Issue: Group III Written Notice with Termination (workplace harassment, inappropriate comments and inappropriate gestures); Hearing Date: 03/09/15; Decision Issued: 03/29/15; Agency: NSU; AHO: Ternon Galloway Lee, Esq.; Case No. 10539; Outcome: Full Relief; **Attorney's Fee Addendum issued 05/06/15 awarding $6,353.50.**

DECISION OF HEARING OFFICER

In the matter of
Case Number: 10539
Hearing Date: March 9, 2015
Decision Issued: March 29, 2015

SUMMARY OF DECISION

The Agency had found Grievant violated the Agency's policy against workplace harassment and sexual misconduct in the workplace. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found the Agency failed to meet its burden. The Hearing Officer then ordered removal of the group notice, reinstatement, and backpay.

HISTORY

On December 10, 2014, the Agency issued Grievant a Group III Written Notice with termination for workplace harassment and sexual misconduct in the workplace. On or about January 6, 2015, Grievant timely filed her grievance to challenge the Agency's action. The Office of Employment Dispute Resolution ("EDR") appointed the undersigned as the Hearing Officer in this matter effective January 20, 2015. A pre-hearing conference ("PHC") was held on February 2, 2015,[1] and a scheduling order was issued the same date setting the hearing for February 23, 2015. Due to an unforeseen conflict arising with the initial hearing date, the hearing was continued to March 9, 2015.[2]

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. None were presented. The Hearing Officer admitted, without objection, Agency Exhibits 1 through 6 and the contents of the Agency's entire binder and Grievant's Exhibits "A" through "H" and the contents of the Grievant's entire binder. The Hearing Officer also admitted the Hearing Officer's Exhibits including any orders issued by the Hearing Officer, as well as, EDR's letter to the Hearing Officer with enclosures. There were no objections to the exhibits.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate/attorney and the Grievant was represented by her advocate/attorney.

[1] This was the first date that the parties were available.
[2] There was no objection to the continuance.

APPEARANCES

Advocate for Agency
Agency's Representative
Witnesses for the Agency (6 witnesses)
Advocate/Attorney for Grievant
Grievant
Witnesses for Grievant (3, including the Grievant)

ISSUE

Was the Group III Written Notice with termination warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is an institution of higher learning and known as a university. Grievant had been employed by the Agency for six years until management terminated her on December 10, 2014, for workplace harassment and sexual misconduct. At the time of her termination she had worked in the Student Center for about two years. (A Exh. 2; Testimony of Supervisor).

BANANA INCIDENT

2. On November 12, 2014, following the November staff lunch meeting, Supervisor was approached by Academic Advisor. Academic Advisor asked Supervisor to talk to Grievant about what Academic Advisor deemed as Grievant's inappropriate behavior during the meeting. She testified that Grievant specifically stated while holding a banana the words "first you take the banana and peel it real slow." Academic Advisor objected to Grievant's tone and gesture when she made the statement, finding them sexually suggestive. Thereafter, on November 12, 2014, and at the request of Supervisor, Academic Advisor wrote a statement about the incident. Academic Advisor would not have filed this written complaint about Grievant's behavior if she had not been asked to do so by Supervisor. Further, Academic Advisor has not observed any other behavior of Grievant that she perceived as sexual misconduct. (Testimony of Academic Advisor; A Exh. 5, p. 2).

3. After meeting with Academic Advisor on November 12, 2014, Supervisor investigated the complaint lodged and determined that at least one other staff member attending the meeting perceived Grievant's banana comment and gesture as a sexual innuendo. (Testimonies of Supervisor and Outreach Coordinator; A Exh. 5, p. 5).

3. Sometime between November 12, 2014, and November 20, 2014, Supervisor met with Grievant about the banana allegation. Grievant has denied her handling of the banana was meant to be a sexual innuendo. (Testimonies of Supervisor and Grievant).

4. Traditionally, one must peel a banana to eat it which is what the evidence illustrates Grievant was doing. Further, a banana is not usually considered a sexual object. Thus, the banana comment/gesture of Grievant is open to several interpretations. Hence, the incident is too ambiguous to determine if it was a sexual innuendo or dirty joke. (Finding by Hearing Officer).

