

Issue: Group III Written Notice with Termination (failure to follow policy and violation of constitutional rights); Hearing Date: 11/12/14; Decision Issued: 12/28/14; Agency: ABC; AHO: Lorin A. Costanzo, Esq.; Case No. 10378; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 01/09/15; EDR Ruling No. 2015-4083 issued 02/11/15; Outcome: Remanded for clarification; Remand Decision issued 03/21/15; Outcome: Original decision affirmed; **Administrative Review**: EDR Ruling Request on 03/21/15 Remand Decision received 04/03/15; EDR Ruling No. 2015-4129 issued 05/14/15; Outcome: AHO’s decision affirmed; **Administrative Review**: DHRM Ruling Request on original decision received 01/09/15, and DHRM Ruling Request on 03-21-15 Remand Decision received 03/27/15; DHRM Ruling issued 06/05/15; Outcome: AHO’s decision affirmed; **Judicial Review**: Appealed to Roanoke City Circuit Court; Circuit Court ruling issued 12/08/15; Outcome: AHO’s remand decision affirmed; **Judicial Review**: Appealed to Court of Appeals (date ?); Outcome: Circuit Court’s ruling affirmed (11/15/16); **Judicial Review**: Appealed to the Supreme Court of Virginia (date ?); Outcome: Court of Appeal’s judgment affirmed (02/22/18).

COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10378

Hearing Date: November 12 & 13, 2014

Decision Issued: December 28, 2014

PRELIMINARY MATTERS AND TIMELINE

Written Notice:

On April 3, 2014 Grievant was issued a Group III Written Notice with termination for “Failure to Follow Instructions and/or Policy” (Written Notice Offense Code “13”) and “Other-Violation of Constitutional Rights” (Written Notice Offense Code “99”). The offense date was indicated as August 9, 2013. An attachment to the Written Notice stated, among other matters:

An internal affairs investigation was conducted pursuant to a complaint received from an ABC applicant alleging multiple points of misconduct by [Grievant]. The result of the investigation substantiated two of the complaints ...

1. [Grievant] seized evidence in violation of the complainant’s constitutional rights; and
2. [Grievant] rummaged through complainant’s business records with deliberate indifference to her rights.¹

The facts resulting in the substantiation of the charge are, in part, as follows:

On August 9, 2013 [Grievant] and another Agent went to the complainant/applicant’s establishment to review the application file with her and conduct the site visit. During that visit, [Grievant] search through complainant’s office, opening and searching in desk drawers and through documentations on top of a desk. [Grievant] also photographed numerous items in the office

[Grievant] readily admits to having conducted the searches described. Code of Virginia and Virginia Administrative Regulations provide Agents inspection authority over ABC licensees. However, no such authority exists for license applicants. Because the Agent was conducting a background investigation of an ABC applicant, the search he conducted would have required a search warrant or consent from the applicant. Neither was obtained. ...

On May 2, 2014 Grievant grieved issuance of the Group III Written Notice with termination.² When matters were not resolved to Grievant’s satisfaction the grievance was qualified for hearing. The undersigned was appointed hearing officer, effective May 27, 2014,

¹ G. Tab 1; A. Tab 1.

² A. Tab 1, pg. 2

by the Virginia Department of Human Resource Management. A two day grievance hearing was held on November 12, 2014 and November 13, 2014 at facility with Grievant in attendance.

Grievance Timeline:

April 03, 2014	Group III Written Notice with termination issued.
May 02, 2014	Grievance filed.
May 30, 2014	Grievant requested production of documents.
June 06, 2014	Telephone Conference held concerning matters including production.
June 12, 2014	Agency responded to request for production.
June 16, 2014	Telephone Conference held concerning matters including production.
June 18, 2014	Grievant's Notice of Noncompliance & Motion for Production filed.
June 27, 2014	<i>Hearing Officer's Determination and Scheduling Order</i> issued.
July 03, 2014	Hearing Officer extended period for additional matters until 7/9/14.
July 07, 2014	Grievant motion granted to have to 7/14/14 to address Agency's 7/9/14 response.
July 09, 2014	Agency's Response to Hearing Officer's Determination & Scheduling Order.
July 14, 2014	Grievant provided his Response/Reply to Agency letter of 7/9/14.
July 28, 2014	Telephone conference.
July 28, 2014	Decision of Hearing Officer on the 6/18/14 Notice and Motion of Grievant.
Sept. 16, 2014	Hearing Officer's letter determinations on production.
Sept. 19, 2014	Compliance Ruling requested by Grievant re as to HO's determination ltr of 9/16/14.
Sept. 19, 2014	Grievant's Objection to matters in 9/16/14 letter and Compliance Ruling Request.
Oct. 03, 2014	Compliance Ruling (No. 2015-4003) issued.
Oct. 10, 2014	HO Order of amendment.
Nov. 05, 2014	Initial Brief of grievance against ABC.
Nov. 12, 2014	Grievance Hearing day 1.
Nov. 13, 2014	Grievance Ruling day 2.
Nov. 26, 2014	Written Closings of each party submitted this date, as agreed at grievance hearing.

APPEARANCES

- Grievant (who was also a witness)
- Grievant's Attorney
- Agency Attorney
- Agency Party Representative
- Witnesses

ISSUES

Whether the issuance of a Group III Written Notice with termination to Grievant was 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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.³

³ Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.⁴

FINDINGS OF FACT

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

01. Grievant was a Special Agent with Agency. Grievant was first employed by Agency on or about July 25, 2000.⁵

02. On April 15, 2013 Agency received Corporation's Retail License Application. In their Retail License Application, Corporation made application for the following type of licenses: "Wine & Beer on & off premises and Keg, Mixed Beverage On".⁶

03. In reviewing and/or investigating Corporation's application there were concerns additional documents were needed to complete the application portion of the investigation and concerns as to ownership matters which needed further investigated.⁷

04. On August 6, 2013 Special Agent was notified Regional Office had received the application packet of Corporation from Central Richmond Office. On this same date, a call was received from Individual, indicated in Application as Officer, Director, and owner of all shares of common stock issued of Corporation.⁸

05. On August 8, 2013 Special Agent was contacted by President of the Corporation listed as landlord for the building that establishment was located in. President expressed concern about Applicant not receiving an ABC license. President stated he knew the owner really well and that "he has done everything he could do to get open". President made reference to the owner being a male. When asked who he was referring to as the owner, President stated "W". President explained "W" was the only person he dealt with, however, he was aware that Individual was an owner also. President called back within 20 minutes and wanted to change what he previously said. President indicated he had just spoken with Individual and that "W" was only a "cook" and had nothing to do with business.⁹

06. As scheduled with Individual, on August 9, 2013 Special Agent and Grievant went to the establishment and met with Individual to conduct a site visit and follow up on concerns as to the application.¹⁰ Special Agent and Grievant entered establishment through the front door. Special Agent remained in the dining area to speak with Individual. Grievant went through the kitchen area to inspect the premises to ensure it was a functional and fully stocked restaurant sufficient to meet the required regulations for an ABC License.¹¹

⁴ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

⁵ A. Tab 1, pg. 3.; A. Tab 20, pg. 1

⁶ G. Tab 13.

⁷ G. Tab 14; A. Tab 6, pg. 2.

⁸ A. Tab 14, pg. 3 and 6; Testimony.

⁹ A. Tab 6, pg. 3.

¹⁰ A. Tab 12. and A. Tab 6, pg. 3

¹¹ A. Tab 12, pg. 1.

While Grievant was in the back of the establishment, he went into the business office which was a room approximately 8' x 5'. Grievant described the office as unorganized and not appearing to have been set up yet. The room contained documents, a computer, and a video surveillance system. Grievant stated the front door was open when he entered, he did not ask permission, and didn't see anybody when he was in the office. Grievant did not take anything out of the room but picked up numerous pieces of paper lying about in the office and photographed various papers. Grievant opened drawers or cabinets but didn't specifically remember each and everything he opened in the office. He stated he went through business records and made a thorough examination of everything in the office.¹²

07. On October 3, 2013 Individual filed a written complaint with the Office of the Governor addressing what she referred to as "professional misconduct" by Grievant and Special Agent during their meeting at establishment on August 9, 2013.¹³

08. Agency received a copy of Individual's complaint and Agency's Office of Professional Standards reviewed Individual's complaint and determined it was to be dealt with at the regional level. On or about 10/21/13 SAC was assigned as Investigator to conduct an investigation regarding Individual's complaints and the alleged misconduct by Grievant and Special Agent. Agency notified Individual in writing on 10/21/13 that SAC would be investigating her complaint.¹⁴

09. Point of view camera footage recorded a portion of the time Special Agent and Grievant were at the establishment on August 9, 2013. The footage was reviewed by Investigator. The point of view camera was not turned on for approximately the first fifty-five minutes Special Agent and Grievant were in the establishment. Thereafter, approximately one hour of video footage was recorded from the time Special Agent requested Grievant, while both were seated at the dining table, to turn camera/recorder on. Individual was not present at the time the point of view camera was turned on. Three other individuals were recorded at various times interacting with Special Agent and Grievant.¹⁵

10. Investigator interviewed both Special Agent and Grievant.¹⁶ Investigator also received written statements from both.¹⁷

11. Investigator was not able to set up and interview with Individual concerning her complaint. Investigator did talk with Individual by telephone to attempt to set up a meeting but Individual told Investigator she needed to speak with her attorney before talking with Investigator. Investigator attempted a number of times to communicate with Individual and her Attorney to secure an interview. Investigator tried to secure any video surveillance footage that Individual had that may have existed.

Between October 30, 2013 and December 4, 2013 Investigator's efforts and results include:

10/30/13 Investigator called Individual and left voicemail requesting call back re her letter of 10/30/13.

¹² A. Tab 13, pg. 1, A. Tab 14, pg.9-10.

¹³ A. Tab 7.

¹⁴ G. Tab 63; A. Tabs 8 and 9.

¹⁵ A. Tab 14, pg. 4-6.

¹⁶ G. Ex. 72; A. Ex. 31.

¹⁷ A. Ex. 13 and A. Ex. 14.

- 11/01/13 Investigator made contact by telephone with Individual who told Investigator she needed to speak with her attorney before talking to Investigator. Both agreed to speak again that afternoon.
- 11/01/13 Individual contacted and she told Investigator she had not spoken to her attorney and would call Investigator when she had.
- 11/06/13 Investigator called Individual and left voicemail requesting to meet or speak and requested any video surveillance footage as mentioned in her email.
- 11/09/13 Investigator called Individual and left voicemail requesting to meet or speak and requested any video surveillance footage mentioned in her email.
- 11/22/13 Investigator spoke with Individual by telephone and asked if she had the video. Individual responded she didn't know if she was going to present the video at this time. Meeting was requested and Individual told Investigator she would hear back after Individual talked with her attorney.
- 11/26/13 Attorney contacted Investigator regarding Administrative objection hearing set for 12/4/13. Attorney was aware of complaint investigation and stated he wanted to take care of hearing situation before spoke about the complaint.
- 12/01/13 Investigator e-mailed Attorney requesting meeting with Individual.¹⁸

12. Investigator notified Grievant in writing on 10/24/13 that he was the subject of an internal investigation being conducted by Bureau and notified him of the nature of the investigation being, "Alleged improper conduct during August 9, 2013 interactions with **[Individual]**". Special Agent also received a similar notification this date from Investigator.¹⁹

13. On 11/06/14 Grievant received from Investigator a document entitled "Administrative Proceeding Rights". This document set for the nature of the investigation and was signed on 11/6/13 by Grievant acknowledging he was informed of the rights set forth within the document. This document stated, among other matters:

The **[Bureau]** is interviewing you as a part of an official investigation. You are being asked questions specifically, directly, and narrowly related to the performance of your official duties or fitness for office.

Any admission made in the course of this interview may be used as the basis for administrative charges seeking removal, discharge, suspension, or other appropriate disciplinary action. As defined by the Code of Virginia, under sections 9.1-500 et. seq. you have specific rights as they relate to this investigation.

