Issue: Group III Written Notice with Termination (workplace harassment); Hearing Date: 08/27/12; Decision Issued: 08/28/12; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 9872; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 09/10/12; DHRM Ruling issued 10/09/12; Outcome: Remanded to AHO; Remand Decision issued 11/08/12; Outcome: Written Notice elevated to Group II. Employee still reinstated.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9872

Hearing Date: August 27, 2012
Decision Issued: August 28, 2012

PROCEDURAL HISTORY

On May 17, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of policy 2.30, Workplace Harassment.

On June 6, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 30, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 27, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's Representative
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?

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 Correctional Sergeant at one of its Facilities. He had been employed by the Agency since 1997. He worked as a Unit Manager. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant served in the Army from 1972 to 1996. He displayed a picture near his office showing him in uniform with a weapon while he served in Vietnam. He used the picture to engage in conversation with residents about his days in Vietnam.

On April 11, 2012, Grievant walked into classroom A3 and observed the residents talking and laughing out loud. The unit staff were unsuccessful in trying to keep a group of approximately 16 male residents calm. He tried to draw their attention by telling them that he would talk and make them laugh. When the group became quiet, Grievant told the story about the Japanese people he had met. He then started talking about the picture of him in Vietnam. He then told a story about his neighbor and a story about wanting to steal the watch off the arm of a coworker.

Grievant then started talking to the Officer while the residents listened. He asked her how she was doing and she responded, "fine." He said she was looking "cute" and the Officer nodded her head. He asked her if she was married. She replied "happily." He asked her if she had a boyfriend. She said yes, her husband. Grievant noticed some marks on the Officer's shoes. The Officer mentioned that her husband bought the

shoes for her. Grievant said that if he was a "baller" he would buy her a new pair of shoes. A "baller" is slang for someone who is a "player" or womanizer who has the means to provide financial assistance to women. The Officer threw up her hands and said "I won't touch that with a ten foot pole." Grievant responded that he had a six foot pole. The residents erupted with laughter. The Officer said that Grievant's comment was disrespectful. The Officer was offended because she assumed Grievant's comment about having a six foot pole was a euphuism for saying he had a large penis. Grievant apologized and said he did not intend his comment to be disrespectful. He again apologized to her and said he was only trying to engage in conversation to get the residents to calm down. He told her his remark was an old army saying. He said that the Marines say "I would not touch that with a ten foot pole", the Air Force says, "we wouldn't touch it with an eight foot pole" and the Army say, "we got a six foot pole and we'll take the mission."

One of the residents left the group and complained to another security staff member that Grievant was being disrespectful to the Officer. The Officer complained to a supervisor regarding Grievant's comments and the Agency began an investigation.

Grievant introduced an exhibit of an Army field manual referring to a "Six Foot Pole." Section 5-14 begins, "Another field expedient weapon that can mean the difference between life and death for a soldier in an unarmed conflict is a pole about 6 feet long. *** The size and weight of the pole requires him to move his whole body to use it effectively. Its length gives the soldier an advantage of distance in most unarmed situations.[1]

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."[2] Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Disruptive behavior is a Group I offense.[3] On April 11, 2012, Grievant asked questions of a personal nature to the Officer in front of residents. His questions were inappropriate and showed a lack of respect for her in front of the residents. The Officer told Grievant that his comments were disrespectful. She was offended by his comments. One resident complained to another security staff that Grievant was being

[1] Grievant Exhibit 6.

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

[3] See, Attachment A, DHRM Policy 1.60.

disrespectful to Officer. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.[4]

The Agency argued that Grievant should receive a Group III Written Notice for workplace harassment under DHRM Policy 2.30. In particular, the Agency alleged Grievant created a hostile work environment for the Officer.

The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual's race, sex, color, national origin, religion, age, veteran status, political affiliation or disability. Any 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.

Workplace Harassment is:

> Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.[5]

A Hostile Environment is:

> A form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work.[6]

It is clear that Grievant's behavior was unwelcome. The Agency has not established, however, that Grievant's behavior was sufficiently severe or pervasive to create an intimidating or offensive workplace.

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[4] In rare circumstances, a Group I may constitute a Group II where the agency can show that a particular offense had an unusual and truly material adverse impact on the agency. Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above. The Agency has not established a truly material adverse impact on the Agency to elevate the Group I to a Group II offense.

[5] See, DHRM Policy 2.30, Workplace Harassment.

[6] See, DHRM Policy 2.30, Workplace Harassment.

