Personal relationships, even between peers, within the same work unit may create similar problems and reassignment of one or both parties should be considered if such a relationship influences or effects the work environment or the work performance of any of the parties involved.
>
> e. Regardless of the supervisory/subordinate or peer/peer working relationship, staff involved in a romantic relationship with a co-worker should advise the work unit head of their involvement to address potential employment issues.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's

disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

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

The Agency employed the Grievant as a corrections lieutenant when it learned that he was engaged in a personal romantic or sexual relationship with an officer trainee. The officer trainee initiated the relationship with the Grievant, and they began their relationship in the fall of 2015. The Written Notice provided:

> Violation of DOC Operating Procedure (DOP) 101.3, Standards of Ethics and Conflict of Interest, relating to Consensual Personal Relationships/Sexual Harassment in the Workplace: The facility was notified that you were in a consensual, personal relationship with an Officer in your indirect line of supervision whom you occasionally had direct supervisory responsibilities for at the facility. According to the trainee, you had several sexual encounters with her. Relationships between supervisors and subordinates are prohibited under DOC Operating Procedure (DOP) 101.3. In addition to engaging in a relationship with subordinate, you admitted you had been in the relationship with the trainee since December 2015 and had not notified the facility of the relationship in accordance with procedure.

The Grievant admitted to the relationship and that he failed to provide notification to Agency management. He said he and the officer trainee did not report the relationship because they were both married. The Grievant asserts that the Agency's level of discipline is disproportionate to the offense and that the Agency applies discipline under this policy inconsistently. The Grievant testified that it was only after he filed his grievance, asserting disparate enforcement of the policy, that the trainee officer's probationary period was extended. The officer trainee also testified to confirm the relationship and that her probationary status was extended only after the Grievant made his grievance. Agency Exh. 5. The Grievant also pointed to at least two other instances of relationships between supervisors and subordinates that have not resulted in discipline. Agency Exh. 5. The Grievant also testified that he did not directly supervise the officer trainee, that she was a trainee in his building for one or two weeks, and that he never gave her any orders or assignments nor showed any favoritism.

As circumstances considered, the Written Notice provided:

> According to DOP 101.3, sexual relationships with subordinates are prohibited and may subject to disciplinary action up to a Group III written notice. Furthermore, the appropriate disciplinary action for the multiple violations of policy is usually a Group III with termination. The disciplinary action has been mitigated from termination to a demotion. No additional mitigation is appropriate.

The warden testified that if the Grievant had provided notice of the relationship, there would have been no discipline issued to the Grievant. He further testified that the Agency's interpretation of the policy is that the prohibited relationships are allowed when notification is provided. Notwithstanding the existence of the supervisor/subordinate relationships, the warden explained that no discipline was issued in the two other cases the Grievant pointed to because notification of the relationship was provided. Agency Exh. 5. The warden testified that when management knows of the relationship, the Agency can take measures to minimize and manage the conflicts or potential conflicts.

The warden testified that, based on "chatter" of a relationship involving the Grievant, he warned the Grievant not to be engaged in an unauthorized relationship. The warden also testified that he took this disciplinary action once the relationship was reported to the facility by a third-party, anonymous caller, and confirmed through investigation. The warden testified that there was no specific adverse effect on the work environment beyond the stated concerns within the policy itself—that intimate romantic relationships between supervisors and subordinates undermines the respect for supervisors with the other staff, undermines the supervisor's ability to make objective decisions, may result in favoritism or perceived favoritism, may lower morale among co-workers, or open supervisors and the Agency to liability risk. The warden testified that this discipline was imposed before any harm to the Agency occurred. The warden also testified that the Grievant, as a supervising lieutenant and "dialogue practitioner," set a poor example with this relationship.

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

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness.

Based on the manner, tone, and demeanor of the witnesses, I find all the witnesses credible. The witnesses' testimony and the Grievant's admission of not providing notice of the

relationship, together, justify some level of discipline. I find, based on the evidence and policy, that the offense presented does not justify the most severe discipline—Group III. Operating Procedure 101.3 (135.3) deals with multiple ethical and conflict concerns, and some violations of the policy certainly fall within a Group III level. However, the section on personal relationships specifically anticipates discipline at all three levels, depending on the seriousness of the effect on the work environment. The policy itself, by its implementation and enforcement, is somewhat incongruous. While the language of the policy states that a supervisor/subordinate relationship is prohibited, in practice, these relationships are tolerated and are undisciplined when reported. I cannot rewrite the policy, but I must follow the Agency's own interpretation and application of the policy.