It is the policy of the **[Bureau]**, pursuant to Garrity v. New Jersey, 385 U.S. 493 (1967) and related cases, that any admission made by you during the course of this interview will not be used against you in a subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent departmental charges.²⁰

14. Agency summarized Individual's complaints/allegations of misconduct as the below 9 numbered items. Agency investigated and addressed each of the 9 numbered complaints/allegations of misconduct in its Investigation Report of December 6, 2013.

1. **[Individual]** expected to be issued ABC license when visited by agents on August 9, 2013.
2. On August 9, 2013 one agent entered through the front door and one through the back door like they were "raiding the place".
3. On August 9, 2013, agents told **[Individual]** they were "revoking my license privileges pending a hearing."

¹⁸ A. Tab 14.

¹⁹ A. Tab 10

²⁰ A. Tab 11, pg. 1.

4. Agents issued subpoenas to [Individual's] bank by signing the documents themselves.
5. On August 9, 2013, agents held [Individual] in what they called a "criminal investigation" for three hours. [Individual] informed agents of her health problems but Agents "continued anyway, twisting my words and calling me a liar." Agents held [Individual] without allowing her to leave and did not inform [Individual] of her rights.
6. Agents seized evidence in violation of [Individual's] constitutional rights.
7. Agents rummaged through [Individual's] business records with deliberate indifference to her rights.
8. Agents used threatening language and behavior on August 6, 2013.
9. The 2012 retail application for the [name] was "lost and strung out."²¹

15. Investigator conducted an investigation of Individual's allegations concerning Grievant and Special Agent and, on December 6, 2013, issued an Investigation Report.²²

16. On December 9, 2013 Investigator issued a Report Supplement to her Investigation involving Special Agent and Grievant. This supplement addressed, among other matters, Investigator being contacted on December 9, 2013 by Individual's attorney and concerns of Individual with speaking to Investigator. Investigator also confirmed relay of this information to DDO and their conversation.²³

17. On January 28, 2014 DDO made written recommendations of dispositions to the Director addressing each of the 9 numbered complaints/allegations of misconduct addressed in the December 6, 2013 Investigation Report. DDO recommended following as to the:

- Allegation No. 6 and 7 Recommended to be found SUBSTANTIATED for Grievant only
- Allegation No. 1, 2, 3, and 8 Recommended to be found NOT SUBSTANTIATED for Grievant or Special Agent
- Allegation No. 4, 5, and 9 Recommended to be UNFOUNDED for Grievant or Special Agent²⁴

DDO recommended allegations 6 & 7 be substantiated as to Grievant. In making this recommendation DDO stated his belief that Grievant violated Individual's constitutional rights against unreasonable search and seizure, in violation of General Orders 10-Code of Conduct, General Order 12-Code of Ethics, and General Order 8-Search and Seizure. He also stated his belief Grievant violated Individual's rights when he searched and rummaged through Individual's business office during the visit to the establishment on August 9, 2013 and when he photographed various documents in the office and took those images from the premises.

18. Director reviewed DDO Recommendation and the *Investigation Report*. Director also discussed matters with HR Director and COO. Director ultimately made a determination, with concurrence of HR Director and COO, that violation of policies occurred.²⁵

²¹ A. Tab 14, pg. 3.

²² G. Tab 42; A. Tab 14.

²³ A. Tab 15, pg. 1.

²⁴ A Tab 15.

²⁵ Testimony.

19. Grievant was issued a Memorandum of Pending Disciplinary Action. Grievant received and signed a document entitled "Memorandum of Pending Disciplinary Action" on 2/6/14. This document informed Grievant the internal affairs investigation was completed and review of the investigation substantiated violations of Agency Policy, illegal search and seizure, violation of 4th amendment rights, and failure to conform to law and policy. It was further indicated that the search of an unlicensed (ABC) was not consensual and without a search warrant. As stated in this document, Grievant was afforded opportunity to review the investigative file concerning these matters and was afforded 7 business days, to submit for consideration any statement in mitigation.²⁶

20. Grievant reviewed Agency investigative file in Richmond on February 14, 2014. Grievant, via counsel, provided a letter/response on February 19, 2014 to Agency stating his response and matters in mitigation. His letter of 2/19/14 was received by Agency and taken into consideration in determining level of discipline/mitigation.²⁷

21. Grievant gave Investigator a data disc containing digital copies of the photographs he had taken at establishment on 8/9/13, including the photographs taken in the office. Grievant reported 14 photographs were taken in the establishment office on 8/9/13. The timestamps of the photographs taken in the office range from 2:10:57 p.m. until 2:27:27 p.m.²⁸

22. Grievant had a point of view camera when he and Special Agent meet with Individual on 8/9/13 at establishment. Bureau was conducting a pilot test program with point of view cameras in which agents had been directed to use these cameras and provide feedback on ease of use and quality of equipment. The point of view camera was not turned on until after Grievant and Special Agent had been on the premises for approximately fifty-five minutes. No point of view recordings were made in kitchen or office. After being turned on there was approximately a one hour recording made of matters.²⁹

CONCLUSIONS

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 of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

The Virginia Department of Alcoholic Beverage Control has promulgated General Order 10, Code of Conduct, to establish a basis of conduct for all members of the Bureau of Law Enforcement. General Order 10 provides, in pertinent part:

²⁶ G. Tabs 17 & 71.

²⁷ G. Tab 8 and G. Tab 65; A. Tab 20 and A. Tab 19, A. Tab 18.

²⁸ A. Tab 14, pg. 10.

²⁹ A. Tab 14 pg. 5.

II. POLICY

It is the policy of the Bureau of Law Enforcement to ensure that the performance of its members is characterized by lawful police actions that are carried out in an exemplary fashion. To this end, the Bureau of Law Enforcement expects its personnel to maintain the highest standards of appearance and conduct at all times, while on duty or off duty.

Violations of the agency's policy, Code of Conduct, General Orders, Memorandums, State of Virginia's DHRM Personnel Rules, Local Ordinances, laws of the Commonwealth of Virginia or the United States of America shall result in disciplinary or personnel actions as defined in this policy. The disciplinary action taken will depend on the severity of the offense, the record of the offender, and the seriousness of the consequences of the violation. If employee misconduct results in dismissal, the employee will be provided with a statement citing the reason(s) for dismissal and the effective date of the dismissal.

III. DEFINITIONS

F. DISCIPLINARY ACTIONS - Disciplinary actions may include a written notice (Group I, II, III) suspension, and reduction in pay, demotion, or dismissal/termination.

IV. DEFINITION OF PENALTIES/ TRAINING

WRITTEN NOTICE - Group according to severity of the offense ranging from a Group I to a Group III ...³⁰

OM-03 Retail Investigations (effective date: 11-06-2009) provides:

I. Policy

It is the policy of the Bureau of Law Enforcement to conduct a detailed and thorough investigation of all persons and locations for ABC licenses in a prompt and efficient manner. Investigations will adhere to the Code of Virginia, Board Regulations, Bureau Policies and Procedures, and in accordance with local ordinances. ...

III PROCEDURE:

A. RETAIL INVESTIGATIONS

19. Before a license is issued the agent should conduct a site visit to ensure sufficient inventory of qualifying items. Comments should be entered in Webcore to appear on the 805-1.³¹

3 VAC 5-50-70 provides:

A. The construction, arrangement and illumination of the dining areas and designated areas and the seating arrangements therein of a licensed establishment shall be such as to permit ready access and reasonable observation by law-enforcement officers and by special agents of the board. The interior lighting shall be sufficient to permit ready discernment of the appearance and conduct of patrons in all portions of such areas.

B. The board and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth where alcoholic beverages

³⁰ G. Tab 3; A. Tab 21.

³¹ G. Tab 11 pg. 1 and 15; A. Tab 25, pg. 15.

are manufactured, bottled, stored, offered for sale or sold, for the purpose of examining and inspecting such place.

C. In addition to special agents, other law-enforcement officers in the performance of their official duties shall be allowed free access to any retail licensed establishment for the purpose of observation of activities on those licensed premises during reasonable hours.

D. Any person who by use of threats, force or intimidation impedes or obstructs any special agent or other law-enforcement officer in the performance of his official duties from entering or remaining upon any licensed establishment shall be guilty of a violation of this regulation and shall be subject to the penalty prescribed by § 4.1-349 of the Code of Virginia.

E. For the purposes of this regulation, the term "reasonable hours" shall be deemed to include all business hours of operation and any other time at which there exists any indication of activity upon the licensed premises.

§ 4.1-100 of the Code of Virginia provides, in pertinent part:

§ 4.1-100 Definitions.

As used in this title unless the context requires a different meaning:

"Establishment" means any place where alcoholic beverages of one or more varieties are lawfully manufactured, sold, or used.

"Licensed" means the holding of a valid license issued by the Board.

"Licensee" means any person to whom a license has been granted by the Board.

§ 4.1-204 of the Code of Virginia provides, in pertinent part:

B. Retailers. -- Every retail licensee shall keep complete, accurate and separate records, in accordance with Board regulations, of all purchases of alcoholic beverages, the prices charged such licensee therefor, and the names and addresses of the persons from whom purchased. Every retail licensee shall also preserve all invoices showing his purchases for a period as specified by Board regulations. He shall also keep an accurate account of daily sales, showing quantities of alcoholic beverages sold and the total price charged by him therefor. Except as otherwise provided in subsection D. such account need not give the names or addresses of the purchasers thereof, except as may be required by Board regulation for the sale of alcoholic beverages in kegs. In the case of persons holding retail licenses which require sales of food to determine their qualifications for such licenses, the records shall also include purchases and sales of food and nonalcoholic beverages.

F. Inspection. -- The Board and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth and to the premises of both (i) every wine shipper licensee and beer shipper licensee and (ii) every delivery permittee wherever located where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold, for the purpose of examining and inspecting such place and all records, invoices and accounts therein. The Board may engage the services of alcoholic beverage control authorities in any state to assist with the inspection of the premises of a wine shipper licensee, a beer shipper licensee, or delivery permittee, or any applicant for such license or permit.

For purposes of a Board inspection of the records of any retail licensees, "reasonable hours" means the hours between 9 a.m. and 5 p.m.; however, if the licensee generally is not open to the public substantially during the same hours,

"reasonable hours" shall mean the business hours when the licensee is open to the public. At any other time of day, if the retail licensee's records are not available for inspection, the retailer shall provide the records to a special agent of the Board within 24 hours after a request is made to inspect the records.

§ 4.1-212.1. of the Code of Virginia provides, in pertinent part:

B. Any person located within or outside the Commonwealth who is authorized to sell wine or beer at retail for off-premises consumption in their state of domicile, and who is not a brewery, winery, or farm winery, may apply for a delivery permit that shall authorize the delivery of any brands of beer, wine, and farm wine it is authorized to sell in its state of domicile, in closed containers, to consumers within the Commonwealth for personal consumption.

§ 4.1-222. of the Code of Virginia provides, in pertinent part:

A. The Board may refuse to grant any license if it has reasonable cause to believe that:

1. The applicant, ... or if the applicant is a corporation, any officer, director, or shareholder owning 10 percent or more of its capital stock ... :

n. Is violating or allowing the violation of any provision of this title in his establishment at the time his application for a license is pending;

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

At the time of the 8/9/13 incident Grievant was conducting a background investigation of an ABC applicant and site visit. Grievant and Agency had concerns Corporation's license application did not provide identification of all Corporate Officers and Directors and concerns with possible non-disclosed ownership interests.³² Only one person, Individual, was stated in the application as having ownership interest. However, Agency was concerned the business license included another person's name, "W", who completed and signed the business license application and who signed the check for the corporation's license fee.³³ Additionally, on August 8, 2013 Special Agent was contacted by President of the corporate landlord who indicated he knew the owner very well, referred to the owner as "he", and upon inquiry identified "W" as the owner. Later that day the President retracted his statement that "W" was the owner and stated "W" was only a cook.³⁴

On 8/9/13 Special Agent and Grievant went to establishment for a site visit and, among other matters, to follow up on the information being gathered pertaining to ownership of the business. Both entered the establishment through the front door and, as planned, they split up. Special Agent remained in the dining area to speak with Individual and Grievant went to the back area of the establishment.

³² A. Tab 6, pg. 2.

³³ A. Tab 5, pg. 17 and A. Tab 6, pg. 2.

