



**COMMONWEALTH OF VIRGINIA**  
*Department Of Human Resource Management*  
*Office of Employment Dispute Resolution*

**DECISION OF HEARING OFFICER**

In re:

**Case number: 11921**

**Hearing Date: October 20, 2023**  
**Decision Issued: December 15, 2023**

**PROCEDURAL HISTORY**

On December 12, 2022, Grievant was issued a Group II written notice for disciplinary action with termination for unsatisfactory performance and failure to follow instructions and/or policy for “[f]ailure to respond to emails, Google instant messages, text messages, and phone calls within 15 minutes or less, as previously instructed; failure to check in upon [Grievant’s] arrival and departure from the office as instructed” as further described in the Written Notice on October 18-21, 2022, October 24, 2022, October 26-28, 2022, October 31, 2022, November 1-2, 2022, November 3, 2022, November 4, 2022, November 7, 2022, November 14, 2022, November 16-18, 2022, November 21-22, 2022 and November 28, 2022. For ease of reference, this Group II written notice will be referred to as the “First Group II Written Notice”.<sup>1</sup>

On December 12, 2022, Grievant was issued a Group II written notice for disciplinary action with termination for unsatisfactory performance and failure to follow instructions and/or policy for “[f]ailure to follow supervisor’s instructions” as further described in the Written Notice on October 31, 2022, November 23, 2022, and December 1, 2022. For ease of reference, this Group II written notice will be referred to as the “Second Group II Written Notice.”<sup>2</sup>

On December 29, 2022, Grievant timely filed a grievance to challenge the Agency’s action. The matter advanced to hearing. On January 24, 2023, the Office of Employment Dispute Resolution assigned this matter to a hearing officer. The hearing of

---

<sup>1</sup> Agency Ex. at Tab 4.

<sup>2</sup> Agency Ex. at Tab 5.

this matter was scheduled and rescheduled during the spring and summer of 2023 during which time the hearing officer originally assigned to hear this matter became unavailable. On July 17, 2023, the Office of Employment Dispute Resolution re-assigned this appeal to this Hearing Officer. On October 20, 2023, a hearing was held at a State office building in the City of Richmond.

### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency's Counsel  
Agency Party Designee  
Witnesses

### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g. free of unlawful discrimination) and policy (e.g. properly characterized as a Group I, II or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

Grievant began working for the Agency in 2018. Grievant was employed by the Agency as an Intake Support Assistant on a unit (or Team) in a Division of the Agency until his removal on December 12, 2022. No evidence of prior active disciplinary action was introduced during the hearing.

The Division was responsible for handling client appeals and provider appeals related to the Commonwealth's implementation of the Medicaid program. Among the responsibilities of the Team in the Division was the receipt and management of telephonic, walk-in and email inquiries. The Team also was responsible for receiving and beginning the processing of appeals including entering information into the Agency's appeals information management system.<sup>3</sup>

It was critical to the Agency that it meet the deadlines associated with appeals to ensure that the Agency satisfied Federal requirements for funding, to minimize potential litigation risk, and, with respect to provider appeals, to avoid the Agency automatically losing a case with potential significant financial implications.<sup>4</sup>

Because of the significance and impact of appeals deadlines, timeliness was essential to the Division's work. In order to ensure that the appeals deadlines were met, members of the Team were required to quickly and accurately process appeals and associated documents as they were received.<sup>5</sup> Coordinator assigned documents to Team members to process. Team members were expected to process documents within 30 minutes or less. If it would take longer than 30 minutes to process a document, Team members were instructed to notify Coordinator or Supervisor so that they could provide assistance and manage the workload and workflow of Team members.<sup>6</sup>

The Employee Work Profile (EWP) for Grievant's position set forth core responsibilities and measures for those core responsibilities. According to the Employee Work Profile, approximately 80 percent of Grievant's work was to "[p]rocess incoming correspondence in the Appeals Information Management System (AIMS)." Among the measures for this core responsibility was a requirement that Grievant "[r]aise impediments in real time to the [Coordinator or Supervisor]." Grievant's EWP defined an impediment as "[a]ny system, hardware, or on-line issue that (sic) prevents performance or completion of assigned work duties."<sup>7</sup>