Here, the Agency disciplined the Grievant for both a) having the relationship and b) not reporting the relationship. Had the Grievant reported the relationship, according to the warden, there would not have been any discipline (consistent with the practical implementation and enforcement of the policy). Thus, the offending conduct was not reporting. Because of the Agency's interpretation of the policy, in fact, not to enforce the stated ban on supervisor/subordinate relationships, the Group III Written Notice must be revised to delete this offense aspect. The Agency's evidence, including the Grievant's admission, preponderates in showing that the Grievant did not report the relationship. On this issue, the Agency consistently enforces the requirement to report such relationships so that they may be effectively managed to avoid adverse effects on the work environment. Thus, the Written Notice is revised to limit the offense to failure to report the relationship.

I find that 1) the Grievant engaged in the behavior described in the Written Notice—he was engaged in the relationship and failed to report it; 2) the behavior constituted misconduct, but only to the extent that failure to report is the enforced aspect of the policy; and, 3) the Agency's discipline was not consistent with policy, as it is interpreted, applied, and enforced. Contrary to the stated policy prohibition, supervisors are not prohibited from engaging in personal romantic or sexual relationships with subordinates.

I find the Agency's interest in being aware of relationships between supervisors and subordinates to be a valid and compelling policy, and consistent enforcement justifies imposition of discipline. The issue turns to the appropriate level of discipline for this offense of not reporting the relationship so the Agency can address potential employment issues. Since the policy anticipates offense levels at Group I, Group II or Group III, the Agency bears the burden of showing the appropriate level. While there is always the potential of even a severe impact, the Agency did not show any evidence of adverse effects on the work environment. There was no evidence of any resulting untoward conduct or circumstance at work or that personnel assignments would have been any different had the relationship been reported. Further, the policy does not establish a higher burden of reporting on supervisors compared to subordinates. I recognize the Grievant had a prior Group II Written Notice for failure to follow proper procedure for offender supervision, but that offense is not of the same character as the present one so as to establish repeated conduct. Thus, discipline more severe than a Group I Written Notice is not supported, and the Written Notice is revised, accordingly, to a Group I Written Notice.

Mitigation

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.,* EDR Rulings Nos. 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a *prima facie* case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." 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. I find that the Agency has not consistently applied disciplinary action among similarly situated employees. The record shows that supervisors are permitted to have personal romantic or sexual relationships with subordinates.

Given the revision of the discipline from a Group III to a Group I Written Notice, any mitigation analysis has been subsumed by the analysis of the appropriate offense and level of discipline. There is no other mitigation that could reduce the discipline further.

DECISION

For the reasons stated herein, I uphold the Agency's discipline but reduce it from a Group III Written Notice to a Group I Written Notice, limited to the Grievant's failure to report the relationship with a subordinate. Because the disciplinary record of a Group I Written Notice, with the prior Group II Written Notice, does not support potential termination of employment, the demotion and 10% pay cut must be reversed. Thus, the Grievant must be reinstated to his former position or, if occupied, to an equivalent position, with restoration of any loss of pay, seniority, and benefits.

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You 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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.[1]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

RECONSIDERATION DECISION OF HEARING OFFICER

In the matter of: Case No. 10802

Hearing Date:	June 10, 2016
Decision Issued:	June 13, 2016
Reconsideration Decision	August 17,2016

<u>PROCEDURAL HISTORY</u>

EDR has remanded the matter to the hearing officer to add to the rationale classifying the offense as a Group I offense rather than a Group II offense. EDR points out that DHRM Policy 1.60, Standards of Conduct, lists the failure to "comply with written policy" as an example of a Group II offense.

Additionally, EDR remanded for the hearing officer to address Operating Procedure 135.3(IV)(F)(2)(e) that provides: "[r]egardless of the supervisory/subordinate or peer/peer working relationship, staff involved in a romantic relationship with a co-worker should advise the work unit head of their involvement to address potential employment issues." The hearing officer is to consider and address this language as well as any other record testimony on the requirement to report the conduct under policy.

Finally, because of the reconsideration as to the appropriate level of offense, EDR has directed the hearing officer to re-apply the appropriate mitigation standard set forth in the Rules following reconsideration.

<u>DISCUSSION</u>

The Agency did not rely on DHRM Policy 1.60, Standards of Conduct. The Agency, instead, relied on its own *Standards of Conduct*, Operating Procedure 135.1. However, EDR directed the hearing officer to apply DHRM Policy 1.60, which defines Group II Offenses to include acts of misconduct that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. As observed by EDR, examples of a Group II offense under DHRM Policy includes failure to comply with written policy. However, as explained in the original decision, the specific policy at issue anticipates offenses at all levels, Group I, II, and III. The primary objective of rules of statutory construction is to ascertain and give effect to legislative intent. *Turner v.*

Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). I find the objective of statutory construction persuasive and appropriately applicable to interpreting policy provisions. When one statute speaks to a subject generally and another deals with an element of that subject specifically, the more specific statute is controlling. *Viking Enter. v. County of Chesterfield*, 277 Va. 104, 110, 670 S.E.2d 741, 744 (2009).