³⁴ A. Tab 6, pg. 3.

Office:

When Grievant was in the back of the establishment he went into the business office. There was no one in the office and Grievant stated the front door was open when he entered. Grievant described the office an approximate 8x5 foot room, unorganized, and not having been set up yet. The office contained documents, a computer, a video surveillance system, a countertop, and perhaps a desk and file cabinet. He also recalled something with drawers, but did not remember exactly what it was.³⁵

While in the office, Grievant picked up pieces of paper/documents and took photographs of them but did not remove anything from the office. Grievant opened drawers or cabinets in the office and looked at and/or photographed papers therein. In response to Investigator's question if Grievant opened drawers or cabinets in the office Grievant responded "yes".³⁶ Grievant also stated to investigator he didn't specifically remember each and everything he opened in the office but said he made a thorough examination of everything in the office. Grievant didn't see anybody when he was in the office and he did not ask permission to go in or go through matters in the office.³⁷

Grievant was asked by investigator if his actions inside the office could have been perceived as "rummaging", and responded to Investigator saying, "sure – how would you define rummaging?" Investigator replied rummaging would involve shuffling through documents and looking through documents. Grievant then stated absolutely that is exactly what he did; he was going through business records in the office.

When Investigator asked if he left the office in the same condition as when he arrived, Grievant responded to her saying not exactly, he moved papers around but did not leave it in any disarray. He indicated he did not trash the office but didn't try to put things back in such a way that she would not know that I was there.

Both Grievant and Special Agent stated to Investigator they did not physically seize or take any items from the establishment on 8/9/13. However, both reported that Grievant took photographs, including photographs taken in the office and photographs taken of the checkbook at the table.

At table:

Grievant stated that Individual, at the dining table, questioned the agents' authority to look at the business records and Grievant stated, "we told her that we did, and I remember explaining to her that it was part of the application investigation that we were looking at the business records."³⁸

Grievant made a point of view camera recording as to certain matters at the table and these were reviewed by Investigator. In the recordings "W" was objecting to agents taking documents with them at the conclusion of the meeting. Special Agent picked up a stack of documents as he motioned to leave the establishment and "W" objected. Special Agent engaged in a short debate over whether or not "W" had brought the documents to the meeting to give to agents. "W" objected and was adamant that the documents were originals and that agents could not have them and that he would make copies for agents.

³⁵ A. Tab 14, pg. 9.

³⁶ A. Tab 14, pg. 9-10.

³⁷ A. Tab 14, pg. 10.

³⁸ A. Tab 31, pg. 63-64.

“W” was shown in the point of view recording to be on a phone with “J” and telling him agents were stealing his documents. Grievant then took the documents from Special Agent, laid them on the table, looked through them, and ask a question about payroll. “W” continued to state the agents could have copies but not the originals and Grievant told “W” that they would make copies and to relax. Grievant then took photographs of the documents with his cell phone and returned the documents to “W”.³⁹

Complaint Investigation:

On October 3, 2013 Individual made a written complaint addressing what she referred to as “professional misconduct” by Grievant and Special Agent on August 9, 2013 when they met with her at establishment.⁴⁰ Subsequently, Agency Office of Professional Standards reviewed her complaint and set her complaint for investigation.⁴¹

On October 21, 2013 SAC was assigned as to conduct an Agency investigation regarding Individual’s complaints and the alleged misconduct by Grievant and Special Agent.⁴² Individual’s complaints/allegations of misconduct by Grievant and Special Agent were summarized as the following:

1. [Individual] expected to be issued ABC license [when visited by agents on August 9, 2013.
2. On August 9, 2013 one agent entered through the front door and one through the back door like they were “raiding the place”.
3. On August 9, 2013, agents told [Individual] they were "revoking my license privileges pending a hearing."
4. Agents issued subpoenas to [Individual’s] bank by signing the documents themselves.
5. On August 9, 2013, agents held [Individual] in what they called a "criminal investigation" for three hours. [Individual] informed agents of her health problems but Agents "continued anyway, twisting my words and calling me a liar." Agents held [Individual] without allowing her to leave and did not inform [Individual] of her rights.
6. Agents seized evidence in violation of [Individual’s] constitutional rights.
7. Agents rummaged through [Individual’s] business records with deliberate indifference to her rights.
8. Agents used threatening language and behavior on August 6, 2013.
9. The 2012 retail application for the [name] was “lost and strung out.”⁴³

Grievant and Special Agent were notified in writing they were the subject of an internal investigation into the alleged improper conduct during their August 9, 2013, interaction with Individual.⁴⁴

Investigator talked with Individual by phone and attempted to set up an interview with Individual concerning her complaint. Individual told Investigator she needed to speak with her attorney before talking with Investigator. Investigator attempted a number of times to

³⁹ A. Tab 14, pg. 9.

⁴⁰ A. Tab 7.

⁴¹ A. Tab 8 and A. Tab 9.

⁴² A. Tab 8.

⁴³ A. Tab 14, pg. 3.

⁴⁴ A. Tab 10 pg. 1-2.

communicate with Individual and talked with Individual's Attorney seeking to secure an interview. Investigator additionally tried to secure any video surveillance footage that may have existed of the 8/9/13 matter.

Investigator interviewed Grievant on November 6, 2013. On 11/6/13, prior to the interview with Grievant, she provided and discussed with Grievant the Administrative Proceeding Rights form. After Grievant stated he was not familiar with §§ 9.1-500 *et seq.* addressed in the form, SAC offered to and did use a computer to look up the sections, briefly discussed several of the referenced Code sections, and she afforded him opportunity to review same indicating, "So you can go into that if you want to read it." She also asked if he had any other questions and Grievant replied, "No."⁴⁵

Investigator interviewed Grievant and Special Agent. After reviewing the point of view recording made she determined it was unnecessary to interview two of the three males recorded. Additionally, she did not need to interview the third male captured on the point of view camera as he did not accompany Grievant during his site inspection and he was on the point of view recording also.⁴⁶

After completion of her investigation, an *Investigation Report* dated December 6, 2013 was issued. The *Report* addressed each of the nine allegations of misconduct alleged by Individual. Among other matters, the *Investigation Report* indicated that, while Grievant was in the back of the establishment, he went into the business office, the door was open, he didn't see anyone when he was there, didn't ask permission to enter, and no one was in the office. Grievant stated he picked up and examined pieces of paper lying about, took photographs of some. Grievant opened drawers and/or cabinets in the office but didn't specifically remember each and everything he opened in the business office but made a thorough examination of everything and the office.⁴⁷

On December 9, 2013 Individual's attorney contacted Investigator concerning certain matters. During their conversation attorney put off/declined Investigator's request for to interview Individual. Investigator confirmed in the *Report Supplement* of 12/9/13 that she reported this matter to DDO who advised she turn in her *Investigative Report* without having an interview of Individual but to write a supplement to the *Investigative Report* if Individual should agree to a future interview.⁴⁸

Grievant raises a number of concerns related to Investigator and the investigation. Grievant testified as to his concerns that SAC has had no training in internal affairs investigations and alleging she was promoted from Special Agent to SAC without having been afforded the opportunities to grow, develop, and educate herself in this area and field of expertise. He contends that SAC should have not been the assigned as the Investigator and she conducted the investigation improperly.

GO #8 provides that the Office of Professional Standards ... "will assign the investigation number and a determination will be made as to who will be assigned the investigation. If determined that the complaint will be investigated at the Regional level, it will be returned to the

⁴⁵ A. Tab 31 pg. 6-8.

⁴⁶ Testimony and A. Tab 14.

⁴⁷ A. Tab 14 pg. 9-10; A. Tab 31, pg. 71-72.

⁴⁸ A. Tab 15

SAC/Supervisor to handle/assign. The Office of Professional Standards will investigate formal complaints not assigned to the field.”⁴⁹

Two letters dated 10/21/13 were sent from the Office of Professional Standards.⁵⁰ One letter was sent to SAC confirming mailing of the original Acknowledgement Letter to complainant and stated the complaint has been reviewed and a determination made it can be dealt with most effectively at the regional level. The letter also stated, “I am requesting this matter be assigned to the proper supervisor for investigation.” The second letter of this date was sent to Individual, (i.e. the complainant) confirming receipt of the complaint and that an investigation was being conducted. This letter also stated, “In the meantime, should a question arise, please feel free to contact [SAC] as she is the individual assigned to investigate your complaint.”

Grievant was concerned Investigator did not interview Individual and was not able to secure a viewing of any surveillance tapes that may have been made at establishment on 8/9/13. The evidence indicates that Investigator did, on multiple occasions attempt to do so and made multiple contacts with Individual and Individual’s Attorney. Grievant had access to and reviewed the point of view recording which recorded matters with persons at the table in the establishment. Investigator made the determination, as the matters at the table with the other persons were recorded, there was no need to interview the other persons.

Investigator documented in her Report Supplement of 12/9/13 Individual’s Attorney contacting her that day and their discussions as to an interview. She also documented relaying this information to DDO and being directed to turn in the investigation report and if Individual agreed to a future interview that Investigator would write a supplement to the report.⁵¹

GO #8 provides that Administrative investigations should be expedited, the investigative report will be a comprehensive review of the facts and circumstances uncovered during the investigation, and there will be no recommendation made by the investigator as to the disposition of any allegations.⁵²

DDO Recommendation:

Following review of the Investigation Report, by memorandum dated January 28, 2014, DDO made a recommendation to Director based on the recording and information obtained by Investigator. DDO recommended the following as to the 9 numbered complaints/allegations of misconduct investigated by Investigator/SAC:

- Allegations No. 6 and 7 be SUBSTANTIATED for Grievant only.
- Allegations No. 1, 2, 3, and 8 be NOT SUBSTANTIATED for Grievant or Special Agent.
- Allegations No. 4, 5, and 9 be UNFOUNDED for Grievant or Special Agent.⁵³

DDO further recommended the investigation be completed as it pertains to Special Agent. Complaints/allegations of misconduct No. 6 and 7, which DDO recommended be SUBSTANTIATED for Grievant, provided:

- No. 6 ... (*Agents seized evidence in violation of Individual’s constitutional rights*)
- No. 7 ... (*Agents rummaged through Individual’s business records with deliberate*

⁴⁹ A. Tab 26.

⁵⁰ A. Tabs 8 and 9.

⁵¹ A. Tab 15 pg.1.

⁵² A. Tab 26.

⁵³ G. Tab 2; A Tab 15 pg.2

indifference to her rights).

DDO stated it was his belief Grievant violated Individual's constitutional rights against unreasonable search and seizure, in violation of General Orders 10 - Code of Conduct, General Order 12 - Code of Ethics, and General Order 8 - Search and Seizure when he searched and rummaged through her business office (beyond plain view) during the course of the visit to the establishment on August 9, 2013 and when he photographed various documents in the office and took those images from the premises.

DDO recommended that Grievant be notified of pending disciplinary action for the purposes of giving him an opportunity to provide a response in mitigation.⁵⁴

Director:

Director reviewed the *Investigation Report*, DDO Recommendation, and met with HR Director and COO conferring on matters. All agreed with recommendation for disciplinary action. Director with concurrence determined violation of policies occurred with the search of the office and seizure of photographic evidence, both done without consent. Ultimately, the decision to terminate was a collaborative decision involving Director, COO, and HR Director.⁵⁵

Director had a *Notice of Disciplinary Action* issued to Grievant in which Grievant was afforded opportunity to respond and provide mitigating circumstances. Grievant did respond in writing by document his attorney drafted. Director met with COO and HR Director and consideration was given to Grievant's response which his attorney drafted.⁵⁶

Agency was concerned that Grievant entered the office of an applicant for an ABC License, searched the office, took photographic evidence from that search, all without authority and without permission. Agency was concerned that while Grievant's actions and inspection would have been authorized for an ABC Licensee they were not authorized for an investigation of an applicant for an ABC license. Agency expressed their concern and belief that Grievant's entry into the office as part of an applicant investigation for an ABC license is not covered under general inspection provisions as it would be for a licensee/holder of an ABC license. Agency further expressed concern that there was no lawful purpose to be in the office without applicant present and consenting.