INCIDENT REGARDING THE STUDENT RETREAT

5. In addition to the banana incident on November 12, 2014, Outreach Coordinator alleged that after the meeting, Grievant used offensive sexual language as the two of them reviewed procedures for registering the students for an upcoming overnight retreat. Specifically, Outreach Coordinator contends that Grievant was clarifying Grievant's responsibilities when she would register the students. In doing so, Grievant stated to Outreach Coordinator that Grievant would inform the students when registering them that (i) "here is your condom" and (ii) "your no fucking rules." (A Exh. 5, p. 5).[3]

HALLOWEEN COSTUME INCIDENT

6. Next, sometime between November 12, 2014, and November 20, 2014, another employee reported to Supervisor that while Supervisor was away to attend a conference during the Halloween timeframe, Grievant wore a costume with cat ears and a tail. Further, Grievant had asked several staff members to guest what she was portraying for Halloween. When a staff member guessed incorrectly, Grievant informed him/her that she was "A Good Pussy/Good Pussy for Halloween." (Testimonies of Supervisor, Spanish Instructor, Outreach Coordinator. After investigating this report, Supervisor determined that employees could substantiate the report. None had lodged a workplace/sexual harassment complaint. The employees were then asked to write a statement regarding the incident. Spanish Instructor, Outreach Coordinator and Academic Support Coordinator complied with the request. No employee indicated the comment was offensive. In fact, Spanish Instructor and Outreach Coordinator reported laughing when Grievant informed them of her portrayal. (Testimonies of Spanish Instructor, Outreach Coordinator, and Academic Support Instructor.

7. Grievant eventually acknowledged she made the "Good Pussy" comment. The evidence

[3] Moreover, Outreach Coordinator alleged that while at the November 12, 2014 monthly meeting, Grievant handed Outreach Coordinator some decoration and gestured as if the decoration was a penetrating penis. Grievant denied the accusation. (Testimonies of Outreach Coordinator and Grievant). The Hearing Officer finds the claim is unsubstantiated. Having observed the demeanors of the witnesses, the Hearing Officer finds the evidence is insufficient to show Grievant engaged in this behavior.

establishes that office staff was not offended by the comment. (Testimonies of Grievant, Spanish Instructor, Outreach Coordinator, and Academic Support Coordinator).

COMPUTER SPECIALIST INCIDENT

8. During Supervisor's investigation regarding the Halloween incident, Computer Education Specialist (Computer Specialist) reported that Grievant had made a sexual gesture and advances toward him while Supervisor was away attending a conference. He reported the time was sometime between November 3 through 5, 2014. (Testimonies of Supervisor and Computer Specialist).

9. As a backdrop to the incident reported by the Computer Specialist, joking by staff members frequently takes place in the office. The office has an open, relaxed, and friendly atmosphere. Moreover, Grievant and Computer Specialist have known each other for at least 20 years. They had attended the University as undergraduate students during the same time period and worked together in another setting before at the University. At the time of Grievant's termination, they were coworkers and often joked in the office setting. These jokes could be sexual in nature on Computer Specialist's and/or Grievant's part. Historically, this manner of joking was accepted by both individuals in the office setting and the evidence suggest by other staff as well. Cups of coffee could be obtained from Grievant's office. On or about November 5, 2014, Computer Specialist went to Grievant's office to get coffee. In addition to Computer Specialist, present were Grievant and two female students. As reported by Grievant, she and Computer Specialist exchanged words jokingly. Specifically, while obtaining his coffee from Grievant's office Computer Specialist's made a joking comment to Grievant using words to the effect of "I am going to put it on you." This phrase was perceived as sexual in nature by Grievant and the students in her office. Grievant responded similarly with words to the effect "Oooh Computer Specialist, I'll talk to you later." Computer Specialist excused himself from Grievant's office. Grievant noted being offended by the statement. The students were surprised by it. (Testimonies of Computer Specialist and Grievant).

10. Hours later Grievant appeared at the door of Computer Specialist' office to follow up on Computer Specialist' earlier comment. As reported by Computer Specialist, at the same time, Grievant began calling Computer Specialist by his name in what Computer Specialist perceived to be a flirtatious manner. Further, Computer Specialist testified that Grievant was using his door like a stripper uses a dancing pole. To this accusation Grievant denies. Computer Specialist contends he did not welcome Grievant's gestures and name calling, was angered by the acts, and ignored Grievant. Grievant and Computer Specialist agree that at some point, Grievant entered Computer Specialist's office and began to close one of several sets of mini blinds in his office. Grievant states that she was attempting to speak with him about his comment to her earlier during the day because she was offended by it. At that point, Computer Specialist instructed Grievant to leave, and she did. (Testimonies of Grievant and Computer Specialist).