Grievant also often was tasked with conducting the monthly test of the Division's automated telephone system or "phone tree." The phone tree is the automated telephonic system members of the public engage with when calling one of the various telephone numbers available for the Division. Members of the public may call one of the Division's numbers for a variety of reasons, including to ask a question, to get information about an on-going appeal or to file an appeal telephonically. Because of the importance of a well-functioning phone tree, Division Director established testing of the phone tree as a priority for the Team and required the Team to test the phone tree monthly on the first business day of each month. If the first day of the month fell on a Monday or the Team was experiencing a heavy workload, the Division Director may authorize the Team to test the phone tree on the second day of the month. Any exceptions to phone tree testing on the

---

<sup>3</sup> Hearing Recording at 13:34-15:15.

<sup>4</sup> Hearing Recording at 15:21-16:40.

<sup>5</sup> Hearing Recording at 16:40-17:19.

<sup>6</sup> Hearing Recording at 1:49:43-1:50:58, 2:56:46-2:57:13.

<sup>7</sup> Agency Ex. at Tab 31.

first of the month were approved in advance by the Division Director.<sup>8</sup> The monthly test required that assigned Team members call into the telephone numbers for the Division and work their way through the system prompts to ensure that they could get to information and then document the results of their testing. The results of a phone tree test would then be sent to Supervisor and Coordinator and Supervisor would share the results with Division Director.<sup>9</sup>

Grievant's Supervisor noted a change in Grievant's performance after Team members began teleworking full-time during the COVID-19 pandemic. Supervisor observed that it could be hard to get Grievant to respond to emails and to confirm when Grievant was on-line working.<sup>10</sup>

On June 21, 2021, Supervisor provided verbal counseling to Grievant regarding his work performance specifically related to his responsiveness to emails and his failure to follow instructions.<sup>11</sup> Grievant was put on notice at that time that his failure to improve his performance could result in disciplinary action.

Even after the June counseling, there continued to be issues with Grievant's performance requiring Supervisor to follow-up with Grievant to determine his work status and instruct him that if he was having technical difficulties, he had to let Supervisor or Coordinator know in real time.<sup>12</sup>

Supervisor provided verbal counseling to Grievant on September 20, 2021. Supervisor reiterated her expectation that Grievant "[c]ontinue raising impediments in real time."<sup>13</sup>

And still, issues with Grievant's performance continued. On September 28, 2021, Supervisor became aware that [Grievant] had experienced issues connecting to G-mail and G-suite on the day before (a Monday) and on the preceding Friday and that Grievant had missed a regular Team stand-up meeting as a result. Supervisor emailed Grievant to remind him, again, that he had been instructed to call or text [Coordinator] and Supervisor when he experienced these types of issues so they would know his work status.<sup>14</sup> On September 30, 2021, following Grievant's failure to notify Supervisor that he would be late, Supervisor reiterated to Grievant that he needed to advise her and Coordinator if he was unable to work or would be late for work.<sup>15</sup>

Problems with Grievant's performance continued and at some point, in December 2021 or early January 2022, staff from the Agency's human resources office spoke with Grievant regarding the on-going issues with Grievant's performance. Operations

---

<sup>8</sup> Hearing Recording at 1:18:36-1:21:35 and 1:21:50-1:23:07.

<sup>9</sup> Hearing Recording at 1:18:36-1:21:35 and 1:21:50-1:23:07.

<sup>10</sup> Hearing Recording at 2:15:25-2:16:25.

<sup>11</sup> Agency Ex. at Tab 7.

<sup>12</sup> Agency Ex. at Tabs 9 & 11.

<sup>13</sup> Agency Ex. at Tab 12.

<sup>14</sup> Agency Ex. at Tab 15.

<sup>15</sup> Agency Ex. at Tab 14.