Agency determined Grievant engaged in the behavior which was described in the written notice. Director testified to a significant amount of discussion between COO, HR Director, and Director as to the appropriate discipline and ultimately it was decided to issue a Group III with termination. Among other matters, consideration was given to effectiveness and credibility issues, what the effect of Grievant's action could be on Agency, risk to Agency reputation and effectiveness, liability of Agency, the sensitive nature of the highly industry regulated, mitigating factors including length of service and other matters, and Grievant's written response. After consideration of the facts, reports, recommendations, Grievant's written statement, aggravating circumstances, and mitigating circumstances, the decision was made to issue the Group III with termination.

Instructions, policy, and the 4th:

⁵⁴ G. Tab 2; A. Tab 15.

⁵⁵ Testimony.

⁵⁶ A. Tab 19 and testimony.

Grievant contends he had a right to search based upon regulations, statutes, and the administrative search exception to the Fourth Amendment for highly regulated businesses. He also contends that he had consent, expressed and/or implied.

Agency introduced testimony that it has not instructed, trained, or permitted its agents to conduct warrantless, non-consensual searches of license applicants or their facilities.⁵⁷ Furthermore, Agency indicated a site visit of a premise to be licensed, during the inspection process, has never risen to the level of an inspection of a licensed premise for which there is statutory and regulatory authority.

Grievant was at the establishment on August 9, 2013, as an employee of the Agency to conduct the business of Agency. As such, he was required to follow instructions and/or policy. Agent was there to review the application file with Individual and to conduct a site visit. A "Site Visit" is provided for in OM-03 Retail Investigations, § III. A.19. which states before a license is issued the agent should conduct a site visit to ensure sufficient inventory of qualifying items ...⁵⁸

Agency indicates that it has not instructed or permitted its agents to conduct warrantless, non-consensual searches of license applicants or their facilities. Grievant contends he had statutory and regulatory authority for his actions and addressed § 4.1-100 and § 4.1-204 of the Code of Virginia.

§ 4.1-100 Code of Virginia defines "Licensed" to mean the holding of a valid license issued by the Board and "Licensee" means any person to whom a license has been granted by the Board.

§ 4.1-204. B. requires every retail licensee to keep and preserve certain records and accounts but does not require the same from applicants.

§ 4.1-204. F. of the Code of Virginia addresses inspection and provides free access to every place in the Commonwealth and to the premises of both (i) every wine shipper licensee and beer shipper licensee and (ii) every delivery permittee for the purpose of examining and inspecting such place and all records, invoices and accounts therein. It further states the Board may engage the services of alcoholic beverage control authorities in any state to assist with the inspection of the premises of a wine shipper licensee, a beer shipper licensee, or delivery permittee, or any applicant for such license or permit.

§ 4.1-212.1. B. of the Code of Virginia references who may apply for a delivery permit. § 4.1-209.1. of the Code of Virginia addresses shipper's license. There is no evidence Corporation is a wine shipper licensee, beer shipper licensee, or a delivery permittee or has made application to be such. The evidence in this case is that Corporation made application for "Wine & Beer on & off premises and Keg, Mixed Beverage On" Licenses.⁵⁹ As such, § 4.1-204. F. of the Code of Virginia, which specifically address applicant for a wine shipper licensee, a beer shipper licensee, or delivery permittee, is not applicable in this cause.

⁵⁷ Testimony of Director.

⁵⁸ G. Tab 11 pg. 1 and 15; A. Tab 25, pg. 15.

⁵⁹ G. Tab 13.

The U.S. Supreme Court has ruled that the rights guaranteed by the Fourth Amendments generally apply equally in state courts via the Fourteenth Amendment, which guarantees to citizens of every state the right to due process and equal protection of the laws.⁶⁰ Generally, searches conducted without probable cause and a search warrant are unconstitutional except in certain situations and exceptions. The expectation of privacy is of strong consideration and what is knowingly exposed to the public is not generally subject of Fourth Amendment protections.

A number of cases address administrative searches and the heavily regulated industry administrative exception to the Fourth Amendment's warrant requirement. It is not contested that the liquor industry is such a heavily regulated industry. In *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) addressing a catering business that had a liquor license the Court held that because the liquor industry had long been regulated, Congress did have the power to authorize warrantless searches in the regulatory schemes that it passed. *Colonnade*, 397 U.S. at 76. In *United States v. Biswell*, 406 U.S. 311, 314-315 (1972) the Court noted that there would be no question of the validity of the search if the business in this case had been licensed by the liquor industry and indicated, when inspecting a business in a pervasively regulated industry, "the legality of the search depends not on consent but on the authority of a valid statute." Later, in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) the court addressed certain differences between the *Colonnade* and *Biswell* cases and noting that a businessman engaged in such federally licensed and regulated enterprises accepts the burdens as well as the benefits of their trade, whereas the petitioner in this case was not engaged in any regulated or licensed business. Businessmen in a regulated industry in effect consent to the restrictions placed on him.

It is not contested that Corporation had filed an application for a license but did not have a license to sell any form of alcohol. Corporation could not legally sell alcohol on the basis of its application. As an applicant for a license to enter into a highly regulated industry, the liquor industry, Corporation was not engaged in the liquor business nor receiving benefits of that business.

Grievant contends Applicants for licenses are held to the same standard as licensees citing Code of Virginia § 4.1-222. A. 1. n. which indicates the Board may refuse to grant any license if it has reasonable cause to believe that the applicant ... is violating or allowing the violation of any provision of this title in his establishment at the time his application for a license is pending.

Grievant's counsel in closings raises *Hill v. Commonwealth of Virginia*, 47 Va. App. 442 (2006) in support of his rejection of the distinction between licensed and unlicensed. However, it is noted that this matter is differentiated on a number of grounds, including, but not limited to the fact that the appellants were and had been actively engaged in a business (i.e. the production, storage, and sale of goat cheese) and because of this a sanitary/health inspection of the goat cheese facilities was attempted. Additionally, the "Virginia Food Act", § 3.1-339 of the Code of Virginia (since repealed) provided for access by agents re. examinations of samples. Denial of access for the purposes authorized by §3.1-399 was specifically prohibited by § 3.1-388 of the Code of Virginia (Repealed effective October 1, 2008). And, as the couple were and had been actively engaged in the ongoing business of producing, storing, and selling their cheese to the public, there were health concerns in the ongoing protection of the food supply.

⁶⁰ *Wolf v. Colorado*, 338 U.S. 25 (1949).

Appellants in *Hill* argued that the Fourth Amendment bars warrantless searches of premises operated by “homeowners and occupants of a farm not required by law to obtain a license to sell . . . goat cheese made thereon.” The law does not allow for the sale of alcohol without a license but requires there be a license granted before entering into the business of the sale of alcohol.

There is no statutory or regulatory provision that an applicant automatically forfeits fourth amendment rights by merely applying for a license. There is insufficient evidence to find that ABC applicants and ABC licensees and permittees are equally treated and/or equally held to the same standards regarding Fourth amendment rights and the Administrative Exception for Heavily Regulated Industries.

There is insufficient evidence that Individual or anyone else gave consent, expressed or implied, to Grievant’s search of the office, opening of drawers and/or cabinets, and photographing of documents in that office. Grievant did not ask permission to enter the office and do so.⁶¹ Implied consent is generally defined to exist when, considering the “totality of circumstances”⁶², circumstances exist which would lead a reasonable person to believe that consent had been given, although no direct, express or explicit words of agreement had been uttered. There is insufficient evidence to find that Individual or anyone else impliedly consented by failing to object to Grievant’s actions as there is no evidence Individual or any other person knew or was even aware that Grievant had entered the office and/or was searching/opening drawers and/or cabinets.

Witness:

Witness addressed certain matters as to search and seizure and internal affairs matters. Witness opined you can’t fire anyone for violations of search and seizure rules testifying he has never seen anyone fired for search and seizure violations. However, there is concern as to the need to address cases individually upon the facts and circumstances of each case. This cause involves an Agency’s termination of an employee for failure to follow instructions and/or policy and other-violation of constitutional rights. The Hearing Officer is charged with determining, based upon the totality of the evidence admitted, whether issuance of the Written Notice with termination was warranted and appropriate under the circumstances.

Agencies are required to act in a lawful and responsible manner and may be held liable for the acts of their employees. Management has the right and the duty to manage the business of the Agency and to manage the actions of its employees. Corporation, of which Individual was sole shareholder, was an applicant for “Wine & Beer on & off premises and Keg, Mixed Beverage On” licenses to be issued by Agency.⁶³ Agency acknowledged rights as per the administrative exception to the Fourth Amendment’s warrant requirements as to an ABC licensee and/or permittee. However, Agency does not hold it possesses such rights, has not promulgated such rights, or instructed it employees they could exercise such rights as to applicants for “Wine & Beer on & off premises and Keg, Mixed Beverage On” licenses.

On 8/9/13 Corporation was an Applicant and was not a holder of any license or permit issued by Agency. Agency has determined it does not have rights per the administrative exception for highly regulated industries as to applicants for such licenses. Agency has not

⁶¹ A. Ex. Tab 31, pg. 46.

⁶² *United States v. Jenkins*, 986 F.2d 76 (4th Cir. 1993).

⁶³ G. Tab 13.

promulgated policy applying such rights or allowing its employees to apply such rights to applicants.

Witness also testified to being familiar with the rules, requirements and procedures in doing internal affairs investigations, depending on the department. However, in this cause Witness expressed he does not have experience with internal investigations conducted by Agency, has not review policy of Agency involving internal affairs investigations, and has only reviewed some of the investigation documents in this case.

Retaliation:

Grievant claims, "The investigative actions, disciplinary determinations, and the process followed by [DDO] and [SAC] are tainted by bias that exists from their knowledge that [Grievant] had recently become a "Whistle blower" and made multiple reports of misconduct by employees of Virginia ABC who were close friends of theirs.⁶⁴ Grievant also alleges, "The Agency's true motivation behind seeking this termination is in response to [Grievant's] reporting of fraudulent conduct of officers who have a close relationship with upper management."⁶⁵

Grievant raised an incident concerning a tape recording which occurred in the latter part of 2010/first part of 2011. He contends his termination was due to having reported information to DDO (when DDO was then a Special Agent in Charge) regarding allegations that an officer was alleged to be involved in unethical and/or illegal wrong doings. Grievant stated he related information to DDO he received from an informant. DDO (then a Special Agent in Charge) told Grievant to make a recording if he talked to the person again. Subsequently Grievant did so and gave the tape recording to DDO to listen to. Grievant testified he also said he didn't want to be involved. Grievant contends DDO, after listening to a part of the tape, gave the tape back to Grievant and said they didn't need [___] like this floating around the office.

DDO (who was the then SAC) testified Grievant did play an audio recording of an interview of a suspect involved with illegal moonshine who alleged potential wrongdoing of an officer on the recording. DDO indicated told Grievant to bring in the person so he could talk to him or arrange for a meeting so he could talk to the person. DDO testified to concerns Grievant was not a fan of the officer. While DDO told Grievant to set up a meeting with the person giving information, DDO indicated Grievant never did so. DDO wanted a meeting to determine matters and circumstances related to the allegations and ascertain validity and other matters related to the taped claims being made.

Concern is given to the time of the incident which was alleged as around late 2010/early 2011. Grievant was asked to get the recording by DDO who, after listening to part of the recording, asked for a meeting with the person on the tape. Grievant was given back the recording. Grievant's testimony was that he indicated he did not want to get involved. Before she became SAC, Grievant talked to her about this.

Director testified he was aware of the matter and he did not initiate an investigation due to concerns as to, the timeliness of when he heard of the matters and base information concerns. He was concerned there was no ability of the field supervisor to develop further information from the person who provided it.

⁶⁴ Tab 2, pg. 29.

⁶⁵ Tab 2, pg. 33.

Grievant contends that DDO's conduct towards him changed when he reported the allegation and their relationship from that point was very strained. Grievant contends that the present disciplinary matter is due to or affected by Retaliation and his having reported and raised the above allegations.

From Grievant's report of the misconduct in about late 2010 until this current matter he received no disciplinary action or other adverse employment action. Grievant does present a January 2012 e-mail from DDO, his then SAC, complaining of a dress code violation in his wearing "crock slippers" to work December 19, 2011.⁶⁶ However, there is no indication that this incident resulted in anything else but this e-mail.