11. During this time, Spanish Instructor walked by Computer Specialist's office. However, she observed nothing sexual in nature. Moreover, as mentioned above, Spanish Instructor did write a statement about any possible questionable conduct of Grievant. This statement does not

corroborate Computer Specialist's version of events. (Testimony of Spanish Instructor; A Exh. 5, p. 4).

12. Computer Specialist only reported the incident during the investigation conducted by Supervisor. Further, he filed no written complaint until November 20, 2014. This filing was generated after his supervisor requested he write a statement. This was at least two weeks after Computer Specialist alleges the incident occurred. (Testimony of Supervisor; A Exh. 5, p. 1).

13. Neither Computer Specialist's nor Grievant's version of events is corroborated by other witness testimony.

14. Sometime between November 12, 2014, and November 20, 2014, Supervisor met with Grievant again about the Halloween and Computer Specialist incidents. Grievant denied both allegations at that meeting.[4] (Testimony of Supervisor).

GROUP NOTICE

15. Supervisor then reported all the incidents to the Human Resource Director in an effort to assist the Grievant in correcting her behavior. At that time the Human Resource Director informed Supervisor that Supervisor, Human Resource Director, and Grievant needed to meet. Thus, they met on November 20, 2014. Discussions during that meeting ensued about the Halloween incident, the November 12, 2014 meeting incident, the Computer Specialist incident, and Grievant's comments about "Hump Day."[5] Grievant was then placed on administrative leave until December 1, 2014. Grievant received a notice of intent to terminate on December 1, 2014. (Testimony of Supervisor).

16. After receiving and reviewing Grievant's response to the December 1, 2014 letter, Grievant received a Group III Written Notice and was terminated on December 10, 2014.

17. The group notice described the offense(s) as follows:

> Grievant was reported to have been making gestures of a sexual nature to her coworkers. She used language that her coworkers found offensive creating an environment that is hostile.

[4] However, at a meeting on November 20, 2014, Grievant did acknowledge she made the statement on Halloween.

[5] Staff in the office participated and welcomed jokes about the phrase "Hump Day." There were two accepted interpretations of the phrase. One referenced a Geico television commercial where a camel's hump is depicted symbolizing Wednesday as the mid-work week and thus "hump day." When "hump day" was mentioned, it was common for staff to imitate the hump in the camel's back. Also, jokingly staff would encourage Grievant to give an alternate definition or phrasing for the term. For instance, an employee in the office urged Spanish Instructor to ask Grievant what "hump day" meant. Upon this asking, Grievant responded by gyrating and saying words to the effect of "this is the day I hump." Spanish Instructor testified that she was not offended by this comment. Further, Supervisor testified that the basis of her meetings with Grievant for her conduct was not the "hump day" gestures or comments. These revelations indicate that management did not consider Grievant's comments/gestures about "hump day" a violation of policy. The Hearing Officer finds none either. (Testimonies of Spanish Instructor and Supervisor).

(A Exh. 2, p. 2).

POLICIES

18. The Agency alleges that Grievant violated Agency Policy 2.30 Workplace Harassment (Policy 2:30) and Agency Policy BOV Policy # 05 (2014) Sexual Misconduct (Policy #05). (A Exh. 2).

19. Under Policy 2:30, sexual harassment is identified as a form of workplace harassment. Moreover, "sexual harassment" is defined as "[a]ny unwelcome sexual advances, requests for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, coworkers or nonemployee (third-party)." The policy also identifies "hostile environment" as a kind of sexual harassment. The policy defines "hostile environment" as follows:

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

(A Exh. 6, pp. 1-4).

20. Policy 2.30 also provides that "[a]ny employee who engages in conduct determined to be harassment or encourages such conduct by others shall be subject to corrective action, up to and including termination, under Policy 1.60, Standards of Conduct. (A Exh. 6, p. 3).

21. The Policy also mandates that the Agency communicate Policy 2.30 to employees and third parties. Further that communication must include:

- **educating employees about the types of behaviors that can be considered workplace harassment**, and
- explaining procedures established for filing workplace harassment complaints.

(A Exh. 6, p. 3, emphasis added).

22. The University considers all forms of sexual misconduct a serious offense and has a zero tolerance for violating the policy. (A Exh. 6, p. 7).

