

Issues: Group III Written Notice (failure to follow policy), Group III Written Notice (conduct unbecoming), and Termination; Hearing Date: 07/31/15; Decision Issued: 09/06/15; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 10571; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF HUMAN RESOURCE MANAGEMENT**  
**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**In the matter of: Grievance Case No. 10571**

**Hearing Date: July 31, 2015**  
**Decision Issued: September 6, 2015**

**PROCEDURAL HISTORY**

**A. Two Written Notices:** On February 10, 2015 Grievant was issued two Group III Written Notices with termination (effective date of termination: 2/10/15) for Written Notice Offense Codes 99.<sup>1</sup>

One Written Notice was issued for "Failure to Report Sexual Misconduct" which indicated:

Violation of D.O.P. 038.1 IV, C. 7, A On November 21, 2014, [Grievant] testified in the [General District Court] that on October 10, 2013, [C/O] entered the Watch Office at [Facility] and placed her hand inside his pants and grasped his penis, asking him "when they were going to meet?" He grabbed her wrist and removed her hand. [Grievant] failed to report the incident as outlined in OP 038.1 IV, C.7, A.

The other Written Notice was issued for "Conduct Unbecoming a Security Sup." which indicated:

[Special Agent] interviewed [Grievant] on December 12, 2014, concerning a groping incident (10/10/2013) in the Watch Office at [Facility]. This incident was never reported to any of [Grievant's] supervisors, nor [Facility] Administration. [Grievant] lied to SIU during questioning at that time.

On February 27, 2015 Grievant filed a *Grievance Form A - Dismissal Grievance*.<sup>2</sup> The two Group III Written Notices were qualified for hearing and, effective March 18, 2015, undersigned was appointed hearing officer.

**B. Extension of 35 day period and Continuances:** The parties agreed, by e-mails dated 3/17/15, to extend the 35 day period provided for in Regulations for the hearing to be held.

The hearing date was originally set, by agreement, for May 5, 2015 but was continued, by agreement, to June 5, 2015. On June 3, 2015, due to a health related matter of the Hearing Officer, the hearing set for June 5, 2015 was continued. On June 5, 2015 a telephone conference was held and the grievance hearing was agreed to be set for July 31, 2015.

**C. Motion for Production and Written Decision:** On April 28, 2015 Grievant filed a *Motion* for Document Production by Agency seeking Agency to produce:

- All personnel records pertaining to job performance, disciplinary actions, and all records of a similar nature pertaining to [C/O]. *and*
- A full, complete, and un-redacted copy of the entire investigation file pertaining to the

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<sup>1</sup> A. Tab 3; G. pg. 90-91.

<sup>2</sup> A. Tab 4; G. pg. 87-89.

dismissal of [Grievant].

On May 3, 2015 Agency Advocate filed a *Response* noting objection/opposition to the *Motion* and on May 5, 2015 Grievant's *Motion* and the Agency's *Response* were discussed and addressed in a pre-hearing telephone conference. On May 5, 2015, a written *Decision on the Motion for Production* was issued by the Hearing Officer.

**Re: Grievant's Motion for Production of "All personnel records pertaining to job performance, disciplinary actions, and all records of a similar nature pertaining to [Corrections Officer]":**

At the 5/5/15 pre-hearing conference Grievant amended his *Motion*, to request only the production of the disciplinary records of [C/O]. The parties agree to discuss same and attempt to secure a stipulation as to such disciplinary records and/or attempt to reach agreement as to production of such disciplinary records. As of 5/5/15 there were no further matters to be addressed concerning this issue with the understanding that matters, if not so resolved/agreed to, may be addressed to the Hearing Officer in the future.

**Re: Grievant's Motion for Production of "A full, complete, and un-redacted copy of the entire investigation file pertaining to the dismissal of [Grievant]."**

At the 5/5/15 pre-hearing conference, Grievant amended his *Motion* to request only the production of Grievant's un-redacted *Investigation Report*. Grievant had been furnished a redacted copy of the *Investigation Report*. Agency was Ordered to furnish an un-redacted copy of the *Investigation Report* regarding Grievant's dismissal. Furthermore, all un-redacted copies of the *Investigation Report* were Ordered returned to Agency at the conclusion of the grievance.