A taxation matter with Department is also raised by Grievant as indicative of matters relating to whistleblowing. By letter dated 12-7-13, Individual, in response to Department's "Notice of Personal Responsibility" regarding LLC, noted reasons she believed she was not responsible. Among the reasons stated she indicated, "It is my personal belief that you are involved with those agents in an effort to keep me from obtaining my ABC License because I wrote letters complaining of those very agent's behavior." "... ONLY REASON YOU BRING THIS UP NOW IS UNDER REQUEST BY [GRIEVANT] & [SPECIAL AGENT]." Additionally, in her attorney's letter of 12/18/14 it was noted Individual was concerned that a Notice of Personal Responsibility was sent at the suggestion or request of certain agents of Agency after she filed complaints concerning improper conduct.⁶⁷

Department responded by letter of December 31, 2013. On 1/3/14 SAC indicated to Grievant she noted the original letter was copied to the Board and COO so she forwarded the response up the chain of command for their information. Grievant contends the Agency chain of command from his SAC to Director refused to investigate matters alleged in Individual's and her attorney's letters to Department regarding him.

A media FOIA request was made concerning communications between Department, Grievant, and Special Agent. Grievant raises the 2/12/14 Agency response that Agency was not able to accommodate the media's FOIA request as such records of communications would have occurred during the course of the administrative investigation for a license application and therefore were exempt from FOIA per § 2.2-3705.3 of the Code of Virginia. Grievant challenges this and not conducting a formal investigation of the allegations made to Department.⁶⁸

Retaliation is defined in §9 of the *Grievance Procedure Manual* as "Adverse employment actions taken by management or condoned by management because an employee participated in an activity recognized as protected in §4.1(b). §4.1(b) of the *Grievance Procedure Manual* addresses the following matters:

1. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations;
2. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;
3. Arbitrary or capricious performance evaluation;
4. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such law to a government authority, seeking to change any law before Congress or General Assembly, reporting an incidence of fraud, abuse, or gross

⁶⁶ G. Tab 58.

⁶⁷ G. Tab. 61.

⁶⁸ G. Tabs 59 & 60.

- mismanagement, or exercising any right otherwise protected by law;
5. Informal discipline

To establish retaliation Grievant must show (1.) he engaged in a protected activity; (2.) he suffered an adverse employment action; and (3.) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.⁶⁹ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁷⁰

While evidence indicates Grievant engaged in a protected activity, there is insufficient evidence to find a nexus or causal link existing between the protected activity and the adverse employment action. Agency initiated an investigation into allegations due to a complaint of Individual made to Governor. The complaint and investigation ultimately gave rise to facts which the disciplinary action.

Agency has presented a legitimate non-retaliatory business reason for the adverse action and there is insufficient evidence to find that Agency's stated business reason was a mere pretext or excuse for retaliation.

Upon consideration of all the evidence presented in this cause, there insufficient evidence to indicate the Group III Written Notice with termination was a mere pretext or excuse for retaliation. For the reasons stated herein, Retaliation is not found in this cause and there is insufficient evidence to find issuance of the Group III Written Notice with termination was due or related to retaliation.

§9.01-500 et seq. - Law Enforcement Officers Procedural Guarantee Act

Grievant contends Agency failed, as required, to provide him notification of rights set forth in the Law Enforcement Officers Procedural Guarantee Act (§ 9.1-500 et. seq. of the Code of Virginia) and thus he was denied due process and the opportunity to proceed as provided therein.

Grievant was given a written document entitled ADMINISTRATIVE PROCEEDING RIGHTS. This document indicated among other matters, "As defined by the Code of Virginia, under sections 9.1-500 et seq. you have specific rights as they relate to this investigation."⁷¹ On November 6, 2013 Grievant signed the ADMINISTRATIVE PROCEEDING RIGHTS document which stated, "The undersigned acknowledges that he/she was informed of the above rights".

SAC and Grievant, in their meeting on November 6, 2013 discussed the ADMINISTRATIVE PROCEEDING RIGHTS and specifically discussed § 9.1-500 et seq. of the Code of Virginia which was addressed therein. SAC indicated to Grievant they could look Code Sections up on the computer and did so at the meeting. SAC and Grievant discussed the referenced sections 9.1-500 et seq. briefly and SAC then offered, "So you can go into that if you want to read it" and Grievant acknowledged, "Okay." Then, when asked if he had any other

⁶⁹ *E.g.*, *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir: 2000).

⁷⁰ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248. 255 n.10 (1981) (Title VII discrimination case).

⁷¹ A. Tab 11, pg. 1.

questions Grievant said “no”.⁷² Additionally, in response to questioning at hearing, Grievant indicated in the affirmative that a part of his job as a law enforcement agent is to be able to read and research and interpret statutory code, the law, and he knows where to find the law if he needs to look it up.

Prior to being discharged Grievant was notified in writing on October 24, 2013 that he was the subject of an internal investigation, the nature of the investigation, and the name and rank of the Investigator.⁷³ Grievant was aware of the allegations being investigated and addressed the allegations in his *Written Response to Allegations* dated November 12, 2013.⁷⁴ In the *Memorandum of Pending Disciplinary Action* Grievant signed, which was dated February 4, 2014, Agency gave Grievant a written notice of pending disciplinary action, the allegations, and the underlying facts. This memorandum afforded Grievant seven (7) business days to respond and provide mitigating circumstances to be considered in determining the appropriate level of discipline. Grievant was afforded opportunity to review the investigation.⁷⁵ Additionally, Grievant obtained the assistance of counsel who on February 18, 2014 filed a written response to DDO (and copied to Director) on behalf of Grievant.⁷⁶

Grievant was informed in writing by Agency on 11/6/13 that he had rights as defined by the Code of Virginia, under §9.1-500 et seq. and a copy of the statutes was called up on the computer and offered to Grievant to further read prior to his signing of the document. Prior to discharge Grievant had the assistance of counsel.

Upon the totality of the evidence presented, there is insufficient evidence to find Grievant was denied due process or that Agency did not act in compliance with the Law Enforcement Officers Procedural Guarantee Act (§9.1-500 et seq. of the Code of Virginia).

Mitigation:

Va. Code § 2.2–3005.1 authorizes a hearing officer to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resources Management ...".⁷⁷ The hearing officer must receive and consider evidence in mitigation or aggravation of any offense charged by an agency.⁷⁸

The *Rules for Conducting Grievance Hearings* provide that a hearing officer is not a “super-personnel officer” and, therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy. A hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness and, if the hearing officer mitigates the Agency’s discipline, the hearing officer is charged with stating in the hearing decision the basis for mitigation.

Grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the “exceeds the limits of reasonableness”

⁷² A. Tab 31, pg. 6-8.

⁷³ A. Tab 10, pg. 1.

⁷⁴ A. Tab 13, pg. 1 & 2.

⁷⁵ A. Tab 16.

⁷⁶ A. Tab 18.

⁷⁷ Va. Code § 2.2-3005.

⁷⁸ Va. Code § 2.2-3005 (C)(6).

standard. The Agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.⁷⁹

The evidence indicates that Agency gave consideration to mitigating and to aggravating circumstances. Based upon review of all the evidence in this cause, the Hearing Officer finds the issuance of a Group III Written Notice with termination does not exceed the limits of reasonableness.

CONCLUSION

For the reasons stated above, based upon the evidence presented at hearing, Agency has proven, by a preponderance of the evidence, that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

Furthermore, Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with termination was warranted and appropriate under the circumstances and Agency's discipline does not exceed the limits of reasonableness.

DECISION

For the reasons stated above, the Agency's issuance to Grievant of a Group III Written Notice with termination is **UPHELD**.

APPEAL RIGHTS

As the Grievance Procedure Manual and Rules for Conducting Grievance Hearings set forth in more detail, this hearing decision is subject to administrative and judicial review. Requests for review may be initiated by electronic means such as facsimile or e-mail. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

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

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

2. A challenge that the hearing decision is inconsistent with state policy or Agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority

⁷⁹ Rules for Conducting Grievance Hearings, § VI. (B.)(2.).

is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director, Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.

3. A challenge that the hearing decision does not comply with grievance procedure and/or the *Rules for Conducting Grievances Hearings* as well as a request to present newly discovered evidence is made to the Office of Employment Dispute Resolution. This request must refer to the specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed, or e-mailed.

A party may make more than one type of request for review. All requests for review must be made in writing, and **received** by the administrative reviewer, within **15 calendar days** of the date of the original hearing decision. "Received by" means delivered to, not merely postmarked or placed in the hands of a delivery service. (Note: the 15 calendar-day period begins with the date of issuance of the decision, not receipt of the decision.) However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision.) A copy of each challenge or appeal must be provided to the other party.

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

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

Judicial Review of Final Hearing Decision: §7.3(a) of the Grievance Procedure Manual provides ***within thirty days of the final hearing decision***, either party may seek review by the Circuit Court on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. §7.3(a) further provides neither the hearing officer nor the Department of Human Resource Management (or any employee thereof) shall be named as a party in such an appeal. A copy of your notice of appeal must be provided at the time of filing to the other party and to Employment Dispute Resolution. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

Copy of this decision has been e-mailed to:
Grievant
Agency Advocate at Hearing

COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

Remand Decision Issued: March 21, 2015

**In the matter of: Grievance Case No. 10378 and
EDR Ruling No. 2015-4083 (February 11, 2015)**

REMAND DECISION

In Ruling Number 4083 (February 11, 2015) the Office of Employment Dispute Resolution, Department of Human Resource Management, remanded the hearing officer's decision for further consideration of the mitigating factors presented by Grievant. EDR's Administrative Review provided:

As EDR cannot determine from the hearing decision whether the hearing officer considered the evidence presented as to potential mitigating factors in making his decision, the hearing decision must be remanded to the hearing officer for further consideration of the mitigating factors presented by the grievant.

As per EDR's remand, Hearing Officer's further consideration of the mitigating factors presented by Grievant is herein addressed together with consideration given to applicable statutes, cases, law, the *Grievance Procedure Manual*, and the *Rules for Conducting Grievance Hearing*, including:

§ 2.2-3005 of the Code of Virginia, 1950, as amended provides in pertinent part:

C. Hearing officers shall have the following powers and duties:

6. Receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management pursuant to § [2.2-1202.1](#);

Rules for Conducting Grievance Hearing and the *Grievance Procedure Manual* (promulgated by The Office of Employment Dispute Resolution, Department of Human Resource Management) provide, in pertinent part:

§ VI. of The Rules for Conducting Grievance Hearings

A. General

Under the grievance statutes, management is reserved the exclusive right to manage the affairs and operations of state government. In addition, challenges to the content of state or agency human resource policies and procedures are not permitted to advance to a hearing. Thus, in fashioning relief, the reasonableness of an established policy or procedure itself is presumed, and the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective he believes it may be.¹² However, the hearing officer may order relief to remedy

the application of a policy when policy is misapplied, unfairly applied, or when that application is inconsistent with law or with another controlling policy.

Furthermore, a hearing officer is not a "super-personnel officer."¹³ Therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.

In general, the hearing officer is not limited to the specific relief requested by the employee on the Form A, as long as the relief granted is consistent with law, policy, and the grievance procedure. When the grievance involves a disciplinary matter, the hearing officer may uphold or reverse the disciplinary action challenged by the grievance, or, in appropriate circumstances, modify the action; the hearing officer may also order reinstatement of the grievant with back pay for the appropriate period. The awardable period may not extend back beyond the 30 calendar day statutory period preceding the initiation of the grievance.¹⁴

All remedies provided by a hearing officer in his/her decision must conform to law, policy, and the grievance procedure.

B. Disciplinary Actions

1. Framework for Determining Whether Discipline was Warranted and Appropriate

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁷ To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determination had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

¹² Cf. Pulliam v. Coastal Emergency Services, 257 Va. 1, 9, 509 S.E. 2d 307, 311 (1999) (citing to the "well-established principle" that all statutes are presumed to be constitutional, and that unless "plainly repugnant" to the state or federal constitution, the wisdom or propriety of a statute is for the legislature, not the courts, to decide).