23. Agency Policy BOV Policy # 05 (2014) Sexual Misconduct (Policy #05), defines "sexual harassment" as follows:

> Unwelcomed conduct of a sexual nature. It includes sexual violence, sexual discrimination, unwelcome sexual advances, sexual gestures, touching, requests for sexual favors, verbal or nonverbal physical aggression, dirty jokes, spreading rumors of a sexual nature, comments or questions about a person's body, dress or personal life, offensive language of a sexual nature, intimidation, hostility or stereotyping, even if those acts do not involve conduct of a sexual nature.

(A Exh. 6, p. 9).

24. The evidence is insufficient to establish that Grievant was notified of Policy #05 which was approved by the University's Board on May 9, 2014. (Testimony of Supervisor).

OTHER

25. On Grievant's most recent annual performance evaluation which was dated October 27, 2014, by her supervisor, Grievant was rated a contributor in 4 out of 5 of her areas of core responsibilities. In the other area which was personal and professional conduct in dealing with students, coworkers, and public, Grievant was rated an extraordinary contributor. (G Exh. H; Testimony of Supervisor).

26. Supervisor initially recommended Grievant receive counseling, remain employed at the University but transferred to another office. (Testimony of Supervisor; A Exh. 4).

27. Grievant did not have a disciplinary history. (Testimony of Supervisor).

28. The Agency's Advocate inquired on direct examination whether Supervisor was aware of insemination of Policy #05. To which Supervisor testified "Yes." (Testimony of Supervisor).

29. The University is required to widely publish policy #05. The evidence is insufficient to illustrate that Policy #05 was widely published or distributed to the University community, to include Grievant. Thus, the Agency cannot establish that Grievant had notice of Policy #5. (A Exh. 6, p. 6).

DETERMINATIONS 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/her 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 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.[6]

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 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.

Under the Standards of Conduct, Group III offenses are the most serious acts and behavior which normally warrant removal on a first occurrence. When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so. *See* Standards of Conduct Policy 1.60(B)(3).

On December 10, 2014, management issued Grievant a Group III Written Notice with termination for the reason previously noted here. Accordingly, the Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?

The Agency contends that Grievant violated Policies 2.30 and Policy #05 and thus engaged in workplace/sexual harassment and sexual misconduct in the workplace. Under Policy 2:30, "sexual harassment" is defined as "[a]ny unwelcome sexual advances, requests for sexual favors, or verbal, written or physical conduct of a sexual nature by a manager, supervisor, coworkers or nonemployee (third-party)." The policy also identifies "hostile environment" as a kind of sexual harassment. The policy defines "hostile environment" as follows:

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

Similarly, Policy #05 defines sexual harassment/ as follows:

[6] GPM §5.8

> Unwelcomed conduct of a sexual nature. It includes sexual violence, sexual discrimination, unwelcome sexual advances, sexual gestures, touching, requests for sexual favors, verbal or nonverbal physical aggression, dirty jokes, spreading rumors of a sexual nature, comments or questions about a person's body, dress or personal life, offensive language of a sexual nature, intimidation, hostility or stereotyping, even if those acts do not involve conduct of a sexual nature.

Now the Hearing Officer undertakes an examination of the evidence regarding the alleged incidents of workplace harassment.

Banana Incident

The Hearing Officer finds the banana incident too ambiguous to find sexual misconduct. The evidence demonstrates that at the November lunch meeting, Grievant held a banana and made the statement "first you take the banana and peel it real slow." The tone in which she made the statement suggested to at least two employees that Grievant's comment and gesture were meant to be a sexual innuendo. Grievant denies such was her intent. Of note, a banana is not usually considered a sexual object. Moreover, traditionally one would peel a banana and then eat it as referenced in Grievant's comment. In addition, no employee filed a written complaint alleging sexual misconduct until they were requested to do so by Supervisor. In fact, the employee who brought the incident to the attention of Supervisor testified that she had not intended to file a complaint. What is more, she had not been offended by any other behavior of Grievant. Accordingly, considering the totality of the evidence, the Hearing Officer cannot find the Agency has met its burden and shown that Grievant's comments/gesture was a "dirty joke" or offensive language of a sexual nature. Hence, the banana incident fails to demonstrate sexual harassment.