**D. Written Closing Arguments due 8/17/15:** At the close of the 7/31/15 grievance hearing Counsel for Grievant and Agency Advocate moved to submit a written closing arguments which were, by agreed due by August 17, 2015. Both parties timely submitted written closing arguments 8/17/15.

### **ISSUES**

1. Whether the Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. 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).
4. Whether there were mitigating circumstances justifying reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its 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 more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.<sup>3</sup>

### HEARING

Grievance hearing was held on July 31, 2015 at Facility. The following appeared at the grievance hearing:

Grievant (who also was a witness)  
Grievant's Attorney  
Agency Advocate at Hearing  
Agency Party Representative at Hearing (who also was a witness)  
Witnesses

At hearing, the parties agreed to admission of exhibits *en masse*. All exhibits offered were admitted. A copy of the one volume transcript of the November 21, 2014 General District Court trial was admitted into evidence and is referred to as Tr. “\_” with the page number inserted at “\_”.

### FINDINGS OF FACT

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

01. Grievant has been employed by Agency since July of 1999.<sup>4</sup> He was promoted to Lieutenant at Facility in October of 2010.<sup>5</sup>

02. Due to allegations C/O alleged occurred on October 10<sup>th</sup> and October 14<sup>th</sup> of 2013 Grievant was the subject of charges and was tried in General District Court on November 21, 2014.<sup>6</sup> Upon conclusion of the trial the Judge **dismissed** the charges against Grievant.<sup>7</sup>

03. During the November 21<sup>st</sup>, 2014 trial Grievant testified that on October 10, 2013, while working at Facility, C/O, a female Correctional Officer, placed her hand in Grievant's pants and grabbed his penis. He testified this was a skin to skin contact and when she did this he removed her hand instantly by grabbing her wrist. Grievant further testified he did not report this incident to anybody.<sup>8</sup>

04. On October 10, 2013, while working at Facility, C/O placed her hand in Grievant's pants and grabbed his penis.<sup>9</sup>

05. Grievant did not report that on October 10, 2013, while both were working at Facility, C/O placed her hand in Grievant's pants and grabbed his penis.<sup>10</sup>

06. Special Agent was present at the November 21, 2014 General District Court proceeding when Grievant testified.<sup>11</sup> She heard his testimony that C/O placed her hand in his pants, C/O grabbed his penis, and that he did not report this incident.<sup>12</sup>

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<sup>3</sup> Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

<sup>4</sup> Gr. Ex. pg. 106.

<sup>5</sup> Gr. Ex. pg. 95.

<sup>6</sup> Tr. 3 and 37-47.

<sup>7</sup> Tr. 228; Testimony of Grievant at Grievance Hearing

<sup>8</sup> Tr. 183, 203.

<sup>9</sup> Tr. 181 -183; Testimony of Grievant at grievance hearing.

<sup>10</sup> Testimony of Grievant at grievance hearing; Tr. 183 & 203;

07. Agency first became aware of the 10/10/13 incident of C/O placing her hand in Grievant's pants and grabbing his penis when Special Agent reported that Grievant testified to this in his General District Court trial on November 21, 2014.<sup>13</sup>

08. Grievant's written statement submitted on October 14, 2014 to Agency, in response to C/O's allegations to Agency that Grievant had exposed himself and sexually assaulted her, stated, "I have not touched her inappropriately. NEVER. His written statement addressed certain matters occurring on 10/10/13 and 10/14/13 but did not raise or mention that C/O had reached into his pants and grasped his penis on 10/10/13.<sup>14</sup>

09. In his written statement dated 12/11/14 Grievant wrote concerning C/O, "... she enters the Watch Officer and briefly stuck her hand down my pants. I immediately removed her hand by her wrist and demanded her to leave". He also wrote, "I was debating in writing her up. I was so embarrassed, surprised, mad, and angry, just didn't understand why she could just do that to me or anyone."<sup>15</sup>

10. Among other matters stated in Grievant's January 28, 2015 letter to Warden Grievant stated:

As to my testimony during the trial on the 21<sup>st</sup> day of November, 2014, in which I testified about the incident involving [C/O], I acknowledge that I did not previously report the same to you or anyone. ...