Operating Procedure 101.3 (135.3), as it pertains to relationships between supervisors and subordinates, specifies a policy violation as a Group I, Group II, or Group III offense, *depending on its effect on the work environment.* Therefore, the more specific applicable policy expresses that a violation of the written policy is not necessarily a Group II or III level offense. Further, the Written Notice used offense code 99 (other) instead of code 13 (failure to follow instructions and/or policy).

As for the language of the policy that states "staff involved in a romantic relationship with a co-worker should advise the work unit head," I find the directive to be a requirement—mandatory rather than precatory. The Grievant did not challenge the policy by asserting it to be less than a requirement. Given the intent and context of the policy, reporting is a necessary element for the Agency to manage the workforce and to address potential employment issues.

As stated in the original decision, there is always the potential of even a severe impact on Agency operations, but the Agency did not show any evidence of adverse effects on the work environment. The warden testified that he learned of the relationship and issued discipline before there was any adverse effect on the work environment. There was no evidence of any resulting untoward conduct or circumstance at work or that personnel assignments would have been any different had the relationship been reported. Thus, along the continuum between Group I and Group III, this offense is not shown to be more than the least serious offense, being specifically anticipated by Operating Procedure 101.3 (135.3). The Agency only took disciplinary action against the involved trainee officer after the Grievant filed his grievance. The apparent after-thought discipline of the trainee officer reinforces the lack of severity and absence of any adverse effect on the Agency. Since the least serious offense anticipated by Operating Procedure 101.3 (135.3), albeit a written policy, is a Group I offense, I find Group I to be the appropriate level of offense.

Not all written policy offenses are Group II violations. The Agency's *Standards of Conduct*, Operating Procedure 135.1, specifies several violations of written policies that may be considered a Group I offense, depending on the nature of the violations.

As for reconsideration of mitigation, a non-exclusive list of potential bases to consider 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. Further, DHRM has previously held in its administrative review in Hearing No. 8233 that an agency may not aggregate multiple offenses and charge them as a single Group III. Because of this impermissible grouping of alleged offenses in the present matter, there may be no deference allowed to the Agency's designation of offense level.

If the offense were deemed to include the existence of the relationship, I would find that the Agency has not consistently applied disciplinary action among similarly situated employees. The record shows that supervisors are permitted to have personal romantic or sexual relationships with subordinates. Therefore, if the offense were deemed to be engaging in the relationship, I would find the Agency's inconsistent application of the policy mitigates against discipline for that offense. As for the requirement of reporting the relationship, the Grievant has not shown the Agency has applied that requirement inconsistently or without notice. Thus, under the decision originally issued, which I reassert upon reconsideration, no further mitigation is warranted for the Group I written notice.

DECISION

For the reasons stated herein and in the original decision, I uphold the Agency's discipline but reduce it from a Group III Written Notice to a Group I Written Notice, limited to the Grievant's failure to report the relationship with a subordinate. Because the disciplinary record of a Group I Written Notice, with the prior Group II Written Notice, does not support potential termination of employment, the demotion and 10% pay cut must be reversed. Thus, the Grievant must be reinstated to his former position or, if occupied, to an equivalent position, with restoration of any loss of pay, seniority, and benefits.

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 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

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

   Office of Employment Dispute Resolution
   Department of Human Resource Management

101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You 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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.[1]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

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

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

SECOND RECONSIDERATION DECISION OF HEARING OFFICER

In the matter of: Case No. 10802

Hearing Date:	June 10, 2016
Decision Issued:	June 13, 2016
Reconsideration Decision	August 17,2016
Second Recon. Decision	Sept. 16, 2016

PROCEDURAL HISTORY

Following the decision on remand first from EDR, DHRM has reviewed the decision from a policy standpoint and has further remanded the matter to the hearing officer to clarify why the offense was classified as a Group I offense rather than a Group II. DHRM points out that DHRM Policy 1.60, Standards of Conduct, lists the failure to "comply with written policy" as an example of a Group II offense.

DISCUSSION

As explained in the first remand decision, I considered DHRM Policy 1.60, which defines Group II Offenses to include acts of misconduct that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. As observed by DHRM, examples of a Group II offense under DHRM Policy include failure to comply with written policy. However, as explained in the original and first remand decision, the specific policy at issue anticipates offenses at all levels, Group I, II, and III. The primary objective of rules of statutory construction is to ascertain and give effect to legislative intent. *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). I find the objective of statutory construction persuasive and appropriately applicable to interpreting policy provisions. When one statute speaks to a subject generally and another deals with an element of that subject specifically, the more specific statute is controlling. *Viking Enter. v. County of Chesterfield*, 277 Va. 104, 110, 670 S.E.2d 741, 744 (2009).