Manager credibly testified that the Agency's practice was for human resources personnel to speak with an employee prior to giving final approval for issuance of a formal written counseling for the employee.<sup>16</sup>

By email dated January 5, 2022, Grievant advised Supervisor that he was

extremely disappointed in the information I just received, I was notified of a performance issue that was reported to [the Agency's human resources office]. I will be honest, I felt targeted for a while but I now feel that my job is no longer safe here with the [Team] or [Division] and steps are being made to get me fired. This is all very surprising to me, but I definitely noticed the change in how I was treated on this team after the beginning of the pandemic. I expressed concern about printing and delivering the mail the targeting started. First it was from [Coordinator] then you. Unfortunately the only support I had on this team was from [a former employee] and when she retired I knew the targeting would get a lot worse. We are now at the point where I know longer feel a part of this team. What's more disappointing is how unfair I was treated after missing time from work with COVID. This is an illness that has impacted not only the world but many people around us. When I returned to work I was blindsided by a bad evaluation, and now this. This is all extremely hurtful and humiliating, and I never expected this treatment from you. If you no longer want me here, and you are taking steps to get me fired please let me know so I can plan accordingly.<sup>17</sup>

Grievant's performance issues continued. On January 27, 2022, Grievant explained that he had not responded to emails and missed a meeting because of a computer issue he was experiencing earlier that morning and the day before. Supervisor advised Grievant that he had been issued an Agency phone "to use as a hotspot and as means of communication so that [he could] call, text, or email [Coordinator] and [Supervisor] if or when [Grievant] experiences any connectivity or other issues." Supervisor also confirmed that neither she, nor Coordinator had received any communication from Grievant indicating that he was experiencing connectivity issues. Supervisor reiterated to Grievant that "[t]he expectation is and continues to be that you notify [Coordinator] and [Supervisor] of any impediments, including G-suite or other connectivity issues, in real time and that you use your agency-issued phone to communicate that information to us if you cannot via the usual work email or instant message channels."<sup>18</sup>

To address the continuing performance issues with Grievant, Supervisor issued a formal Written Counseling to Grievant by memorandum dated February 4, 2022. Supervisor noted that improvement was needed in the following areas:

- Utilizing training and other resources to process documents and appeals.
- Attention to detail and reviewing your work in order to correct errors.
- Timely processing documents within 30 minutes.

---

<sup>16</sup> Hearing Recording at 7:15:01-7:16:36.

<sup>17</sup> Grievant's Ex. at G-2.

<sup>18</sup> Agency Ex. at Tab 16.

- Escalating impediments, questions and concerns in a timely fashion.
- Verbal and written communication.
- Following instructions.<sup>19</sup>

The Written Counseling reiterated the performance expectations set forth during the September 2021 verbal counseling and described specific issues that had been identified on various occasions in November, December, January and February.<sup>20</sup>

Grievant acknowledged receipt of the Written Counseling on February 7, 2022, and also provided written feedback to the Written Counseling, noting that:

I do have one concern in reviewing the Formal Written Counseling. I noticed the lack of language acknowledging the circumstances that contributed to some of the issues outlined throughout the document. Some examples of this would have been me having Covid and missing almost a month of work. The lack of training provided in the beginning of Aims, which was a major concern voiced by me and several other members of [the Team], as the majority of us had no experience provider appeals. Also there is no acknowledgement of how frequently processes change when it comes to provider and medical appeals, until early [D]ecember every week the guidance on how to process these type of appeals would change, these type of changes could cause an disruption in an employees ability to accurate process a document, if they were out of work for just one day. I believe this information is vital to add to the document to add context to why my work performance has been affected. I also believe this information being added shows the direct correlation to work performance before Aims and after Aims. When properly trained and given the adequate tools my work performance flourished, with limiting training and inconsistent guidance it has caused my work performance to be negatively impacted.<sup>21</sup>

Grievant also noted in a separate email regarding the Written Counseling that:

[a]nother concerning bullet point I viewed was the Timely processing documents within 30 minutes. There should be more context added to this as well. All appeals are not created equal, some appeals are two pages and others maybe 500. This should be added because [i]f I'm tasked with reviewing a 300 or 500 page appeal this process can take more than 30 minutes to accurately and timely process an appeal.<sup>22</sup>

On June 28, 2022, Grievant contacted the Agency's human resources office stating that he was "reaching out because I would like to file a grievance against a manager that has not been treating me fairly" and that he had "major concerns about the work environment that it had created" and that Grievant "worr[ie]d that filing this grievance will

---

<sup>19</sup> Agency Ex. at Tab 17. The memorandum was signed by Grievant on February 7, 2022.