¹³ Cf. DeJarnette v. Corning, 133F.3d 293, 299 (4th Cir. 1998) ("Title VII is not a vehicle for substituting the judgment of a court for that of the employer").

¹⁴ Compare Brinkley-Obu v. Hughes Training, Inc., 36 F. 3d 336 (4th Cir. 1994) in context of a Title VII or Equal Pay Act violation, relief is available only for the designated statutory time) with Va. Code 2.2-3003(C) (in context of an employee grievance, designated time to file is 30 calendar days).

¹⁷ Grievance Procedure Manual, § 5.8.

When a disciplined employee asserts that the discipline was issued for an improper reason,¹⁸ the employee is determined to be raising an affirmative defense and it is the employee's burden to prove the affirmative defense.¹⁹ The agency has no burden to disprove the affirmative defense.²⁰

If the agency does not prevail as to any of the elements (i) through (iii) above, the disciplinary action should not be upheld. If the agency prevails on all three elements, the hearing officer must then consider whether the grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances. See Mitigating and Aggravating circumstances below.

In reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.²¹ Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.²² (See Mitigating and Aggravating circumstances below.)

When the hearing officer sustains fewer than all of the agency's charges, the hearing officer may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process or proceedings before the hearing officer that it desires that a lesser penalty be imposed on fewer charges.²³

¹⁸For example, an employee might argue that the disciplinary action violates law or was otherwise discriminatory or retaliatory.

¹⁹See *Edwards v. Dep't of Veterans Affairs*, 100 M.S.P.R. 437, 2005 MSPB LEXIS 6557 (2005).

²⁰See *id.*

²¹In *LaChance v. M.S.P.B.*, 178 F.3d 1246 (Fed. Cir. 1999), the court noted that "It is a well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency." *Id.* at 1251 (citing *Miguel v. Department of the Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984)); see also *Beard v. General Serv. Admin.*, 801 F.2d 1318, 1321, (Fed. Cir. 1986) ("[T]he employing (and not the reviewing) agency is in the best position to judge the impact of employee misconduct upon the operations of the agency . . ."); *Hunt v. Department of Health and Human Servs.*, 758 F.2d 608, 611 (Fed. Cir. 1985) ("Determination of an appropriate penalty is a matter committed primarily to the sound discretion of the employing agency.").

²²*Cf. Davis v. Department of Treasury*, 8 M.S.P.R. 317 (1981) (the Merit Systems Protection Board (MSPB) "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"). See also *Mings v. Department of Justice*, 813 F.2d 384, 390 (Fed. Cir. 1987) (The MSPB "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's actions appears totally unwarranted in light of all factors.")

²³*Cf. Lachance*, 178 F.3d at 1260.

2. Mitigating and Aggravating Circumstances: DHRM *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." By law, the hearing officer must "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency."²⁵ Examples of "mitigating circumstances" to be considered by the hearing officer include, but are not limited to:

- whether an employee had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule;²⁶
- whether the discipline is consistent with the agency's treatment of other similarly situated employees; or
- whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.

In making such a determination the hearing officer must give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness.²⁷ 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.

The grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The agency has the burden to demonstrate any aggravating circumstances that may negate any mitigating circumstances.

§ 5.9 of the *Grievance Procedure Manual* provides, in pertinent part, as follows:

In hearings contesting formal discipline, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agencies discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the agency's discipline exceeds the limits of reasonableness (see also *Rules for Conducting Grievance Hearings*).

²⁵Va Code § 2.2-3005(C)(6).

²⁶However, an employee may be presumed to have notice of written rules if those rules have been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.

²⁷*Cf. Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 302 (1981).

ADDITIONAL CONSIDERATIONS

§ 2.2-3005 (C)(6) of the Code of Virginia charges the hearing officer with receiving and considering evidence in mitigation or aggravation of any offense charged. The grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The agency has the burden to demonstrate any aggravating circumstances that may negate any mitigating circumstances.

There is no requirement under the grievance procedure that a hearing officer discuss the testimony of each witness who testifies a hearing or address each piece of evidence presented by the parties.

Further consideration of mitigating circumstances raised in this cause is addressed herein including:

- Grievant contends the discipline imposed was not reasonable.
- Grievant raises "Free Access" and that he believed he had the same authority to search an applicant's premises as he had to search a licensee's premises and was never informed (by policy or otherwise) he did not.
- Grievant contends inconsistent discipline.
- Grievant contends he was a Whistle Blower, raises Retaliation, and claims his discipline was not free of improper motive.
- Grievant contends Agency failed to investigate defamatory claim filed concerning him.
- Grievant raises his long employment history with Agency, having no disciplinary history, and that had received notations of "a very talented agent" and "high contributor."

This matter was initially brought to Agency's attention as a result of a citizen's complaint. Her complaint led to an investigation which ultimately gave rise to disciplinary action. The Investigation and its Report addressed, essentially, nine allegations. Two of the allegations were recommended to be substantiated as to Grievant alone and provided the basis for the disciplinary action (i.e. Group III with termination for "Failure to follow instructions and/or policy" and "Other – Violation of Constitutional Rights"), to-wit:

1. Grievant seized evidence in violation of Individual's constitutional rights and
2. Grievant rummaged through Individual's business records with deliberate indifference to her rights.

re: Authority, "Free Access", not informed:

The Fourth Amendment, providing *the right of the people to be secure in their persons,*

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ... is a consideration in this cause.

In support of mitigation, Grievant presents his belief that he has "Free Access" rights. He contends he has the same authority to search an applicant as he would a licensee. He further contends there is no specific policy that precludes him from conducting a warrantless and/or non-consensual search of an applicant's premises and he was not told he could not conduct a warrantless and/or non-consensual search of an applicant's premises. Grievant also raises his belief as to authority is held by other Special Agents/law enforcement personnel.

"Free Access" was address in testimony and referenced by Grievant as being provided for under regulation and law. Grievant testified, to his understanding, Special Agents have a "free access" under Virginia law and regulations to applicant and licensee premises, and, as the liquor industry is a "highly regulated industry" he has authority to conduct search and seizure related activities at applicant premises as well as licensed premises.

3 VAC 5-50-70 provides:

A. The construction, arrangement and illumination of the dining areas and designated areas and the seating arrangements therein of a licensed establishment shall be such as to permit ready access and reasonable observation by law-enforcement officers and by special agents of the board. The interior lighting shall be sufficient to permit ready discernment of the appearance and conduct of patrons in all portions of such areas.

B. The board and its special agents shall be allowed **free access** during reasonable hours to **every place in the Commonwealth where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold**, for the purpose of examining and inspecting such place.

C. In addition to special agents, other law-enforcement officers in the performance of their official duties shall be allowed **free access to any retail licensed establishment for the purpose of observation of activities on those licensed premises during reasonable hours.**

D. Any person who by use of threats, force or intimidation impedes or obstructs any special agent or other law-enforcement officer in the performance of his official duties from entering or remaining upon any licensed establishment shall be guilty of a violation of this regulation and shall be subject to the penalty prescribed by § 4.1-349 of the Code of Virginia.

E. For the purposes of this regulation, the term "reasonable hours" shall be deemed to include all business hours of operation and any other time at which there exists any indication of activity upon **the licensed premises.**

(emphasis added)

§ 4.1-204 of the Code of Virginia provides, in pertinent part:

Retailers. -- Every retail licensee shall keep complete, accurate and separate records, in accordance with Board regulations, of all purchases of alcoholic beverages, the prices charged such licensee therefor, and the names and addresses of the persons from whom purchased. Every retail licensee shall also preserve all invoices showing his purchases for a period as specified by Board regulations. He shall also keep an accurate account of daily sales, showing quantities of alcoholic beverages sold and the total price charged by him therefor. Except as otherwise provided in subsection D. such account need not give the names or addresses of the purchasers thereof, except as may be required by Board regulation for the sale of alcoholic beverages in kegs. In the case of persons holding retail licenses which require sales of food to determine their qualifications for such licenses, the records shall also include purchases and sales of food and nonalcoholic beverages.

F. Inspection. -- The Board and its special agents shall be allowed **free access** during reasonable hours to every place in the Commonwealth and to the premises of both **(i) every wine shipper licensee and beer shipper licensee and (ii) every delivery permittee wherever located where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold**, for the purpose of examining and inspecting such place and all records, invoices and accounts therein. The Board may engage the services of alcoholic beverage control authorities in any state to assist with the inspection of the premises of a wine shipper licensee, a beer shipper licensee, or delivery permittee, or any applicant for such license or permit.

For purposes of a Board inspection of the records of any **retail licensees**, "reasonable hours" means the hours between 9 a.m. and 5 p.m.; however, if the licensee generally is not open to the public substantially during the same hours, "reasonable hours" shall mean the business hours when the licensee is open to the public. At any other time of day, if the **retail licensee's records** are not available for inspection, the retailer shall provide the records to a special agent of the Board within 24 hours after a request is made to inspect the records.

(emphasis added)

§ 4.1-100 of the Code of Virginia provides, in pertinent part:

As used in this title unless the context requires a different meaning:

"Establishment" means any place where alcoholic beverages of one or more varieties are lawfully manufactured, sold, or used.

"Licensed" means the holding of a valid license issued by the Board.

"Licensee" means any person to whom a license has been granted by the Board.

§ 4.1-212.1 of the Code of Virginia provides, in pertinent part:

§ 4.1-212.1. Permits; delivery of wine and beer; regulations of Board.

A. Any brewery, winery, or farm winery located within or outside the Commonwealth that is authorized to engage in the retail sale of wine or beer for off-premises consumption may apply to the Board for issuance of a delivery permit that shall authorize the delivery of the brands of beer, wine, and farm wine produced by the same brewery, winery, or farm winery in closed containers to consumers within the Commonwealth for personal consumption.

B. Any person located within or outside the Commonwealth who is authorized to sell wine or beer at retail for off-premises consumption in their state of domicile, and who is not a brewery, winery, or farm winery, may apply for a delivery permit that shall authorize the delivery of any brands of beer, wine, and farm wine it is authorized to sell in its state of domicile, in closed containers, to consumers within the Commonwealth for personal consumption.

3 VAC 5-50-70 (F) references inspection of the premises of a wine shipper licensee, a beer shipper licensee, or delivery permittee, or **any applicant** for such license or permit. However, Applicant sought license for "Wine & Beer on & off premises and Keg, Mixed Beverage On"⁸⁰ and was not an applicant for a wine shipper licensee or a beer shipper licensee. As to being an applicant for a delivery permit, § 4.1-212.1 of the Code of Virginia addresses the requirement that any person who is not a brewery, winery, or farm winery, is authorized to sell wine or beer at retail for off-premises consumption and not a may apply for a delivery permit, Applicant was not so licensed and not able to apply as per the statute. .

⁸⁰ G. Tab 13.

There is difference between the “Free Access” provisions of statutes and regulations and what was testified to as a belief to “Free Access”. This difference is put forth as grounds for mitigation.

Applicant had not been issued an ABC license or permit and there are there no statutory or regulatory provisions under the above cited statute and regulation authorizing Grievant “Free Access” and/or authorizing him to conduct search and seizure activities as to an applicant for an ABC license.

Agency raised its concern that an applicant for an ABC license maintains the right to be free from unreasonable searches and seizures. Individual raised her concerns over these matters also.

Grievant was at the establishment to review the application file with Individual and to conduct a site visit. Agency was responsible for managing his actions and potentially liable for his actions.

A “Site Visit” is provided for in OM-03 which provides, in pertinent part:

It is the policy of the Bureau of Law Enforcement to conduct a detailed and thorough investigation of all persons and locations for ABC licenses in a prompt and efficient manner. Investigations will adhere to the Code of Virginia, Board Regulations, Bureau Policies and Procedures, and in accordance with local ordinances. ...