In determining whether harassment is sufficiently severe or pervasive, the Hearing Officer should consider: (1) the severity of the action; (2) its frequency; (3) whether it was physically threatening or humiliating; and (4) whether it unreasonably interfered with plaintiff's work. In addition, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. The facts of this case are insufficient to establish that Grievant's behavior was sufficiently severe or pervasive to create a hostile work environment. Grievant's objective was to tease the Officer in front of the residents in order to calm the residents.[7] His method was to discuss personal information that might embarrass her if the information was revealed. Asking another employee whether she is married is not severe behavior. Asking whether a married employee has a boyfriend is not severe behavior. Suggesting that if he were a "baller" he would buy another employee new shoes is not severe behavior. Saying he had a six foot pole could be problematic in this case if the Officer's assumption was correct that Grievant was referring to the size of his penis. Grievant effectively countered this assumption by showing he was using a phrase he used when he was in the military. Approximately five minutes earlier, Grievant had been telling the residents stories about his time in Vietnam. The Officer's concerns about Grievant's comments were not so much the comments themselves but rather that Grievant's comments were made in front of the residents for whom she served as a role model and was responsible for protecting. She objected to Grievant making statements intended to cause the residents to laugh at her. When the facts of this case are considered as a whole, the Agency has established that Grievant's behavior was unprofessional and disrespectful but it has not established that Grievant's behavior constituted a violation of DHRM Policy 2.30.

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…."[8] 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

[7] Grievant's objective was not to convey to her his intention to establish a romantic or sexual relationship with the Officer. His objective was to entertain the residents at her expense.

[8] Va. Code § 2.2-3005.

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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group I Written Notice. The Agency is ordered to reinstate Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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

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

3. 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 the Office of Employment Dispute Resolution 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:

   Office of Employment Dispute Resolution
   Department of Human Resource Management

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

Or, send by email 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 give a copy of all of your appeals to the other party and to EDR. 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.[9]

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

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

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of
The Department Juvenile Justice

October 9, 2012

The agency has requested an administrative review of the hearing officer's decision in Case No. 9872. For the reason stated below, the Department of Human Resource Management (DHRM) remands this decision to the hearing officer. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The hearing officer listed the **PROCEDURAL HISTORY** as follows:

On May 17, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of policy 2.30, Workplace Harassment.

On June 6, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 30, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 27, 2012, a hearing was held at the Agency's office.

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The **ISSUES** of this case are the following:

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?

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The **FINDINGS OF FACT** in this case are as follows:

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 Correctional Sergeant at one of its Facilities. He had been employed by the Agency since 1997. He worked as a Unit Manager. No evidence of prior active disciplinary action was

introduced during the hearing.

Grievant served in the Army from 1972 to 1996. He displayed a picture near his office showing him in uniform with a weapon while he served in Vietnam. He used the picture to engage in conversation with residents about his days in Vietnam.

On April 11, 2012, Grievant walked into classroom A3 and observed the residents talking and laughing out loud. The unit staff were unsuccessful in trying to keep a group of approximately 16 male residents calm. He tried to draw their attention by telling them that he would talk and make them laugh. When the group became quiet, Grievant told the story about the Japanese people he had met. He then started talking about the picture of him in Vietnam. He then told a story about his neighbor and a story about wanting to steal the watch off the arm of a co-worker.

Grievant then started talking to the Officer while the residents listened. He asked her how she was doing and she responded, "fine." He said she was looking "cute" and the Officer nodded her head. He asked her if she was married. She replied "happily." He asked her if she had a boyfriend. She said yes, her husband. Grievant noticed some marks on the Officer's shoes. The Officer mentioned that her husband bought the shoes for her. Grievant said that if he was a "baller" he would buy her a new pair of shoes. A "baller" is slang for someone who is a "player" or womanizer who has the means to provide financial assistance to women. The Officer threw up her hands and said "I won't touch that with a ten foot pole." Grievant responded that he had a six foot pole. The residents erupted with laughter. The Officer said that Grievant's comment was disrespectful. The Officer was offended because she assumed Grievant's comment about having a six foot pole was a euphuism for saying he had a large penis. Grievant apologized and said he did not intend his comment to be disrespectful. He again apologized to her and said he was only trying to engage in conversation to get the residents to calm down. He told her his remark was an old army saying. He said that the Marines say "I would not touch that with a ten foot pole", the Air Force says, "we wouldn't touch it with an eight foot pole" and the Army say, "we got a six foot pole and we'll take the mission."

One of the residents left the group and complained to another security staff member that Grievant was being disrespectful to the Officer. The Officer complained to a supervisor regarding Grievant's comments and the Agency began an investigation.

Grievant introduced an exhibit of an Army field manual referring to a "Six Foot Pole." Section 5-14 begins, "Another field expedient weapon that can mean the difference between life and death for a soldier in an unarmed conflict is a pole about 6 feet long. *** The size and weight of the pole requires him to move his whole body to use it effectively. Its length gives the soldier an advantage of distance in most unarmed situations."

In his **CONCLUSIONS OF POLICY**, the hearing officer stated the following:

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious

and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Disruptive behavior is a Group I offense. On April 11, 2012, Grievant asked questions of a personal nature to the Officer in front of residents. His questions were inappropriate and showed a lack of respect for her in front of the residents. The Officer told Grievant that his comments were disrespectful. She was offended by his comments. One resident complained to another security staff that Grievant was being disrespectful to Officer. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

The Agency argued that Grievant should receive a Group **III** Written Notice for workplace harassment under DHRM Policy 2.30. In particular, the Agency alleged Grievant created a hostile work environment for the Officer.