<sup>20</sup> Agency Ex. at Tab 17.

<sup>21</sup> Agency Ex. at Tab 17.

<sup>22</sup> Agency Ex. at Tab 17.

result in retaliation from my manager” and he was “concerned about to proceed with this process.”<sup>23</sup> The Employee Relations Manager and another member of the Agency’s human resources office met with Grievant on July 11, 2022, provided Grievant with information about how to file a grievance and discussed Grievant’s concerns about what Grievant viewed as unfair treatment.

Issues with Grievant’s performance continued<sup>24</sup> and on September 15, 2022, the Agency provided Grievant with a “Notice of Improvement Needed/Substandard Performance.”<sup>25</sup> The Notice of Improvement Needed described Grievant’s performance deficiencies and noted that “[i]mprovements must be made within the next 30 days” in three areas: verbal and written communication, following instructions and attendance and punctuality.

The Notice of Improvement Needed included a section titled Improvement Plan.<sup>26</sup> The Improvement Plan section set forth the following instructions to Grievant:

1. Verbal and Written Communication: Under the terms of the Performance Factors in the current Employee Work Profile, you are required to possess strong oral and written communications skills to meet performance standards. you must: (1) Respond to all emails, Google instant messages, text messages, and phone calls within 15 minutes, or less. (2) Check-in daily via the team chat upon arrival to and departure from work, prior to going on break and upon your return from break, including lunch break. (3) Submit a written request in TAL or in Cardinal to [Supervisor] as far in advance as possible, barring extenuating circumstances, to use annual leave. (4) Notify your [Supervisor and Witness-Coordinator], in writing, at least 15 minutes prior to your approved start time of 8:00 am, if you will be late to work. (5) Request prior approval from [Supervisor] in writing, to attend any training that is not specific to your position. (6) Upon registration for any role-specific training or upon approval of any training request if not recommended or directed by [Supervisor], add the training date, time, and training information to your calendar.

2. Following instructions: You must: (1) Follow the Improvement Plan instructions. (2) Follow all other written or verbal instructions given to you by the Supervisor, [Coordinator] (by and through the [Supervisor]), [Operations Manager], [Director], or any member of executive leadership through either direct communication to you or through your manager(s), via the [Agency] Dispatch, or email.

3. Attendance and Punctuality: Under the terms of the Performance Factors in the current Employee Work Profile, you are required to be punctual to work and to be at work to perform at the expected level. You must: (1) Be at your desk at your approved work time, ready to begin work. (2) Use your work id/badge to swipe into the building, the elevator, and any secured floor. If your work id/badge

---

<sup>23</sup> Agency Ex. at Tab 29.

<sup>24</sup> Agency Ex. at Tab 18 & 19, Hearing Recording at 1:43:40-1:46:15, 2:43:20-2:48:57.

<sup>25</sup> Agency Ex. at Tab 19.

<sup>26</sup> Agency Ex. at Tab 19.

is lost or stolen, you must obtain a temporary badge from the receptionist upon your arrival at work, and return it at the end of the day.

On September 16, 2022, Supervisor completed a performance evaluation for Grievant which gave Grievant an overall rating of “contributor.”<sup>27</sup> The performance evaluation noted that a Notice of Improvement Needed had been issued to Grievant on September 15, 2022. Grievant signed the performance evaluation on September 22, 2022.

On October 31, 2022, Supervisor emailed Grievant after work hours inquiring as to Grievant’s lack of progress on processing work assigned to him that day. Specifically, Supervisor observed that

[w]e were extremely busy today and I have been checking on the progress of lowering the number of documents in the queue. I ran a report at 4:06 pm that shows you processed 13 documents as of that time with the last document processed at 2:35 pm this afternoon. . . . I ran another report at 4:47 pm and it shows that you had not processed any additional documents between 2:53 pm and 4:30 pm even though there are eight documents in ‘new’ status currently assigned to you. I don’t have a leave request for you for this afternoon that I’m aware of. Is there a reason why you did not process any additional documents after 2:53 pm today? If so, please let me know by 9 am, Tuesday November 1<sup>st</sup>.<sup>28</sup>