As to my interview with [Special Agent] on the 12<sup>th</sup> day of December, 2014, and her understanding that I had reported the groping incident to you on the 15<sup>th</sup> day of October, 2013, I believe her recollection of the same to be incorrect. Any reference I made to [Special Agent] pertaining to [C/O's] "groping" was in relation to her groping inmates and other employees as testified to by [Named Witness], a former employee at [Facility], during the trial on the 21<sup>st</sup> day of November, 2014.<sup>16</sup>

11. Counsel for the Grievant and Advocate for the Agency agreed and stipulated as follows:

[C/O's] disciplinary file indicates that she has received the following Group Notices:

1. Group III Offense Code 13 dated 4/21/15. Violation of OP 038.1 Reporting Serious or Unusual Incidents – On March 16, 2015, a use of force was used against an offender. [C/O] was aware of the use of force and failed to report it. Action taken: termination effective 4/21/15.

2. Group I Offense Code 36 dated 3/11/14. Violation of OP 135.1 Standards of Conduct – On November 3, 2013, [C/O] and 2 other officers were engaged in an inappropriate/obscene conversation while on post. According to the other 2 officer statements, [C/O] participated in the conversation and discussed a personal sexual experience. Action taken: [C/O] is advised that any further policy violation may result in further discipline under the Standards of Conduct, up to and including separation of employment."<sup>17</sup>

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<sup>11</sup> Tr. 7-8. Testimony at Grievance Hearing.

<sup>12</sup> Testimony.

<sup>13</sup> Tr. 7-8 and Testimony at Grievance Hearing.

<sup>14</sup> A. Ex. pg. 42, 51.

<sup>15</sup> A. Ex. Tab 5.

<sup>16</sup> G. Ex. pg. 65-66

<sup>17</sup> A. Ex. pg. 61, Stipulation acknowledged at hearing.

## CONCLUSIONS

### **OP 135.1 ... Standards of Conduct**

The Department of Corrections, pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: February 1, 2014) divide unacceptable behavior into three groups, according to the severity of the behavior. Group I offenses include types of behavior less severe in nature, but which require correction in the interest of maintaining a productive and well-managed work force. Group II offences include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal.<sup>18</sup>

OP 135.1 provides, in pertinent part:<sup>19</sup>

#### Section IV. STANDARDS OF CONDUCT

- E. The list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with this operating procedure based on the severity of the offense.

#### Section V. GROUPS OF OFFENSES AND MITIGATING CIRCUMSTANCES

##### A. General

2. When in the judgment of the agency Human Resource Officer, DOC management or the appointed authority, mitigating circumstances exist; specified corrective action may be reduced or increased beyond the normal level.
  - a. Mitigating circumstances include those conditions related to an offense that would serve to support a reduction of corrective action in the interest of fairness and objectivity.
  - b. Mitigating circumstances may also include consideration of an employee's long service with a history of otherwise satisfactory work performance.
  - c. Mitigating circumstances may support, as an alternative to removal, an employee's demotion or transfer to a position with reduce responsibilities and a disciplinary salary action; transfer to an equivalent position in a different work area with no change in salary; and/or suspension. Suspension in lieu of removal shall not exceed 30 workdays for a Group III Offense or for an accumulation of Group I or Group II Offenses, which would normally result in removal.
  - d. Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. DOC may consider any unique impact that a particular offense has on the DOC, and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. (see Attachment 2)

**OP 038.1... "Reporting Serious or Unusual Incidents"** (Effective Date: September 1, 2013)<sup>20</sup> provides, in pertinent part:

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<sup>18</sup> A. Ex. Tab 1.

<sup>19</sup> A. Ex. Tab 1.

## I. PURPOSE

This operating procedure ensures effective communications and reporting of incidents involving Department of Corrections employees, offenders, or physical assets. Incident reporting shall be required for any situation or event that involves the life, health, or safety of employees, volunteers, visitors, or offenders; damages to state property; or a situation that has the potential of subjecting the agency to public comment.

## II. COMPLIANCE

This operating procedure applies to all units operated by the Department of Corrections (DOC). Practices and procedures shall comply with applicable State and Federal laws and regulations, Board of Corrections policies and regulations, ACA standards, PREA standards, and DOC directives and operating procedures.

## III. DEFINITIONS

**Incident** - An actual or threatened event or occurrence outside the ordinary routine that involves the life, health and safety of employees, volunteers, guests, or offenders (incarcerated or under Community supervision), damage to state property, or disrupts or threatens security, good order and discipline of a facility or organizational unit.

### **Sexual Abuse**

**Sexual abuse of an offender by another offender** includes any of the following acts, if the victim does not consent ...

**Sexual abuse of an offender by a staff member, contractor, or volunteer** includes any of the following acts, with or without the consent of the offender: ...

**Sexual Assault** – Any sexual touching or contact that is non-consensual forced or coerced in any manner, including but not limited to rape, sodomy, or unlawful touching. (see [COV §18.2-67.10](#))

**Sexual Harassment** – (1) Repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one offender directed towards another; and (2) Verbal comments or gestures of a sexual nature to an offender by a staff member, contractor, or volunteer, including ...

## IV. PROCEDURE

### A. Incident Reporting

1. Timely and accurate reporting of incidents that occur in the Department of Corrections is essential for proper management and administration. ...

5. Incidents shall be reported to appropriate supervisory or administrative personnel including the following minimum information. ...

### B. Internal Incident Reports

1. Any DOC employee, contract employee, or volunteer that observes or has knowledge of and incident affecting the safe, orderly operation of a DOC organizational unit shall report that incident.

### C. Incident Reports

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<sup>20</sup> A. Ex. Tab 2.

1. Serious or unusual incidents as defined in this operating procedure shall be reported to the Regional and/or Central Office level using an *Incident Report* in VACORIS.
2. Incidents listed in the *Incidents Requiring Immediate Telephone Notification* section of this operating procedure, shall be reported by telephone immediately to be followed by noon the next working day with an *Incident Report* submitted in VACORIS. ...
3. Incidents listed in the *Incidents Not Requiring Immediate Telephone Notification* section of this operating procedure, shall be reported by noon on the next working day with an *Incident Report* Submitted in VACORIS. ...
7. Reporting of Sexual Misconduct
  - a. Any employee volunteer, or contractor shall immediately report to his or her supervisor or the officer in charge any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the DOC; retaliation against offenders or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation. If applicable, an internal incident report checked PREA shall be submitted. (§115.61[a], §115.261[a]).

***Trial Testimony:***

During the November 11, 2014 General District Court trial Grievant raised an incident occurring at Facility on October 10, 2013. Grievant testified C/O put her hand into his pants and grabbed his penis and when she did this he removed her hand instantly by grabbing her wrist. Furthermore, Grievant testified that he did not report this incident to anyone. The hearing transcript indicated:

**[Atty.]:** Can you, please, explain to the court what transpired with [C/O] in her second visit at the watch office on October 10 of 2013, between you and her?

**[Grievant]:** Yes. When she was bringing the second piece of paper, the second piece of paper, she come . . . When she come to the watch office, I was getting out of my seat to get something off the copy machine. When I reached up to get it, it happened so fast, she placed her hand in my pants. When she did this, I removed it instantly by grabbing her wrist. And when she asked me again if I was going to meet her before work, and I instructed her no, and then she left.

**[Atty.]:** When she grabbed your penis, was it skin to skin?

**[Grievant]:** Yes, sir, it was.<sup>21</sup>

**[Atty.]:** [Grievant], why did you not report this incident?

**[Grievant]:** Just, I had so much going on throughout the day. I mean we had inmates fighting, we had put on mental health, and it happened so quick, I mean, I guess my tolerances. I really ... It just happened so fast, it was through, stopped.<sup>22</sup>

The trial transcript also indicated Grievant testified as follows:

**[Asst. CW Atty.]:** You've been employed with D.O.C. for sixteen (16) years?

**[Grievant]:** Yes, since '99.

**[Asst. CW Atty.]:** So, you're a trained professional?

**[Grievant]:** Yes, ma'am.

**[Asst. CW Atty.]:** In those sixteen (16) years, have you received training in how to react if you're a victim of sexual assault?

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<sup>21</sup> Tr. 181, lines 4-20

<sup>22</sup> Tr. 183, lines 11- 17.



[Grievant]: Yes, ma'am.  
[Asst. CW Atty.]: Okay, So, your testimony is that on October 10<sup>th</sup> [C/O] sexually assaulted you?  
[Grievant]: She did touch me.  
[Asst. CW Atty.]: And you didn't report that to anybody?  
[Grievant]: No, ma'am.  
[Asst. CW Atty.]: You didn't follow protocol for that?  
[Grievant]: No, ma'am.<sup>23</sup>

***Failure to Report Sexual Misconduct:***

Grievant was issued a Group III Written Notice for Failure to Report Sexual Misconduct which was indicated as a violation of OP 038.1 IV, C. 7,[a.]. The Written Notice stated that on November 21, 2014 Grievant testified that C/O, on 10/10/13, placed her hand inside his pants, grasped his penis, and Grievant failed to report the incident as outlined in OP 038.1 IV, C.7.A.

Written Notice Section IV – "*Circumstances considered*" indicated, "This incident was never reported to any of [Grievant's] supervisors, nor [Facility] Administration." It was also indicated, "As a Lt he knows to report any such incident as outlined in OP 038.1".

Grievant does not contest the October 10, 2013 incident occurred or that he did not report the incident. Grievant contends he did not violate OP 038.1 IV C. 7.a.

Grievant contends the Written Notice specifically stated he violated OP 038.1 IV C.7.A. and OP 038.1, on its face unequivocally does not apply to his conduct and actions.<sup>24</sup> He alleges that his termination is illegal, wrongful, and a violation of established law, regulation, policy, and his rights.<sup>25</sup>

It is Grievant's contention that:

- DOC specified in its Written Notice a violation of OP 038.1 IV,C.7.A.
- OP 038.1 requires DOC employees to only report specific instances of "sexual abuse" and "sexual harassment" as those specific terms are explicitly defined in and by OP 038.1.
- OP 038.1 defines the terms "sexual misconduct", "sexual abuse", and "sexual harassment" to be strictly limited to only include conduct occurring between employees and offenders or between offenders and other offenders.
- Nowhere in the definition of those terms under OP 038.1 is there any reference to any conduct that occurs solely between employees and employees being required to be reported.

OP 38.1 IV. C. 7.a. provides that any employee, volunteer, or contractor shall immediately report to his or her supervisor or the officer in charge any knowledge, suspicion, or information regarding and incident of sexual abuse, or sexual harassment that occurred in a facility, whether or not it is part of the DOC. It also provides that if applicable, an internal incident report checked PREA shall be submitted.

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<sup>23</sup> Tr. 203 lines 4–19.

<sup>24</sup> Written Closing Statement of Grievant of 8/17/15.

<sup>25</sup> A. Tab 4. Attachment A. pg. 33.

OP 38.1 § III. "DEFINITIONS" provide, under "**Sexual Abuse**":

**Sexual Abuse of an offender by another offender** includes any of the following acts, if the victim does not consent, ... .

**Sexual abuse of an offender by another staff member, contractor or volunteer** includes any of the following acts with or without consent of the offender...

OP 38.1 § III. "DEFINITIONS" also provides:

**Sexual Assault** – Any sexual touching or contact that is non-consensual forced or coerced in any manner, including but not limited to rape, sodomy, or unlawful touching. (see COV § 18.2-67.10)

The definition of "Sexual Assault" specifically refers to and directs attention to § 18.2-67.10 of the Code of which provides, in pertinent part:

§ 18.2-67.10. General definitions.  
As used in this article:

6. "Sexual abuse" means an act committed with the intent to sexually molest, arouse, or gratify any person, where:
  - a. The accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts; ...

OP 038.1 does not provide that "Sexual Abuse" exclusively or restrictively is defined to only include, "Sexual Abuse of an offender by another offender" or "Sexual abuse of an offender by another staff member, contractor, or volunteer". OP 038.1 only provides that "Sexual Abuse of an offender by another offender" *includes* the acts enumerated therein if the victim does not consent and "Sexual abuse of an offender by another staff member, contractor or volunteer" *includes* the acts enumerated therein with or without the consent of the offender.

Sexual abuse of an Employee by another Employee's action is not, as Grievant contends, excluded from reporting requirements of OP 038.1 on account of the provisions of § III as to "Sexual Abuse". The provisions of § III of OP 038.1 as to "Sexual Abuse" do not act to negate, void, or render voidable the reporting requirements of OP 038.1 IV. C. 7.a.

While the definition provided for "Sexual Harassment" in Section III of OP 038.1 is of concern to the Hearing Officer, OP 38.1 IV,C.7.a., addresses the requirement to immediately report any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment.

Due process requires and the *Rules for Conducting Grievance Hearings* (Section VI (B)) provide that an employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge. The evidence indicates that Grievant received notice of the charges in sufficient detail to allow him to provide an informed response to the charge. A due process meeting was held on January 27, 2015 with Warden and he was afforded opportunity to respond to the allegations.

On January 28, 2015, Grievant submitted a written rebuttal and response to allegations. He specifically addressed the Special Agent's letter of 12/15/14. He addressed the incident involving C/O and acknowledged that he did not previously report the same to Warden or anyone and addressed his how he felt. He felt the immediate action taken was appropriate, no further action was necessitated, and made the choice the matter could be handled without further intervention.

Also, he addressed his interview with Special Agent and addressed her report that Grievant said he reported the groping incident to Warden on 10/15/13. Grievant expressed his belief her recollection of the incident to be incorrect. He offered that any reference he made to Special Agent pertaining to C/O's "groping" was in relation to her groping inmates and other employees "as testified to by [Named Witness], a former employee at Facility , during the trial on the 21 day of November 2014.<sup>26</sup> Additionally, at his trial on November 21, 2014 Grievant indicated that he didn't report the incident to anyone and didn't follow protocol for that.<sup>27</sup>

As to the matters alleged in both Written Notices, the evidence indicates that Grievant received notice of the charges in sufficient detail to allow him to provide an informed response to the charges both prior to the discipline being issued and at the grievance hearing.

OP 135.1 § IV. E. provides the list of offenses is illustrative, not all-inclusive. An action or event in the judgment of the agency head, that undermines the effectiveness of the employee or of the agency may be considered a violation of the *Standards of Conduct* and may result in disciplinary action consistent with this operating procedure based on the severity of the offense.

OP 135.1 § V. A. 2. provides that under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. The DOC may consider any unique impact that a particular offense has on the DOC, and the fact that the potential consequences of the performance or misconduct substantially exceeds agency norms.

Grievant was an experienced supervisor and Lieutenant. DOC has adopted and relies upon a strong chain of command. The incident of a C/O placing her hand into a Lieutenant's pants at work is a valid business concern of Agency. Receiving information of this type incident is a valid business concern of Agency. Grievant, a Lieutenant, chose to not report the incident and, in not reporting this incident, undermined his effectiveness and Agency effectiveness. Agency effectiveness in establishing and maintaining norms for the workplace and acts of its employees was undermined. Agency was denied opportunity to be aware of an incident, to investigate, and to determine an appropriate manner to address the matter. When Grievant chose not to report the matter to a supervisor/management/anyone Agency was denied opportunity to address any liability and/or potential liabilities associated with the incident.

As to the Group III Written Notice with termination issued for *Failure to Report Sexual Misconduct*, upon evidence presented at hearing and for the reasons stated herein, the Hearing Officer finds that Agency has met its burden of proof.

**Conduct Unbecoming:**

Grievant was issued a Group III Written Notice with termination for Conduct Unbecoming a Security Supervisor. The Written Notice indicated that Special Agent interviewed Grievant on December 12, 2014 concerning the incident on 10/10/13 of C/O putting her hand into his pants never being reported by him to his supervisors or Facility Administration. The Written Notice alleged Grievant lied during questioning. Additional information provided in the Written Notice stated Grievant informed Special Agent that he had reported the groping to Captain and Warden on October 15, 2013.<sup>28</sup>

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<sup>26</sup> G. Ex. pg. 65, 66.

<sup>27</sup> Tr. 203 lines 13–19.

<sup>28</sup> A. Ex. pg. 30-31.

Special Agent indicated Grievant stated to her that he had reported to Warden on October 15, 2013 the incident involving C/O placing her hand in his pants. She testified at the grievance hearing to this and testified she was told this by Grievant during an interview conducted by her in her car while parked at a Wal-Mart parking lot. She testified this interview occurred on December 12, 2014.<sup>29</sup>

The evidence indicates that Warden and Captain denied Grievant had previously reported the allegation to them.<sup>30</sup>

Grievant admits he did not report the incident of 10/10/13 to anyone and testified at his 11/21/14 trial that he did not report the incident to anyone. However, Grievant denies he told Special Agent he had reported the 10/10/13 incident to Warden and Captain.