The Commonwealth strictly forbids harassment of any employee, applicant for employment, vendor, contractor or volunteer on the basis of an individual's race, sex, color, national origin, religion, age, veteran status, political affiliation or disability. Any 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.

Workplace Harassment is:

> Any unwelcome verbal, written or physical conduct that either denigrates or shows hostility or aversion towards a person on the basis of race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability, that: (1) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an employee's work performance; or (3) affects an employee's employment opportunities or compensation.

A Hostile Environment is:

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

It is clear that Grievant's behavior was unwelcome. The Agency has not established, however, that Grievant's behavior was sufficiently severe or pervasive to create an intimidating or offensive workplace. In determining whether harassment is sufficiently severe or pervasive, the Hearing Officer should consider: (1) the severity of the action; (2) its frequency; (3) whether it was physically threatening or humiliating; and (4) whether it unreasonably interfered with plaintiff's work. In addition, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. The facts of this case are insufficient to establish that Grievant's behavior was sufficiently severe or pervasive to create a hostile work environment. Grievant's objective was to tease the Officer in front of the residents in order to calm the residents." His method was to discuss personal information that might embarrass her if the information was revealed. Asking another employee whether she is married is not severe behavior. Asking whether a married employee has a boyfriend is not severe behavior. Suggesting that if he were a "baller" he would buy another employee new shoes is not severe behavior. Saying he had a six foot pole could be problematic in this case if the Officer's assumption was correct that Grievant was referring to the size of his penis. Grievant effectively countered this assumption by showing he was using a phrase he used when he was in the military. Approximately five minutes earlier, Grievant had been telling the residents stories about his time in Vietnam. The Officer's concerns about Grievant's comments were not so much the comments themselves but rather that Grievant's comments were made in front of the residents for whom she served as a role model and was responsible for protecting. She objected to Grievant making statements intended to cause the residents to laugh at her. When the facts of this case are considered as a whole, the Agency has established that Grievant's behavior was unprofessional and disrespectful but it has not established that Grievant's behavior constituted a violation of DHRM Policy 2.30.

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 .... 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 nonexclusive 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 further the disciplinary action.

The **DECISION** in this case is below:

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group I Written Notice. The Agency is ordered to reinstate Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

DISCUSSION

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

In the instant case, according to the evidence as outlined in the hearing decision, the grievant was charged with and found guilty by the agency of violating DHRM Policy No. 2.30, Workplace Harassment. He was issued a Group III Written Notice with removal.

In its appeal to this Agency, the DJJ requested that this Agency determine if the hearing decision is consistent with policy. The DJJ argues further that the hearing officer redefined and categorized the grievant's misconduct as disruptive behavior, rather acknowledging his conduct to be sexual harassment. In addition, the agency contends that the hearing officer failed properly to identify the grievant's behavior as severe and pervasive.

For the following reasons, the Department of Human Resource Management agrees in part with the hearing officer's decision and in part with the DJJ's position. The sexual harassment component of Policy 2.30 comports with the definition of sexual harassment under Title VII of the Civil Rights Act of 1964, as amended (Title VII). According to that definition, Sexual Harassment is:

> 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). These actions may be described as either:
>
> * 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, or:
>
> * Hostile environment – A form of sexual harassment when a victim is subjected to unwelcome and **severe or pervasive** repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature which creates an intimidating or offensive place for employees to work. (Emphasis added)

As such, this Department adheres to the guidance promulgated by the U.S. Equal Employment Opportunity Commission which enforces Title VII and federal court rulings regarding sexual harassment. Under Title VII, the appropriate standard to sustain a claim of sexually offensive and hostile work environment is a determination of whether the alleged sexually offensive act or statement is sufficiently egregious and pervasive. In the instant case, the probative determination is whether the evidence as presented in the hearing decision and the appeal from the agency is sufficiently egregious and pervasive to sustain a findings of sexual

harassment or sexually offensive environment; and, if so, whether a Group III Written Notice with termination is the appropriate level of disciplinary action as embodied in the Standards of Conduct Policy (Policy No. 1.60).

According to the Standards of Conduct Policy, "It is the policy of the Commonwealth to promote the well-being of its employees by maintaining high standards of work performance and professional conduct." The policy states as its purpose, "The purpose of this policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness." Employees are expected to "Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers."

The DHRM contends that while the incident does not rise to the level of a Group III offense, it is not appropriate to classify it as "disruptive behavior," a Group I level offense. This behavior appears to be more properly described as "inappropriate or unacceptable behavior" and classified as a Group II level offense. This is especially so because of the supervisor's role and the agency's expectations of the supervisor to serve as a role model to clients and to employees under his supervision. Therefore, we are remanding this decision to the hearing officer and directing that he revise his decision to be in compliance with policy. The final determination of the grievant's employment status will be based on whether or not he has other active written notices in his file.

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Ernest G. Spratley
Assistant Director, Office of Equal Employment Services