The next morning, November 1, 2022, Grievant replied to Supervisor at 8:22 am advising that “[Grievant] was working on a document during that time, with the new process in place it sometimes takes [Grievant] more than an hour to process one document.”<sup>29</sup>

Supervisor replied to Grievant at 8:38 am November 1, 2022 with the following questions and instructions:

1. What new process are you referring to that it now takes you (sometimes) one hour to process a document?
2. Since the last document you processed was at 2:53 pm yesterday afternoon, are you saying that from 2:53 pm to 3:53 pm, you were processing one document?
3. The team received instructions that if it takes more than 30 minutes to process a document, to alert [Coordinator] and me. I do not recall receiving any message from you about it. Did you inform [Coordinator]?
4. Please send me a screenshot of the document in the queue that you were working on or the appeal number so that I may take a look at it.<sup>30</sup>

Grievant responded at 8:46 am that Grievant was “not sure I understand.”<sup>31</sup>

---

<sup>27</sup> Agency Ex. at Tab 20.

<sup>28</sup> Agency Ex. at Tab 10.

<sup>29</sup> Agency Ex. at Tab 10.

<sup>30</sup> Agency Ex. at Tab 10.

<sup>31</sup> Agency Ex. at Tab 10.



At 9:11 am on November 1, 2022, Supervisor followed-up again with Grievant by email stating:

Of the eight documents assigned to you to process in the queue, which one were you having difficulty processing with the new process? Two of those documents are new client eligibility appeals, three documents are returned mail pieces, one is a provider appeal, one appears to be a document to add to an existing appeal, and one is an email. So I'm not sure I understand what document you were referring to that was taking you more than an hour to complete.

You received instructions to process documents within 30 minutes and to notify me or [Coordinator] if you were unable to do so. You received instructions to make this improvement in the formal written counseling memo you signed on February 7, 2022.

Please send me a screenshot of the document you were working on that was taking you an hour or so to complete.<sup>32</sup>

Grievant replied at 9:23 am on November 1, 2022, that Grievant was "still not sure I understand the majority of these documents were newly assigned today."<sup>33</sup>

At 9:31 am on November 1, 2022, Supervisor responded again to Grievant stating:

Your response to my original email was "I was working on a document during that time, with the new process in place it sometimes takes me more than an hour to process one document." My questions are what document were you working on that took you at least one hour to process, and what is the new process you are referring? You did not process any additional documents after 2:53 pm.<sup>34</sup>

Grievant replied at 9:41 am "[s]orry I'm just not understanding your questioning this morning, Its very confusing."<sup>35</sup>

Supervisor emailed Grievant at 9:45 am and asked "[w]hat document were you having trouble processing."<sup>36</sup>

At 9:50 am Grievant replied that "I don't believe I ever stated that I had trouble processing the document, some take longer then others with all the additional steps that have been recently added to our process."<sup>37</sup>

---

<sup>32</sup> Agency Ex. at Tab 21.

<sup>33</sup> Agency Ex. at Tab 21.

<sup>34</sup> Agency Ex. at Tab 21.

<sup>35</sup> Agency Ex. at Tab 21.

<sup>36</sup> Agency Ex. at Tab 21.

<sup>37</sup> Agency Ex. at Tab 21.

Supervisor's final response on this issue was at 9:54 am, making clear to Grievant that "[y]ou have not answered my question. Why didn't you process anything after 2:53 pm? I will send a meeting invite."<sup>38</sup>

On the afternoon of November 1, 2022, Supervisor advised Grievant that due to the number of documents that required processing that day, the Division Director had given permission for Grievant's portion of the phone tree test to be completed on November 2, 2022.<sup>39</sup>

Grievant did not provide results from a phone tree test to Supervisor on November 2, 2022. On November 3, 2022, Supervisor emailed Grievant inquiring as to the results of the phone tree test that Grievant had been instructed to perform on November 2, 2022.<sup>40</sup>

Grievant was out of the office on approved leave on November 3, 2022.