III PROCEDURE:

A. RETAIL INVESTIGATIONS

19. Before a license is issued the agent should conduct a site visit to ensure sufficient inventory of qualifying items. Comments should be entered in Webcore to appear on the 805-1.⁸¹

Evidence presented at hearing addressed e-mail communications on 11/7/14 from Investigator asking SAC (PD):

Are you aware of any code or regs that gives ABC Agents statutory authority to review or inspect business records for business applicants? I am aware of our authority to conduct administrative inspections and review business records on ... for licensees, but am trying to find anything specifically giving us authority to do similar with an applicant.

SAC PD replied via e-mail that same date:

Well, if we believe we need to review documents we believe are necessary to determine if a license can be issued, their failure or refusal to provide those documents would halt the investigation process or prompt a hearing.

I would think an applicant for a license to be rather accommodating/agreeable/forthcoming. If they are not and stand firm, either Richmond can tell us we do not need those records, or we schedule a hearing

That said, as you know, 4.1-222(A)(1)(n) does allow the Board the authority to refuse a license if an applicant violating any provision of the ABC Act while an application is pending.

⁸¹ G. Tab 11 pg. 1 and 15; A. Tab 25, pg. 15.

I do not know how we could know whether such violations are occurring without, among other actions, inspect/review the applicant's business records.⁸²

While Grievant raises the duty to conduct a complete and thorough investigation as to applications and applicants, there is no evidence that indicates doing a complete and thorough investigation requires "Free Access" rights. Inspect/review of the applicant's business records may be required to determine if there are violations but this does not equate to there being a requirement for "Free Access" or for a search and seizure.

There is authority to request documents, there is authority to halt the application investigation, there is authority to set matters for a hearing with the Board during which procedural rights and guidelines would apply. There is agency policy and procedures regarding obtaining information from applicants without necessarily having to assume or use "Free Access" /"search and seizure" as to an applicant.

OMB-03(III)(B) provides that the ABC license should not be issued until:

VA ABC has received all required documents,
A Special Agent/Tech has completed his/her processing and investigation,
All fees have been paid,
Any local governmental or citizen objections have been resolved, and
The establishment is in operation or ready to open.⁸³

Agents may, per OMB-03, make a recommendation of approval of the application or that a hearing be called for objections. Licenses may be held until Applicants provide all required documents. Inference that the policy, as stated in OMB-03, of the Bureau of Law Enforcement to conduct a detailed and thorough investigation of all persons and locations for ABC licenses in a prompt and efficient manner infers or supports an assumption of "Free Access" under the statutory or regulatory provisions is not found supported by the evidence.

Grievant had received training as to search warrants and was an experienced Special Agent/Law Enforcement Officer III with ABC. Evidence was received that Agency has not instructed, trained, or permitted its agents to conduct warrantless, non-consensual searches of license applicants or their facilities.⁸⁴ Testimony indicated that a site visit of a premises to be licensed, during the inspection process, has never risen to the level of an inspection of a licensed premises for which there is statutory and regulatory authority.

DDO testified as to his belief and concern Grievant violated Individual's/Corporation's constitutional rights against unreasonable search and seizure, in violation of General Order 10 - Code of Conduct, General Order 12 - Code of Ethics, and General Order 8 - Search and Seizure. He stated his belief and concern Grievant violated Individual's rights when he searched and rummaged through the business office, when he photographed various documents in the office, and when he took those images from the premises.

Management took disciplinary action after review of the Investigation Report and after Director, HR, and COO discussed matters. While Director ultimately decided to discipline, it was with the concurrence of HR Director and COO that violation of policies occurred.⁸⁵ Director

⁸² A. Tab 33.

⁸³ A. Tab 25.

⁸⁴ Testimony of Director.

⁸⁵ Testimony.

testified there was discussion between COO, HR Director, and Director as to the appropriate discipline and Agency took into consideration a number of matters. These matters include effectiveness issues, credibility issues, possible effect and risk to Agency, risks to Agency reputation, liability of Agency, and the sensitive nature of the highly industry regulated was also considered. Director also indicated he considered Grievant's length of service and Grievant's written response.

As discussed in the Decision, there is concern that Grievant's entry into and activities in the back office were without the awareness of Individual or any other agent of Corporation. Matters concerning consent were raised at hearing and address in the Decision including:

There is insufficient evidence that Individual or anyone else gave consent, expressed or implied, to Grievant's search of the office, opening of drawers and/or cabinets, and photographing of documents in that office. Grievant did not ask permission to enter the office and do so.⁸⁶ Implied consent is generally defined to exist when, considering the "totality of circumstances"⁸⁷, circumstances exist which would lead a reasonable person to believe that consent had been given, although no direct, express or explicit words of agreement had been uttered. There is insufficient evidence to find that Individual or anyone else impliedly consented by failing to object to Grievant's actions as there is no evidence Individual or any other person knew or was even aware that Grievant had entered the office and/or was searching/opening drawers and/or cabinets.

Grievant examined documents that were in the office on the desk in plain view as well as documents that were inside drawers. He told Investigator his actions in the office could have been perceived as shuffling through and looking through everything. He stated he did not ask permission from anyone to take these actions in the office.⁸⁸ Consideration is also given to Grievant's statement to Investigator he thought what had occurred regarding undisclosed ownership not being reported on the retail application was criminal in nature.

Matters related to mitigation were also addressed in Grievant's initial counsel's 33 page letter of May 2, 2014 which listed, among other matters, 19 numbered items under "Grievance Issues" with supporting facts.⁸⁹ Agency's Attachment to Grievant's Written Notice addressed Agency's position as to what they summarized as five proffered arguments as to why Grievant's actions were justified. Agency addressed their concerns and certain aggravating circumstances in its Attachment and stated, among other matters, their position and concern that:

A site visit of a premise to be licensed, during an application process, has never risen to the level of an inspection of a licensed premise (for which there is statutory regulatory guidance and authority).

A site visit consists of a cursory, high level look around the premises to ensure adequate facilities and food stock to operate under an ABC license, as well as to ensure no other glaring violations would exist upon license issuance (as there is no statutory or regulatory authorization to do anything more). Any action more invasive must be taken with the applicant's rights in mind, as individuals do not relinquish their rights simply because they become an applicant for an ABC license.

... The rules and regulations granting Agents of the Board the authority to inspect apply solely to licensees of the Board, not applicants.

⁸⁶ A. Tab 31, pg. 46.

⁸⁷ *United States v. Jenkins*, 986 F.2d 76 (4th Cir. 1993).

⁸⁸ A. Tab 14.

⁸⁹ A. Tab. 2

Grievant's EWP (Section 18) addressed, under *Knowledge Skills and Abilities, and/or Competencies required to successfully perform the work*, that his position required considerable working knowledge of a number of matters including, "law enforcement procedures and practices" and "search and seizure".⁹⁰

The Virginia Department of Alcoholic Beverage Control promulgated General Order 10, Code of Conduct, to establish a basis of conduct for all members of the Bureau of Law Enforcement. General Order 10 provides, in pertinent part:

II. POLICY

It is the policy of the Bureau of Law Enforcement to ensure that the performance of its members is characterized by lawful police actions that are carried out in an exemplary fashion. To this end, the Bureau of Law Enforcement expects its personnel to maintain the highest standards of appearance and conduct at all times, while on duty or off duty.

Violations of the agency's policy, Code of Conduct, General Orders, Memorandums, State of Virginia's DHRM Personnel Rules, Local Ordinances, laws of the Commonwealth of Virginia or the United States of America shall result in disciplinary or personnel actions as defined in this policy. The disciplinary action taken will depend on the severity of the offense, the record of the offender, and the seriousness of the consequences of the violation. . .

Grievant raised that he did not have adequate notice of the rule he is alleged to have violated. Agency General Order # 10 Section VI section 07 addresses that employees shall obey all laws of the United States and any state and local jurisdiction in which the employees are present. Agency expressed the search at an unlicensed premises was not consensual and without a search warrant and Grievant's actions constituted a failure to confirm to 4th Amendment rights. State Law and Regulation for authorizing "Free Access" was limited to basically licensed premises but not followed in its limitations but presented as a belief basis for actions.

As discussed in the Decision, Grievant presented belief he had authority to search the office and presented a number of reasons for such belief. He raised that he was never informed he did not have such authority. In addition to consent issues (expressed and implied) Grievant contented he had a right to search based upon regulations, statutes, cases, and the administrative search exception to the Fourth Amendment for highly regulated businesses (also discussed in Decision).

Management is reserved the exclusive right to manage the affairs and operations of state government. Consideration is given to the right of Agency to manage the affairs of the Agency, Grievant's actions, and the effect Grievant's action upon the rights, including 4th amendment rights, of applicant.

Grievant applied rights related to "Free Access" and search and seizure of licensed establishments to applicant, an unlicensed establishment. Grievant argues he was not told by Agency he could not treat applicants in the same manner license holders are treated. Grievant argues there was no policy saying he could not treat an applicant as he would treat a licensee.

⁹⁰ G. Tab 55.

Hearing Officer does not find these arguments a proper basis for mitigation under the facts and circumstances found in evidence in this case. Statutes and regulations are published and of public record. Grievant assumed greater rights and power as to search and seizure related matters than his employer, Agency, felt was authorized for itself or for its employees.

Search and seizure activities and “Free Access” rights are unique and not strictly policy driven matters but are subject to and impacted on by law and regulation which sets forth both rights and responsibilities. Law and Regulations address matters as to “Free Access” and/or Search and Seizure rights and duties. Not having a policy strictly setting out each and every right and duty related to the application process and/or each phase or matter of the application process is not found to be sufficient grounds to mitigate. Not having a policy that sets out each and every right and duty related to the “Free Access” provided for in statute and regulation is not found to be sufficient grounds to mitigate.

Law and Regulation sets forth restrictions and requirements on search and seizure/“Free Access” rights. The expansion of statutory and regulatory powers from the restricted conditions mandated for its use imposed by statute and regulation is relevant in considering mitigation.

Grievant argues that his mistaken belief and the matters addressed for that belief would require mitigation. There is evidence of requirements for Agency to investigate an applicant’s information and Agency’s requirements to verify and confirm matters related to the application.

Neither party has produced policy directly addressing “Free Access” and/or “search and seizure” activities as to Applicants specifically.

General Order 12, confirms, “Special agents wield considerable power over citizens, power that is carefully circumscribed by state and federal law, the Constitution of Virginia, and the Constitution of the United States and its amendments. Special agent’s power to arrest, seize property, and interfere with the lives and liberties of citizens constitute a public trust.

General Order 68 provides, “Fourth Amendment rights are protected. Agents shall scrupulously observe constitutional guidelines when conducting searches and always remain mindful of their lawful purpose.

Grievant raises that he was not told he couldn’t apply rights related to a licensee to an applicant. Not being told one could not do an act does not generally provide authority to do the act. Generally, management is not assumed to have granted an authority to do an act just because it has not specifically told an employee he/she may not do an act. Furthermore, there is insufficient evidence to find management knew Special Agents implemented “Free Access” or search and seizure rights, provided by regulation and law for licensees, to applicants.

Agency has not instructed, trained, or permitted its agents to conduct warrantless, non-consensual searches of license applicants or their facilities.⁹¹ A site visit of a premises seeking to be licensed, during the inspection process, has never risen to the level of an inspection of a licensed premises for which there is statutory and regulatory authority.

A number of matters were presented concerning site visits, their purpose, and scope. A number of matters were presented concerning investigations and the purpose, scope, and nature of different types of investigation activities. Evidence indicates Agency conducts

⁹¹ Testimony of Director.

investigation activities of various nature and scope, however, not all investigations have the same search and seizure/"Full Access" rights as are granted a Special Agent when dealing with holders of an ABC license.

Concern is given to the actions of Grievant, the impact of Grievant's actions on applicant's rights, and the impact/potential impact upon Agency. Grievant was experienced and his position required considerable working knowledge "law enforcement procedures and practices" and "search and seizure".⁹² Furthermore, measures for Core Responsibilities for his position include, "Searches, seizures, forfeiture actions and arrests are executed in accordance with applicable laws, policies, and procedures."

The evidence indicates that Grievant was aware or should have been aware of the criteria set forth in regulation and in statute as to when "Free Access" rights were authorized and granted.

Policy 1.60 provides that Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.⁹³

Policy 1.60 also notes that, "Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeds agency norms. ...