The Hearing Officer is charged with determining the probative weight and persuasiveness of evidence when there is conflicting evidence or evidence subject to varying interpretations. Consideration is given to the evidence admitted in this cause, including, but not limited to:

The 11/21/14 transcript and [Named Witness's] testimony set forth therein together with Grievant's statement in his 1/28/15 letter addressing the testimony of [Named Witness]. The below statement is of strong concern:

As to my interview with [Special Agent] on the 12<sup>th</sup> day of December, 2014, and her understanding that I had reported the groping incident to you on the 15<sup>th</sup> day of October, 2013, I believe her recollection of the same to be incorrect. Any reference I made to [Special Agent] pertaining to [C/O's] "groping" was in relation to her groping inmates and other employees as testified to by [Named Witness], a former employee at [Facility], during the trial on the 21<sup>st</sup> day of November, 2014.<sup>31</sup> (**emphasis added**)

Special Agent's Memorandum to Chief dated 12/15/14<sup>32</sup> to Chief of Investigations which indicated, when interviewed on 12/12/14, Grievant stated that he had reported the groping incident to Warden on October 15, 2013.

Testimony a hearing of Grievant, Special Agent, and Warden.

Warden and Captain, who assisted with the October 2013 inquiry, denied that Grievant had previously reported the allegations to them.

In testimony at hearing, Special Agent stated she had met with Grievant on 12/4/14 and 12/11/14 and that the 12/12/14 meeting date she reported was not correct. She met with him in a car at a Wal Mart parking and there were no recordings or notes taken. She testified she addressed with Grievant his saying he did not report matters to anyone and then saying he reported the incident involving C/O placing her hands in his pants to Warden and Captain.

Grievant said in open court on 11/21/14 he did not report matters to anyone. In his written statement dated 12/11/14 Grievant wrote concerning C/O," ... "I was debating in writing her up. ..."<sup>33</sup>

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<sup>29</sup> A. Ex. pg. 42, 45.

<sup>30</sup> A. Ex. pg. 42, 45, 58, 59, 60.

<sup>31</sup> G. Ex. pg. 65

<sup>32</sup> A. Ex. pg. 44-45.

<sup>33</sup> A. Ex. Tab 5.

After reviewing the evidence presented and observing the demeanor of each of the witnesses, for the reasons stated herein, Hearing Officer finds Agency has met its burden of proof as the Group III Written Notice with termination issued for Conduct Unbecoming a Security Supervisor.

**Mitigation:**

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall have the power and duty to 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.

The Rules for Conducting Grievance Hearings provide that a hearing officer is not a "super-personnel officer." 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.

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. 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).

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. Furthermore, 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.

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.

Upon consideration of and without repeating the matters discussed hereinabove, taking into consideration all the evidence presented in the cause, including the testimony of witnesses, Grievant's discipline is not found to exceed the limits of reasonableness.

Agency has taken into consideration aggravating and mitigating circumstances.

Hearing Officer has found that Grievant engaged in the behavior described in the Written Notices, the behavior constituted misconduct, and Agency's discipline was consistent with law and policy. Consideration has been given to Grievant's duties and responsibilities as a Lieutenant and Supervisor, his actions or lack thereof, his having a long work history of approximately 16 years,

beginning in 1999, with Agency, his not having a disciplinary record,<sup>34</sup> and consideration has been given to his EWP's.<sup>35</sup> Additionally, Hearing Officer has given consideration to Grievant's actions and choices and their effect on Agency and its responsibilities. Upon consideration of these matters and the evidence in this cause mitigating circumstances justifying reduction or removal of the disciplinary action are not found.

### **DECISION**

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds, as to each of the two Group III Written Notices with termination issued to Grievant:

1. Grievant did engaged in the behavior described in the Written Notice.
2. The behavior did constituted misconduct.
3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Agency's issuance to Grievant of the two Group III Written Notices of February 10, 2015 with termination are each ***upheld***.

### **APPEAL RIGHTS**

As the *Grievance Procedure Manual (effective date: July 1, 2012)* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

#### **A. Administrative Review:**

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and ***received by*** the 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.

**1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM.** This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be

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<sup>34</sup> Testimony.

<sup>35</sup> G. Ex. Section 3 (pg. 124 et seq.).

sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

**2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR.** This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("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, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is [edr@dhrm.virginia.gov](mailto:edr@dhrm.virginia.gov)).

**B. Final Hearing Decisions:**

A hearing officer's 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.

**C. Judicial Review of Final Hearing Decision:**

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

S/ Lorin A. Costanzo

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Lorin A. Costanzo, Hearing Officer

*copies e-mailed to:* Grievant's Attorney  
Agency Advocate  
EDR