Because Grievant had not shared any results from a phone tree test before going on leave, Coordinator conducted a phone tree test on November 3, 2022.<sup>41</sup>

Grievant returned to work on November 4, 2022.

On November 4, 2022, at 9:09 am, Supervisor emailed Grievant to inquire as to whether he had performed the phone tree test on November 2, 2022, as instructed.<sup>42</sup> At 1:01 pm on November 4, 2022, Supervisor again emailed Grievant to follow up on her earlier email and inquire again as to whether Grievant had completed the phone tree test on November 2, 2022. Supervisor also reminded Grievant that "according to your Notice of Needs Improvement, you are required to respond to emails within 15 minutes or less."<sup>43</sup>

Grievant replied at approximately 1:54 pm that "[y]es, the phone tree test was completed. I saw [Coordinator's] email and saw she completed and passed it as well."

Supervisor followed-up with an email to Grievant at 1:56 pm:

When did you complete the test and what phone number did you use to perform the test? Also, why haven't you sent me the results and why didn't you respond when I emailed you about this?<sup>44</sup>

---

<sup>38</sup> Agency Ex. at Tab 21.

<sup>39</sup> Agency Ex. at Tab 25.

<sup>40</sup> Agency Ex. at Tab 25.

<sup>41</sup> Hearing Recording at 1:46:11-1:49:44.

<sup>42</sup> Agency Ex. at Tab 25.

<sup>43</sup> Agency Ex. at Tab 25.

<sup>44</sup> Agency Ex. at Tab 25.

Grievant replied at approximately 2:26 pm on November 4, 2022, that “[Coordinator] sent the results.”<sup>45</sup> Grievant never provided any results from a November 2, 2022, phone tree test to Supervisor or Coordinator.<sup>46</sup>

On November 7, 2022, at 9:44 am, Supervisor emailed Grievant:

I noticed that you have not checked in this morning via the group chat. I also noticed that you haven’t processed any documents, yet, this morning and I don’t have an email from you that you are experiencing any impediments.

Are you working today? I checked Cardinal and did not see any leave requests from you to have off today. I also reviewed the team calendar and do not have you being out today. Is this something I overlooked?

Please let me know the reason you have not processed any documents in AIMS so far this morning.<sup>47</sup>

Grievant responded approximately one hour later, at 10:44 am stating only “[y]es, I am working. [E]verything is fine.”<sup>48</sup>

On November 22, 2022, Grievant requested that Supervisor approve his use of volunteer leave on the following day. Supervisor denied Grievant’s request primarily due to inadequate staffing on that date and advised Grievant that he would be “expected to report to work at 8 am tomorrow.”<sup>49</sup>

The next day, at approximately 7:35 am, Grievant sent an email to Supervisor stating: “I’m not feeling well today. I will be OOO today.”<sup>50</sup> After initially making clear his intention to not work due to illness, Grievant proceeded to report to the office to work and sent a message advising Supervisor that he had come to work with a 102-degree fever. Supervisor replied at approximately 9:00 am by email as follows:

I received your email this morning stating that you were sick and that you would be OOO today. I also received your instant message that you arrived at work but with a 102-degree fever. If you have a fever, you should not be in the building and you will need to use leave, and be OOO as you originally stated. Therefore, I have marked you as being out today. I hope that you feel better, that you get some rest, and that you have an enjoyable Thanksgiving.<sup>51</sup>

---

<sup>45</sup> Agency Ex. at Tab 25.

<sup>46</sup> Agency Ex. at Tab 25, Hearing Recording at 1:46:11-1:49:18, 1:51:25-1:53:33, 1:57:35-1:57:42, 3:04:36-3:05:04.

<sup>47</sup> Agency Ex. at Tab 22.

<sup>48</sup> Agency Ex. at Tab 22.

<sup>49</sup> Agency Ex. at Tab 26.

<sup>50</sup> Agency Ex. at Tab 26.

<sup>51</sup> Agency Ex. at Tab 26.

Grievant replied at approximately 9:20 am stating "I'm already in the office working this morning."