Operating Procedure 101.3 (135.3), as it pertains to relationships between supervisors and subordinates, specifies a policy violation as a Group I, Group II, or Group III offense, *depending on its effect on the work environment.* Therefore, the more specific applicable policy expresses that a violation of the written policy is not necessarily a Group II or III level offense. Further,

the Written Notice used offense code 99 (other) instead of code 13 (failure to follow instructions and/or policy). A review of examples of Group I offenses includes tardiness, poor attendance, abuse of state time, etc. The state *Standards of Conduct* itself includes the expectation that employees "report to work as scheduled and seek approval from their supervisors in advance for any changes to the established work schedule"—a written policy. The Agency's *Standards of Conduct*, Operating Procedure 135.1, similarly expects employees to "report to work as scheduled" etc. At least some Group I offenses would be considered violations of applicable written policy. The state *Standards of Conduct*, Policy 1.60, specifically describes Group I offenses as those "that have a relatively minor impact on business operations but still require formal intervention." The Agency's *Standards of Conduct*, Operating Procedure 135.1, describes Group I offenses to include "types of behavior less severe in nature, but require correction in the interest of maintaining a productive and well-managed workforce." Operating Procedure 135.1 actually lists among potential Group I offenses violations of other written policies, including policies on alcohol and drugs, workplace harassment, etc. Operating Procedure 135.1, at p. 8. Thus, violation of written polices is not, *per se*, a Group II offense.

As stated in the original and first remand decision, there is always the potential of even a severe impact on Agency operations, but the Agency did not show any evidence of adverse effects on the work environment. The warden testified that he learned of the relationship and issued discipline before there was any adverse affect on the work environment. There was no evidence of any resulting untoward conduct or circumstance at work or that personnel assignments would have been any different had the relationship been reported. Thus, along the continuum between Group I and Group III, this offense is not shown to be more than the least serious offense, being specifically anticipated by Operating Procedure 101.3 (135.3). The Agency only took disciplinary action against the involved trainee officer after the Grievant filed his grievance. The apparent after-thought discipline of the trainee officer reinforces the lack of severity and absence of any adverse effect on the Agency. Since the least serious offense anticipated by Operating Procedure 101.3 (135.3), albeit a written policy, is a Group I offense, I find Group I to be the appropriate level of offense.

So as not to duplicate and extend this decision unnecessarily, I reassert the original and first remand decisions herein, by this reference. Respectfully, I have no further bases for clarifying why I found the offense to be a Group I rather than a more serious offense.

DECISION

For the reasons stated herein and in the original decision, I uphold the Agency's discipline but reduce it from a Group III Written Notice to a Group I Written Notice, limited to the Grievant's failure to report the relationship with a subordinate. Because the disciplinary record of a Group I Written Notice, with the prior Group II Written Notice, does not support potential termination of employment, the demotion and 10% pay cut must be reversed. Thus, the Grievant must be reinstated to his former position or, if occupied, to an equivalent position, with restoration of any loss of pay, seniority, and benefits.

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 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

   or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

   Office of Employment Dispute Resolution
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You 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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.[1]

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

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

Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

THIRD RECONSIDERATION DECISION OF HEARING OFFICER

In the matter of: Case No. 10802

Hearing Date:	June 10, 2016
Decision Issued:	June 13, 2016
Reconsideration Decision	August 17, 2016
Second Recon. Decision	Sept. 16, 2016
Third Recon. Decision	December 1, 2016

PROCEDURAL HISTORY

Following the hearing officer's second decision on remand, DHRM has reviewed further the decision from a policy standpoint and reversed the hearing officer's determination that the violation is properly a Group I offense. See *Policy Ruling of October 26, 2016.* DHRM determined that the offense of not reporting his relationship with a subordinate, a failure to follow instructions, is a Group II offense rather than a Group I. Accordingly, DHRM has directed that the applicable discipline must be a Group II Written Notice. Because the grievant now will have two active Group II Written Notices, the original demotion must be retained as a component of the disciplinary action.

DISCUSSION

I find the DHRM policy ruling controlling, and, accordingly, reissue my decision to modify the applicable discipline as a Group II Written Notice. As directed by DHRM, two active Group II Written Notices support the agency's discipline of a demotion and 10% pay cut. The conclusiveness of DHRM's policy ruling ("the grievant now will have two active Group II Written Notices") does not allow further analysis of mitigation.

DECISION

For the reasons stated herein and in the original decision, I uphold the Agency's discipline but reduce it from a Group III Written Notice to a Group II Written Notice, limited to the Grievant's failure to report the relationship with a subordinate. Because the disciplinary record of two Group II Written Notices supports potential termination of employment, the demotion and 10% pay cut must be 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 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:

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

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer