Issue: Group III Written Notice with Termination (failure to follow policy); Hearing Date: 07/21/15; Decision Issued: 07/27/15; Agency: DOC; AHO: Cecil H. Creasey, Jr.; Case No. 10635; Outcome: Partial Relief.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10635

Hearing Date: July 21, 2015
Decision Issued: July 27, 2015

PROCEDURAL HISTORY

Grievant was a counselor for the Department of Corrections ("the Agency"). On April 21, 2015, the Grievant was issued a Group III Written Notice, with termination, for being involved in an unreported intimate relationship with an officer and other related offenses. The offense date was April 8, 2015.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and the grievance qualified for a hearing. On June 24, 2015, the Office of Employment Dispute Resolution, Department of Human Resource Management ("EDR"), appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for July 21, 2015, the first date available for the parties, on which date the grievance hearing was held, at the Agency's facility.

Both the Agency and the Grievant submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency's or Grievant's exhibits, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Advocate for Agency
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

Through his grievance filings and presentation, the Grievant requested rescission of the Group III Written Notice and available relief.

BURDEN OF PROOF

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

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

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

> The purpose of this policy is to set forth the Commonwealth's Standards of Conduct that the Department of Corrections must utilize to address unacceptable

> behavior, conduct, and related employment problems in the workplace or outside the workplace when the conduct impacts an employee's ability to do his or her job, or influences the agency's overall effectiveness.

Agency Exh. 13. The policy provides that 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.

Agency Operating Procedure 101.3, Standards of Ethics and Conflict of Interest, establishes the requirements to act professionally and ethically, and to respect the privacy of fellow employees and individual offenders. The policy requires employees to conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth. Agency Exh. 11. Section IV.F. pertains to consensual personal relationships and sexual harassment in the workplace. Sec. IV.F.2. states:

> d. Personal relationships, even between peers, within the same work unit may create similar problems and reassignment of one or both parties should be considered if such a relationship influences or effects the work environment or the work performance of any of the parties involved.
>
> e. Regardless of the supervisory/subordinate or peer/peer working relationship, staff involved in a romantic relationship with a co-worker should advise the work unit head of their involvement to address potential employment issues.

Section IV.F.3. provides

> The DOC prohibits acts of sexual harassment or inappropriate behavior by any staff. Appropriate action will be taken against persons who engage in sexual harassment.

Agency Operating Procedure 101.2, Equal Employment Opportunity, addresses the prevention of discriminatory practices and workplace harassment. Agency Exh. 9. The policy defines "hostile environment" as "a form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature that creates an intimidating or offensive place for employees to work." Section IV.D.3. of the policy states:

> Any employee who engages in conduct determined to be harassment, or who encourages such conduct by others, will be subject to corrective action under Operating Procedure 135.1, *Standards of Conduct*, which may include discharge from employment.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides

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

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

The Offense

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

The Agency employed the Grievant as a counselor, and the current Written Notice charged the Grievant as follows:

> You were involved in an intimate relationship with Officer [E] that started in 2013, which you failed to report. This is a direct violation of OP 101.3, Standard[s] of Ethics and Conflict of Interest. In addition, you created a hostile environment for Officer [E], showed a picture of your erect penis to a co-worker on state property and violated OP 101.3, Standards of Ethics and Conflict of Interest on the DOC value on ethical conduct in the workplace and with co-workers.

Agency Exh. 1. As circumstances considered, the Written Notice was blank.

The facility's warden testified that a single Group III Written Notice was issued to the Grievant rather than multiple written notices. The warden and assistant warden testified that they inquired and investigated after they were notified that Officer E. voiced a complaint about the Grievant's pursuit of her. Through their investigation, they learned of the consensual, intimate relationship between the Grievant and Officer E. Other witnesses testified to their knowledge of the relationship, or lack thereof.

Multiple witnesses testified to the Grievant's good work performance and relationships. Multiple witnesses also testified that Officer E. repeatedly and constantly telephoned locations throughout the facility in search of the Grievant, to the point of being distracting, annoying, and adversely affecting Agency operations. The warden testified that the Grievant's job is to serve as a role model for the inmates, and that he cannot no longer be effective in that position.

Unreported Intimate Relationship

Based on the unrefuted and admitted evidence, the Grievant was engaged in a consensual, intimate relationship with Officer E. beginning in 2013 and ending in December 2014 or January 2015. The Grievant actually produced pictures of the two of them posing together. Grievant's Exh. 1, 2 and 3. Neither the Grievant nor Officer E. reported the relationship to the Agency as required by OP 101.3. The Agency has met its burden of proof, and, under the applicable policy, discipline is appropriate. The warden testified that Officer E. received a Group II Written Notice for this policy violation of engaging in an unreported intimate relationship. Because of the potential and actual disruption of the workplace, I find Group II is an appropriate level for this offense, consistent with the discipline of Officer E. for the exact offense. Because further discipline elements contained in the Written Notice are reversed, as explained below, the Written Notice will be reduced from a Group III to a Group II.