The Standards of Conduct additionally provides:

*Examples of offense, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense **not specifically enumerated**, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this*⁹⁴

Upon further consideration, as per EDR's remand, of the mitigating factors presented by the grievant, and upon consideration of all the evidence presented in this cause, for the reasons stated herein, the Hearing Officer does not find mitigation is warranted or appropriate.

re: Mitigation and Inconsistent discipline:

Grievant contends Agency has applied inconsistent discipline and he was treated differently than other employees. Whether the discipline is consistent with the agency's treatment of other similarly situated employees is addressed in Section VI.(B)(2) of the *Rules* and presented as an example of "mitigating circumstances" to be considered by the hearing officer.

⁹² G. Tab 55.

⁹³ Agency Tab 3.

⁹⁴ A. Tab 3 page 7.

Grievant raises that Special Agent was not disciplined as Grievant was disciplined and raises concern as to the discipline received by individuals in the Charlottesville ABC incident was not consistent with the discipline he received.

The evidence does not indicate that the circumstances as to Special Agent were the same or similar as to the circumstances involving Grievant's actions. While the evidence indicates Special Agent was at the establishment with Grievant, Special Agent did not enter the business office, go through drawers/cabinets looking for papers, and photographed papers. These all being done without the knowledge of agents or staff of Corporation. The evidence does not indicate that Special Agent directed such action be done or that he had knowledge of Grievant's entry into the office or his activities in the office at the time they occurred. Special Agent did know Grievant was in the back and conducting "Site Visit" related activities but the evidence does not indicate he was aware of the office entry and activities therein.

Special Agent did sit down and talk with Individual and other persons going over the application. Special Agent did ask to see a checkbook and when asked if he had authority to do that Special Agent indicated, "Yes we do. We have authority to look at any and all business records when investigating the business." After discussion of ownership and other matters Special Agent further noted an Administrative Objection would be filed with regards to the application. He also stated he still needed her to turn in the requested documents to complete the application file.

These statements do not equate to the same or similar actions Grievant took in entering the office unknown and without permission and opening drawers/cabinets, viewing papers, and photographing papers.

The evidence in this cause does not indicate there were similar actions, facts, and/or circumstances in the Charlottesville matter, which involved an arrest by ABC agents, as in Grievant's situation. Circumstances involving search and seizure activities as to an ABC applicant during a site visit and going over an Application were not present.

Upon further consideration, as per EDR's remand, of the mitigating factors presented by the grievant, and upon consideration of all the evidence presented in this cause, for the reasons stated herein, the Hearing Officer does not find mitigation is warranted or appropriate under the circumstances as to Grievant's contention that Agency has applied inconsistent discipline and/or he was treated differently than other employees. Grievant has not presented sufficient evidence to find other employees were inconsistently disciplined in the same or similar situation or that he was unfairly or differently treated than other employees in the same or similar situation.

re: Whistle Blower, retaliation, improper motive, and failed to investigate:

Grievant contends improper motive in his discipline and that he was a Whistle Blower. He additionally contends Agency failed to investigate defamatory claim filed concerning him. As discussed in the Decision Hearing Officer indicates:

Grievant claims, "The investigative actions, disciplinary determinations, and the process followed by [DDO] and [SAC] are tainted by bias that exists from their knowledge that [Grievant] had recently become a "Whistle blower" and made multiple reports of misconduct by employees of Virginia ABC who were close

friends of theirs.⁹⁵ Grievant also alleges, “The Agency’s true motivation behind seeking this termination is in response to **[Grievant’s]** reporting of fraudulent conduct of officers who have a close relationship with upper management.”⁹⁶

Grievant raised an incident concerning a tape recording which occurred in the latter part of 2010/first part of 2011. He contends his termination was due to having reported information to DDO (when DDO was then a Special Agent in Charge) regarding allegations that an officer was alleged to be involved in unethical and/or illegal wrong doings. Grievant stated he related information to DDO he received from an informant. DDO (then a Special Agent in Charge) told Grievant to make a recording if he talked to the person again. Subsequently Grievant did so and gave the tape recording to DDO to listen to. Grievant testified he also said he didn’t want to be involved. Grievant contends DDO, after listening to a part of the tape, gave the tape back to Grievant and said they didn’t need [] like this floating around the office.

DDO (who was the then SAC) testified Grievant did play an audio recording of an interview of a suspect involved with illegal moonshine who alleged potential wrongdoing of an officer on the recording. DDO indicated told Grievant to bring in the person so he could talk to him or arrange for a meeting so he could talk to the person. DDO testified to concerns Grievant was not a fan of the officer. While DDO told Grievant to set up a meeting with the person giving information, DDO indicated Grievant never did so. DDO wanted a meeting to determine matters and circumstances related to the allegations and ascertain validity and other matters related to the taped claims being made.

Concern is given to the time of the incident which was alleged as around late 2010/early 2011. Grievant was asked to get the recording by DDO who, after listening to part of the recording, asked for a meeting with the person on the tape. Grievant was given back the recording. Grievant’s testimony was that he indicated he did not want to get involved. Before she became SAC, Grievant talked to her about this.

Director testified he was aware of the matter and he did not initiate an investigation due to concerns as to, the timeliness of when he heard of the matters and base information concerns. He was concerned there was no ability of the field supervisor to develop further information from the person who provided it.

Grievant contends that DDO’s conduct towards him changed when he reported the allegation and their relationship from that point was very strained. Grievant contends that the present disciplinary matter is due to or affected by Retaliation and his having reported and raised the above allegations.

From Grievant’s report of the misconduct in about late 2010 until this current matter he received no disciplinary action or other adverse employment action. Grievant does present a January 2012 e-mail from DDO, his then SAC, complaining of a dress code violation in his wearing “crock slippers” to work December 19, 2011.⁹⁷ However, there is no indication that this incident resulted in anything else but this e-mail.

⁹⁵ A. Tab 2, pg. 29.

⁹⁶ A. Tab 2, pg. 33.

⁹⁷ G. Tab 58.

A taxation matter with Department is also raised by Grievant as indicative of matters relating to whistleblowing. By letter dated 12-7-13, Individual, in response to Department's "Notice of Personal Responsibility" regarding LLC, noted reasons she believed she was not responsible. Among the reasons stated she indicated, "It is my personal belief that you are involved with those agents in an effort to keep me from obtaining my ABC License because I wrote letters complaining of those very agent's behavior." "... ONLY REASON YOU BRING THIS UP NOW IS UNDER REQUEST BY [GRIEVANT] & [SPECIAL AGENT]."

Additionally, in her attorney's letter of 12/18/14 it was noted Individual was concerned that a Notice of Personal Responsibility was sent at the suggestion or request of certain agents of Agency after she filed complaints concerning improper conduct.⁹⁸

Department responded by letter of December 31, 2013. On 1/3/14 SAC indicated to Grievant she noted the original letter was copied to the Board and COO so she forwarded the response up the chain of command for their information. Grievant contends the Agency chain of command from his SAC to Director refused to investigate matters alleged in Individual's and her attorney's letters to Department regarding him.

A media FOIA request was made concerning communications between Department, Grievant, and Special Agent. Grievant raises the 2/12/14 Agency response that Agency was not able to accommodate the media's FOIA request as such records of communications would have occurred during the course of the administrative investigation for a license application and therefore were exempt from FOIA per § 2.2-3705.3 of the Code of Virginia. Grievant challenges this and not conducting a formal investigation of the allegations made to Department.⁹⁹

Retaliation is defined in §9 of the *Grievance Procedure Manual* as "Adverse employment actions taken by management or condoned by management because an employee participated in an activity recognized as protected in §4.1(b). §4.1(b) of the *Grievance Procedure Manual* addresses the following matters:

1. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations;
2. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;
3. Arbitrary or capricious performance evaluation;
4. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such law to a government authority, seeking to change any law before Congress or General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law;
5. Informal discipline

To establish retaliation Grievant must show (1.) he engaged in a protected activity; (2.) he suffered an adverse employment action; and (3.) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business

⁹⁸ G. Tab. 61.

⁹⁹ G. Tabs 59 & 60.

reason for the adverse employment action, retaliation is not established unless the Grievant shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.¹⁰⁰ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹⁰¹

While evidence indicates Grievant engaged in a protected activity, there is insufficient evidence to find a nexus or causal link existing between the protected activity and the adverse employment action. Agency initiated an investigation into allegations due to a complaint of Individual made to Governor. The complaint and investigation ultimately gave rise to facts which the disciplinary action.

Agency has presented a legitimate non-retaliatory business reason for the adverse action and there is insufficient evidence to find that Agency's stated business reason was a mere pretext or excuse for retaliation.

Upon consideration of all the evidence presented in this cause, there is insufficient evidence to indicate the Group III Written Notice with termination was a mere pretext or excuse for retaliation. For the reasons stated herein, Retaliation is not found in this cause and there is insufficient evidence to find issuance of the Group III Written Notice with termination was due or related to retaliation.

Grievant contends improper motive and that he was a Whistle Blower. He contends the underlying motivation for termination is retaliation by the Agency and management used unfounded complaints to support termination to both silence and retaliate against Grievant for his refusal to remain silent and his reporting the unethical and corrupt conduct of employees who were close friends of management. He indicates his termination has further been used "as an opportunity for [3 named individuals] to "silence a firebreather during a political firestorm".¹⁰² However, the evidence as to these contentions do not support mitigation of the discipline.

Upon further consideration, as per EDR's remand, of the mitigating factors presented by the grievant, and upon consideration of all the evidence presented in this cause, for the reasons stated herein, the Hearing Officer does not find mitigation is warranted or appropriate as to the mitigation factors discussed herein related to allegations of Whistle Blower, improper motive, and failure to investigate.

re: long employment history, no disciplinary history, evaluations

Consideration is given to evidence admitted in this cause as to Grievant's long work history (approximately 13 years¹⁰³), not having a disciplinary record, and his work evaluations. Grievant's EWP's admitted into evidence¹⁰⁴ were taken into consideration.

While it cannot be said that either length of service or otherwise satisfactory work performance are never relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.

¹⁰⁰ *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir: 2000).

¹⁰¹ See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248. 255 n.10 (1981) (Title VII discrimination case).

¹⁰² G. Tab 1

¹⁰³ G. Tab 1.

¹⁰⁴ G. Tab 55.

The weight of an employee's length of service and past work performance will depend largely on the facts of each case and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged.¹⁰⁵

In this case, Grievant's length of service, otherwise satisfactory work performance, and positive evaluations do not justify mitigation of the agency's decision to issue a Group III Written Notice and terminate Grievant.

Upon further consideration, as per EDR's remand, of the mitigating factors presented by the grievant, and upon consideration of all the evidence presented in this cause, for the reasons stated herein, the Hearing Officer does not find mitigation is warranted or appropriate as to the allegations of long employment history, no disciplinary history, and evaluations.

re: discipline imposed was not proper:

Upon further consideration, as per EDR's remand, of the mitigating factors presented by the grievant, and upon consideration of all the evidence presented in this cause, for the reasons stated within this entire Remand Decision, the Hearing Officer finds the discipline imposed by agency was warranted and does not find mitigation is warranted or appropriate.

CONCLUSION

The Decision was remanded to the Hearing Officer for further consideration of the mitigating factors presented by the grievant. The Hearing Officer has, as per EDR's Remand, given further consideration to the mitigation factors presented by the grievant, the evidence presented in this cause, and applicable law, policy, and regulation. In the Decision, the Hearing Officer found that the Grievant engaged in the behavior described in the Written Notice, the behavior constituted misconduct, the agency's discipline was consistent with law and policy, and the discipline does not exceed the limits of reasonableness.

Upon further consideration of the mitigating factors presented by the grievant, the evidence admitted this cause is insufficient to find the discipline exceeds the limits of reasonableness and the evidence admitted in this cause does not provide a sufficient basis to justify a reduction or removal of the disciplinary action.

DECISION

After further consideration of the mitigating factors presented by the grievant it is found that the discipline does not exceed the limits of reasonableness and there are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

March 21, 2015

Lorin A. Costanzo, Hearing Officer

Copy e-mailed this date to: Grievant's Attorney
Agency Attorney
EDR

¹⁰⁵ EDR Ruling 2014-3777.