Retreat Incident

In addition to the banana incident on November 12, 2014, Outreach Coordinator alleged that after the meeting, Grievant used offensive sexual language as they reviewed procedures for registering the students for an upcoming overnight retreat. Specifically Outreach Coordinator contends Grievant stated in clarifying Grievant's responsibilities in registering the students that she would inform the students at registration that "here is your condom and the no fucking rules." Grievant denied using this language. The Hearing Officer had an opportunity to observe both witnesses as they testified. She further notes Outreach Coordinator's allegations were not corroborated. Thus, the Hearing Officer finds the evidence insufficient to find Grievant engaged in the conduct alleged by Outreach Coordinator. Hence the Agency has failed to meet its burden regarding this incident and demonstrate sexual harassment.

Similarly, Outreach Coordinator's claim that Grievant made a sexual gesture at the November 12, 2014 meeting with a decorative piece is uncorroborated. Thus, the evidence is insufficient to find Grievant engaged in sexual misconduct by gesturing with decoration.

Halloween Incident

Next, the Hearing Officer turns to the Halloween costume incident. The Agency contends that when Grievant stated that she was portraying "A Good Pussy" on Halloween she engaged in sexual misconduct. First, of significance, the Hearing Officer notes that all three witnesses of the Agency who testified that Grievant made the comment stated they were not offended by the comment. In addition, two of the witnesses testified that they laughed when Grievant made the statement. Further, all three of the witness noted that they only submitted a written statement about the Halloween incident after Supervisor requested it. The Hearing Officer also finds that the evidence shows that the atmosphere in the Student Center office was relaxed and friendly. In addition, the evidence shows that staff often joked with one another and some of those jokes were sexual in nature. Accordingly, the Hearing Officer finds that Grievant's comment on Halloween was welcomed as evidenced by some employees laughing when Grievant made the comment. Further, the comment was not offensive. Hence, the Agency failed to meet its burden and show Grievant engaged in sexual misconduct on Halloween.

Computer Specialist Incident

Now, the Hearing Officer examines Computer Specialist's claim that Grievant had made an unwelcomed sexual gesture/advance toward him. According to Computer Specialist, Grievant's conduct occurred sometime between November 3 and 5, when Supervisor was away from the office attending a conference. The evidence has established that Computer Specialist and Grievant had developed a longstanding relationship that spanned at least 20 years. Moreover, the evidence demonstrates that the two had a history of regularly joking with one another and that this accepted joking included jests of a sexual nature. In fact, the day of the alleged incident Grievant contends Computer Specialist directed a sexual advance toward her while he was in her office. According to Grievant, Computer Specialist stated words to the effect of "I am going to put it on you [Grievant]." She testified that Computer Specialist's comment was made in the presence of two female students who were taken aback by the comment. Grievant testified that she found this comment offensive and went to Computer Specialist's office later to address his flirtatious remark to her. It is at this later encounter that Computer Specialist claims Grievant engaged in the sexual misconduct, revolving around his door as a pole dancer and saying his name in a seductive manner. Grievant denies the accusation and the evidence demonstrates she immediately left his office when asked.

Of note as well, Computer Specialist contends that there were two employees who witnessed Grievant's sexual misconduct in his office. One of those witnesses – Spanish Instructor -testified, but did not corroborate Computer Specialist's claim of misconduct. In fact, Spanish Instructor testified that she observed nothing sexual in nature. The other witness did not testify. And the evidence failed to provide satisfactory reason why this other witness did not testify and substantiate Computer Specialist's allegation.[7] In addition, the Hearing Office had an opportunity to observe Computer Specialist as he testified. Under examination, he displayed evasiveness and selective memory. The evidence shows that he acknowledged making comments to Grievant while in her office and that they could have been sexual in nature. However, he testified that he could not recall the wording of his comments.

[7] The Agency's Advocate argued that some employees in the Student Center were afraid to testify for fear of retaliation. The evidence does not establish such was the case.

Moreover, the Hearing Officer finds Computer Specialist was an initiator and participant in the incident. First, the evidence shows that by Grievant's account, on the day of the alleged offense, Computer Specialist flirted with Grievant in her office by commenting "I am going to put it on you." The Hearing Officer had an opportunity to observe Grievant's demeanor as she testified about this incident and finds credible her claim of flirtation by Computer Specialist. Second, the Hearing Officer has considered Computer Specialist's demeanor under examination. As discussed above, he displayed evasiveness and a selective memory. Further, he acknowledged the joking relationship he and Grievant have had over several years. Third, on cross Grievant acknowledged, explicitly/implicitly, that he did make a comment to Grievant while in her office, and it could have been of sexual nature. Hence, the Hearing Officer finds Computer Specialist was an initiator and participant of "a running joke" in the incident occurring on or about November 5, 2014.

The Hearing Officer also finds it significant that Computer Specialist claims the offensive conduct took place no later than November 5, 2014; yet, he failed to immediately report it to Supervisor and submitted a written claim over two weeks later only after being asked by his Supervisor. The evidence demonstrates that Computer Specialist claims that he reported the incident to Supervisor without delay once Supervisor returned to the office. However, this assertion was contradicted by Supervisor's testimony. For example, the evidence shows that Supervisor learned of the incident regarding Computer Specialist after November 12, 2014. According to Supervisor's testimony, on November 12, 2014, she received a report about the banana incident. Supervisor next investigated this matter and met with Grievant. Then after this investigation concluded, an employee reported the Halloween incident. Supervisor stated while investigating the Halloween incident she learned of the matter involving the Computer Specialist. Hence, contrary to Computer Specialist's testimony claiming/inferring that he readily reported the incident to his supervisor, the Hearing Officer finds that Supervisor's testimony indicates that Computer Specialist did not immediately report to his supervisor the alleged incident involving him. What is more, because of the contradictory testimony, the evidence is insufficient to establish whether Computer Specialist actually reported the incident on his own initiative or because Supervisor was conducting an investigation about alleged sexual misconduct of Grievant.

Accordingly, the evidence fails to establish the timeliness of any report made to the supervisor by Computer Specialist. Further, the evidence is insufficient to establish whether the report was made without solicitation by the supervisor. Computer Specialist's untimeliness in filing the report does not support his claim of sexual misconduct.

As referenced above, the Hearing Officer has considered the following:

- The demeanor of the witnesses;
- The unsubstantiated accounting of the incident involving the Computer Specialist's;
- Computer Specialist initiation of the incident;
- Historical joking between Grievant and Computer Specialist to include jests of a sexual nature;
- Agency Policy requiring immediate reporting of sexual misconduct;
- Insufficient evidence to show Computer Specialist immediately reported the alleged

incident or initiated reporting the incident; and
- contradictory testimony of Agency witnesses

Hence, after careful deliberation of the above, the Hearing Officer finds the evident is insufficient to show misconduct. Accordingly, the Agency has not met its burden and shown that Grievant engaged in sexual misconduct involving Computer Specialist on or about November 3 – 5, 2014.

Hump Day Allegation

"Hump Day" was a phrase introduced by Supervisor. The evidence was insufficient to find Grievant violated agency policy by any comments or gestures regarding "hump day."

Considering the above, the hearing officer finds Agency has failed to show Grievant engaged in workplace harassment and sexual misconduct in the work place.

In addition, the Hearing Officer notes that the Agency has failed to established that Grievant had notice of its Policy #05 on Sexual Harassment. That said, the Hearing Officer is cognizant that Supervisor was asked during her direct examination whether Supervisor was aware if Policy #05 had been inseminated. Supervisor responded "Yes" to this question. Without more, Supervisor's response fails to show the Agency met its responsibility under Policy #05. Specifically, this policy mandates that the Agency "widely publish or distribute the policy to the University community." The Agency provided no evidence that it did so. Nor did it submit any evidence to show the method it used to satisfy this requirement or the date it did so. Accordingly, the Hearing Officer also finds that the evidence is insufficient to demonstrate Grievant had notice of Policy #05 at the time she is alleged to have committed offenses of sexual misconduct.

Further, the Hearing Officer notes that a few days before Grievant is alleged to have engaged in sexual harassment, Supervisor completed Grievant's annual evaluation. In the area of professional and personal conduct in dealing with students, coworkers, and the public, the supervisor rated Grievant as an Extraordinary Contributor. This rating, albeit, a few days before the banana incident, suggests Grievant's behavior in the work place was acceptable and therefore not offensive. It also contradicts evidence of the Agency contending Grievant had a reputation of telling dirty jokes or regularly making comments of a sexual and offensive nature.

B. Was the discipline consistent with policy and law?

The Hearing Officer has found the Agency was unable to meet its burden and show workplace harassment/sexual misconduct. Thus, the discipline is unwarranted and inconsistent with policy and law.

II. Mitigation

Because the Hearing Officer has found that the agency failed to meet its burden a discussion on mitigation will not be undertaken.

Having carefully considered all evidence and arguments, the Hearing Officer sets forth her determination in the decision and order below.