Showed an Explicit Picture to a Co-worker on State Property

The Written Notice alleges that the Grievant showed a picture of his erect penis to a co-worker on state property. The undisputed evidence is that the Grievant showed a cell phone picture of his erect penis to a co-worker, Counselor R., while NOT on state property and NOT during working hours. The incident occurred in August 2014 at a fast food restaurant parking lot, after work hours and during a private conversation with a co-worker, Counselor R., who was also considered by the Grievant to be a friend. There was no evidence that the meeting at the restaurant was work-related. Despite Counselor R.'s prior indication to the Agency that the Grievant showed her nude pictures of Officer E. (Agency Exh. 4), Counselor R. testified during the grievance hearing that the Grievant, in fact, did not show her pictures of Officer E.

Counselor S. testified that the Grievant sent her text messages and pictures after work hours, and the pictures were of a penis and perhaps another individual who was not identifiable. Agency Exh. 3. Counselor S. denied knowingly seeing any pictures of Officer E. Counselor S. testified that she was a friend of the Grievant and did not consider the pictures offensive.

Factually, the Agency has failed in its burden of proof. While the Agency's OP 135.1 provides that an action or event occurring either during or outside of work hours may be considered a violation of the Standards of Conduct, discipline is limited to the charges contained in the Written Notice and may not be expanded at the grievance hearing. These facts do not support this disciplinary allegation.

An agency may have valid reasons for issuing discipline to an employee. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice.

Procedural Due Process is inextricably intertwined with the grievance procedure. The Rules for Conducting Grievance Hearings state:

> In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.

In support of this principle, the Rules cite *O'Keefe v. USPS*, 318 F.3d 1310 (Fed. Cir. 2002). To satisfy the requirements of procedural due process, an agency is required, at a minimum, to give the employee (1) notice of the charges against him or her, and (2) a meaningful opportunity to respond. Whether an agency has met this standard is often a matter of degree. Here, the Written Notice regarding the penis picture specifically states it occurred on state property, but the facts do not support this allegation. Indeed, the testimony reveals that the Agency abandoned any contention that the Grievant showed the picture at the workplace or during work hours.

Under the *Rules for Conducting Grievance Hearings*, the first issue in every disciplinary grievance is:

> Whether Grievant engaged in the behavior described in the Written Notice?

Here, the Written Notice misses the mark. There is a significant distinction between conduct at the workplace and during work hours versus non-work time and place. Thus, the Written Notice as issued on this aspect is woefully inadequate in putting the employee on notice that the discipline was directed to him because of conduct occurring in a personal, non-work setting. The Agency did not amend the Written Notice to allege a violation conforming to the facts. No clarification of the Written Notice, or any additional or amended Written Notice, was ever issued.[1]

The Written Notice has a section where the "nature of the offense and evidence" are to be listed and instructs the supervisor to "briefly describe the offense and give an explanation of the evidence." (The form allows for the attachment of additional documentation if required, but there are no attachments to the Written Notice.) If the standard set forth in *O'Keefe* is to be applied meaningfully, careful review of the Written Notice is necessary when compared to the facts shown. The Agency's Written Notice is specific on this event occuring "on state property." Based on the Written Notice and the evidence presented, I find that the Written Notice did not sufficiently detail the nature of the offense, and the Agency, necessarily, did not present evidence to show the Grievant's conduct as alleged. The Agency may not formally indicate discipline for X and actually prove Y at a grievance hearing as grounds for discipline. Accordingly, the Agency's discipline for showing the penis picture fails.

[1] EDR rulings on administrative review have held the same, concluding that only the charges set out in the Written Notice may be considered by a hearing officer. *See* EDR Rulings Nos. 2007-1409; 2006-1193; 2006-1140; 2004-720. In addition, the *Rules* provide that "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing." *Rules for Conducting Grievance Hearings § I.* Under the grievance procedure, charges not set forth on the Written Notice (or an attachment thereto) cannot be deemed to have been qualified. Thus, such unstated charges are not before a hearing officer.

In making this finding, I recognize that the Agency has a legitimate interest in seeing that policies are followed and personnel conform to Agency expectations. However, based on the aforementioned, the Hearing Officer finds that the agency inadequately informed Grievant of the charge and failed to prove the allegation. Discipline on this basis is reversed.