III. Attorney Fees

Under Virginia Code § 2.2 – 3005.1 (A), "[i]n grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorney's fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated as set forth below in the decision section. There are no special circumstances making an award of attorney's fees unjust. Accordingly Grievant's attorney is advised to submit an attorney's fee petition to the Hearing Officer within 15 days of this decision. The petition should be in accordance with the *Grievance Procedural Manual* §7.2(e).

DECISION AND ORDER

The Hearing Officer has considered all the evidence whether specifically mentioned or not. Accordingly, for the reasons stated here, with respect to the Agency's Group III Written Notice, based on the evidence of record the Hearing Officer finds the Agency has not met its burden. Therefore, the Group III Written Notice is rescinded. The Agency is therefore ordered to remove the Group III Written Notice with removal.

Hence, the Agency is ordered to take the following action:

1. reinstate Grievant to her former position or, if occupied, to an equivalent position.

2. pay full back pay for the period Grievant has been separated from her job (back pay is to be offset by interim earnings);

3. appropriately restore other benefits and seniority;

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
Departmental of Human Resource Management

101 N. 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 N. 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.[8]

Entered this 29th day of March, 2015.

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Ternon Galloway Lee, Hearing Officer
cc: Agency's Advocate/Representative
Grievant's Advocate/Grievant
EDR

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

DECISION OF HEARING OFFICER
In the matter of
Case Number: 10539
Hearing Date: March 9, 2015
Decision Issued March 29, 2015
Addendum to Decision Issued: May 6, 2015

In her decision issued on March 29, 2015, the Hearing Officer found the Agency failed to meet its burden and show Grievant violated agency policies against sexual misconduct in the workplace and workplace harassment. The Hearing Officer then rescinded the Agency's Group III Written Notice that alleged such violations.

The Hearing Officer also noted that the grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorney fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.[9] The Hearing Officer determined that Grievant substantially prevailed and an award of attorney fees would not be unjust. Initially, the Hearing Officer issued an award of attorney fees to Grievant's attorney on April 20, 2015. That order was rescinded. This was so because the Agency asserted it never received the petition, including its attachments, from Grievant's attorney that requested attorney fees. The Agency's advocate was then provided a copy of the petition and any attachments. She was also granted time to respond.[10] In her response, the Agency's advocate asserted that Grievant's attorney failed to provide on the timesheet a description of the services rendered for Grievant. Grievant's attorney then amended her timesheet providing this information.

The Hearing Officer now finds that Grievant's attorney has (i) timely submitted a petition for attorney fees and affidavit, and (ii) provided to the Hearing Officer and the Agency a timesheet setting forth the date of services provided, the time expended on them, and the services provided. Further, she finds that the Agency has received copies of the petition and its attachments. And, the Agency has responded to/had an opportunity to respond to Grievant's submissions.[11]

Moreover, the Hearing Officer has considered all the filings mentioned, any arguments of the parties, the value/nature of the attorney's service, the results obtained, and whether the fees incurred were consistent with those generally charged for similar services. Having done so, the Hearing Officer finds Grievant's attorney(s) expended 48.5 hours in representing her client. Further, she finds that an hourly rate of $131.00 is reasonable.[12] Hence, the Hearing Officer

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[9] Va. Code § 2.2-3005.1A.

[10] The Hearing Officer notes that correspondence from Grievant's attorney dated April 6, 2015, and sent to the Hearing Officer indicates the Agency's Advocate was copied by email. That said, a review of the letter does not clarify whether the Agency's advocate was supposed to be sent the letter's enclosures also.

[11] The petition, affidavit, timesheet(s), and Agency response are attached.

[12] This is the maximum hourly amount permitted under the Rules for Conducting Grievance Hearings (Rules), Section VI (E) and pursuant to EDR website regarding the allowance of Attorney fees.

approves $6,353.50 in attorney fees; that is 48.5 attorney hours x $131.00 = $6,353.50.[13]

Within 10 calendar days either party may petition EDR for a decision solely addressing whether the fee addendum complies with the Manual and the Rules for Conducting Grievance Hearings.

Entered this 6th day of May 2015.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate/Agency Representative
Grievant's Advocate/Grievant
EDR

[13] The attorney fee requested by counsel is higher than the fee approved as it is calculated based on hourly rates of $340.00 and $175.00. As noted here, these hourly rates exceed the maximum hourly rate permitted under the Rules.