Hostile Work Environment

Both Officer E. and the Grievant testified that she (Officer E.) provided nude pictures to the Grievant with her cell phone, and the pictures were sent to the Grievant's cell phone. The Grievant testified that he ended the relationship with Officer E. in December 2014, but Officer E. testified that she ended the relationship. The Grievant testified that Officer E. continued her contact with and pursuit of him up through the end of March 2015. The Grievant testified that Officer E. continuously and repeatedly telephoned for him during working hours, and multiple witnesses testified to the constant and repeated calls Officer E. made to different locations throughout the facility in search of the Grievant even after the relationship ended. The witnesses testified that Officer E.'s constant conduct in search of the Grievant had an adverse impact on the work environment, for no apparent work reason. The Grievant testified that Officer E. sent text messages to his cell phone as late as March 30, 2015, and he read into the record multiple instances of messages, including messages from Officer E. expressing her regret over the end of the relationship.

Officer E. provided a handwritten statement to the Agency on March 31, 2015, complaining that the Grievant "was trying to push up on [her]." In her written statement, she stated she did not consider her sexual involvement with the Grievant to have been a "relationship." Agency Exh. 5. Her written statement also states that the Grievant took nude pictures of her. The Grievant testified that the only pictures he had of Officer E. were from her sending them to him. Officer E.'s testimony confirmed that the pictures were taken with her cell phone. Officer E. was evasive and less than completely forthcoming in her testimony compared to the Grievant's forthright testimony that was corroborated by other witnesses. On disputed facts, based on demeanor of the witnesses, the Grievant's evidence was more credible than Officer E.'s testimony.

As referenced above, OP 101.2 defines "hostile environment" as "a form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature that creates an intimidating or offensive place for employees to work." The Agency alleged that the Grievant created a hostile environment for Officer E. From the evidence presented, the basis for this element of discipline is the Grievant showing Counselor R. a nude picture of Officer E. during the August 2014 occasion at the fast food restaurant described above and perhaps the Grievant's picture sharing with Counselor S. Both Counselor R. and Counselor S. testified that the Grievant did not show them or share nude pictures of Officer E. The co-worker, Counselor R., provided written statements to the Agency stating that the Grievant showed her a nude picture of Officer E. on his cell phone. During her hearing testimony, however, Counselor R. specifically and repeatedly denied that the Grievant showed her a nude picture of Officer E. Counselor R. testified that the only picture the Grievant showed her was of the Grievant's penis. Counselor R.'s conflicting

evidence and testimony renders the Agency proof of discipline on this fact equivocal, at most. Therefore, the Agency fails in its burden of proof of this putative fact.

The allegation of the evidence of the alleged hostile environment is not otherwise described or articulated in the Written Notice. Even the alleged showing of a nude picture of Officer E. is not mentioned in the Written Notice. For this reason, based on the due process protections described above, the Agency's Written Notice is defective on the issue of informing the Grievant of the offending conduct. Regardless, I will address further why discipline for hostile environment is unwarranted.

Agency Operating Procedure 101.2, Equal Employment Opportunity, defines "hostile environment" as "a form of sexual harassment when a victim is subjected to unwelcome and severe or pervasive repeated sexual comments, innuendoes, touching, or other conduct of a sexual nature that creates an intimidating or offensive place for employees to work." Considering the totality of the circumstances, the Agency's evidence does not show a hostile environment. Officer E. was informed by the Agency that the Grievant shared with other co-workers nude pictures of Officer E. Officer E. testified that she considered this a betrayal. Factually, this alleged offending conduct was not proved by the Agency. Thus, as a basis for finding the Grievant created a hostile work environment, the Agency has not borne its burden of proof.

Moreover, assuming the Grievant shared nude pictures of Officer E. (pictures that Officer E. provided to the Grievant), the sharing would have been between friends who happened to be co-workers. Assuming, for the sake of argument, that this occurred, and that the conduct was unwelcome to Officer E., the conduct would not be severe or pervasive repeated conduct of a sexual nature that creates an intimidating or offensive place for employees to work. "[W]hile no one condones boorishness, there is a line between what can justifiably be called sexual harassment and what is merely crude behavior." *Ziskie v. Mineta*, 547 F.3d 220, 228 (4th Cir. 2008). Not all conduct that is inappropriate and unprofessional amounts to a change in the terms and conditions of employment. There is no evidence that the effects of picture sharing in any way crept into the workplace, let alone created an "intimidating or offensive place" to work. The Agency witnesses who allegedly saw pictures of Officer E. from the Grievant testified that they did not. This testimony was under oath. Even Officer E. was unaware of this allegation until the Agency, in its investigation of this matter, erroneously informed Officer E. on March 31, 2015, that the Grievant engaged in that alleged conduct.

The Fourth Circuit has recognized that plaintiffs "must clear a high bar in order to satisfy the severe or pervasive test." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008). Our courts have found that situations involving arguably egregious conduct did not meet the standard of severe and pervasive conduct as articulated by the Supreme Court. *See, e.g., Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 753-54 (4th Cir. 1996) (positioning magnifying glass over crotch and giving kiss during wedding reception line "tasteless and inappropriately forward" but not sufficiently severe or pervasive); *Atkins v. Computer Scis. Corp.*, 264 F. Supp. 2d 404, 410-11 (E.D. Va. 2003) (supervisor gave plaintiff full body hugs, pressed her breasts against plaintiff, revealed her thighs and demanded after hours meetings).

The analysis for a hostile environment contains a "subjective and objective assessment of the conduct." *Martin v. Scott & Stringfellow, Inc.*, 643 F. Supp. 2d 770, 787 (E.D. Va.2009). In other words, "'[the environment must be perceived by the victim as hostile or abusive, and that perception must be reasonable." *Ziskie v. Mineta*, 547 F.3d 220, 227 (4th Cir. 2008). To determine whether the conduct was objectively severe or pervasive, courts consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23, 114 S. Ct. 367. No single factor is dispositive, but "[e]mployment discrimination laws are not designed to create a general civility code for the workplace." *Sunbelt Rentals, Inc.*, 521 F.3d at 315-16 (4th Cir. 2008). "[I]solated incidents of hostile or abusive language are typically insufficient to support a hostile work environment claim." *Martin v. Scott & Stringfellow, Inc.*, 643 F. Supp. 2d 770, 787 (E.D. Va.2009) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)).

Assuming the Grievant's sharing of cell phone photos to two co-worker friends was severely objectionable, nothing, including her testimony, shows that it interfered with Officer E.'s work performance. Thus, the Agency has not borne its burden of proof on this discipline element. Discipline on this basis is reversed.

Violation of OP 101.3, Standards of Ethics and Conflict of Interest
"of the DOC value on ethical conduct in the workplace and with co-workers"

This element of the Written Notice may indicate a separate basis for the discipline, but the only factual allegations of offending conduct are those already discussed above. An Agency may not issue multiple disciplinary actions for the same act of misconduct. *See* EDR Admin. Ruling No. 2010-2528 (February 23, 2010), note 16. Based on the due process protections described above, the Agency's Written Notice is defective on the issue of informing the Grievant of the offending conduct. Regardless, I will address further why discipline for ethics violation is unwarranted.

As discussed above, assuming the offending conduct involves the cell phone pictures, neither Counselor R. nor Counselor S. testified that they were offended by the Grievant's pictures or conduct. There is no evidence that the Grievant's conduct with Counselor R. or Counselor S. was considered by them to be anything but a private, friendly, harmless exchange, albeit a bawdy one, and not offensive or unwelcome. There is no evidence that the Grievant, Counselor R., or Counselor S. brought this topic to the work environment. The conduct between the Grievant and Officer E. was a purely personal relationship, and the impact on the Agency is addressed by the Group II level discipline noted above. Any additional discipline because of this relationship is not warranted. Accordingly, discipline on the additional ethics ground is reversed.

MITIGATION

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

Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution." Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

I accept, recognize, and uphold the Agency's important responsibility for enforcing its policies and protecting the workplace from prohibited conduct. The Agency did not present any consideration of mitigating circumstances. However, the Agency was somehow unaware of Officer E.'s extensive disruptive behavior with her repetitive and constant telephone pursuit of the Grievant at and during work, right up to the point of her complaint to the Agency—conduct the Grievant described as harassing. Officer E.'s conduct occurred during work and affected the Agency's operations and distracted other employees who fielded the calls and inquiries. The warden testified that he was unaware of the extent of Officer E.'s conduct at work until hearing about it during the grievance hearing. While this presents extenuating circumstances, this conduct by Officer E. and the Agency's failure to address it does not mitigate against the Grievant's failure to report his intimate relationship with Officer E. to the Agency. Had the Grievant properly reported his relationship to the Agency, Officer E.'s conduct may have been exposed to management.

The Grievant suggested that Officer E.'s complaint against him was retaliation for his ending their relationship. The Grievant testified that Officer E. was sending him messages up to the day of her complaint, and that she was smiling after she learned of his job termination. I have already noted the Grievant's testimony was more credible than Officer E.'s. Officer E.'s conduct might serve as mitigating circumstances against additional discipline. However, I find this circumstance does not warrant reducing the discipline below Group II for failing to report the intimate relationship.

DECISION

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. Such decision for discipline falls within the discretion of the Agency so long as the discipline does not exceed the bounds of reasonableness. Here, except for the undisclosed intimate relationship, the Agency has not adequately described the additional bases for discipline nor borne its burden to prove additional grounds for discipline.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **reduced** to a Group II Written Notice for engaging in an unreported intimate relationship with a peer employee. This is consistent with the discipline levied on the other employee engaged in the relationship. A Group II Written Notice does not support job termination. Thus, the Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or, if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

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

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

request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[2]

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

Cecil H. Creasey, Jr.
Hearing Officer

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