At approximately 9:53 am, Supervisor again advised Grievant by email that because he had indicated he was sick, he should not be in the office, stating that "[y]ou stated you have a fever of 102 degrees. Not only are you risking the health and well-being of your co-workers but if you have to assist a walk-in customer, you would also risk the well-being of a member of the public. I have approved your request to be out of the office today. Therefore, please make arrangements to leave for the day."<sup>52</sup>

Grievant replied at approximately 10:43 am stating that "I just received this I processed documents in the office until 10:30 am, I will use 2 hours of leave for the remainder of the day."<sup>53</sup> Grievant emailed Supervisor at approximately 10:46 am advising that "correction due to the late notice and miscommunication I will use 1.5 of leave today as I have to enter my timesheet in cardinal and update my OOO email."<sup>54</sup>

At approximately 10:55 am, Supervisor again instructed Grievant to leave:

you were instructed to leave one hour ago, and you did not. You did not follow my instructions and your continued presence puts your coworkers at risk. I am giving you permission to submit your timesheet on Monday when you return to work. Please do not delay and make arrangements to leave immediately.<sup>55</sup>

Grievant finally left the office only after receiving that last instruction from Supervisor.

On December 1, 2022, at approximately 8:44 am, Supervisor emailed Grievant and another employee with directions for performing the monthly phone tree test that day, Supervisor wrote:

please perform the test starting at 10:30 am, after stand-up. In addition, please respond to this email by 9:00 am and let us know what phone number you will be calling from so we're aware when we see it come through the call center. Lastly, please send your written results to [Coordinator] and to me by or before noon today.<sup>56</sup>

Grievant emailed at 8:53 am, "[r]eceived and understood," but did not include the phone number he would be using to conduct the test.<sup>57</sup>

Grievant did not send the phone number he would be using for the phone tree test by 9:00 am.

---

<sup>52</sup> Agency Ex. at Tab 26.

<sup>53</sup> Agency Ex. at Tab 26.

<sup>54</sup> Agency Ex. at Tab 26.

<sup>55</sup> Agency Ex. at Tab 26.

<sup>56</sup> Agency Ex. at Tab 27.

<sup>57</sup> Agency Ex. at Tab 27.

At 9:31 am, Supervisor replied to Grievant's earlier email and again asked Grievant for the phone number he would be calling from so they would recognize it in the call center.<sup>58</sup> After receiving no reply and no phone number from Grievant, Supervisor emailed Grievant again at approximately 10:05 am again instructing him to provide the phone number he would be using to conduct the phone tree test so that it would be recognized by the call center.<sup>59</sup>

Grievant responded at 10:18 am with a partial, 5-digit number.<sup>60</sup> At 10:33 am, Supervisor replied to Grievant directing that he provide the entire phone number before conducting the test.<sup>61</sup> At 10:35 am, Grievant replied to Supervisor stating: "I don't remember the entire number."<sup>62</sup> At 10:44 am Supervisor emailed Grievant instructions for identifying his phone number. At 10:51 am, Grievant sent an email only to Supervisor providing a 7-digit phone number. Supervisor replied at 10:54 am again instructing Grievant to "[p]lease reply all and include [Coordinator] and [employee] as instructed."<sup>63</sup> At 10:56 am, Grievant replied all to Supervisor, [Coordinator] and employee, providing a 7-digit phone number.<sup>64</sup>

At 11:32 am, Grievant emailed Supervisor, [Coordinator] and two other employees that "[p]hone tree test completed."<sup>65</sup>

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>66</sup> Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

The offense of "failure to follow supervisor's instructions/directives"

focuses on the ability of agency managers and supervisors to direct work and the workforce. Management must demonstrate the employee was given proper, reasonable and lawful instructions and the employee improperly failed to follow the instructions or perform the assigned work regardless of whether the failure to act was intentional or unintentional. Generally speaking, an Agency is entitled to have all instructions followed, unless following the instruction would place the

---

<sup>58</sup> Agency Ex. at Tab 27.

<sup>59</sup> Agency Ex. at Tab 27.

<sup>60</sup> Agency Ex. at Tab 27.

<sup>61</sup> Agency Ex. at Tab 27.

<sup>62</sup> Agency Ex. at Tab 27.

<sup>63</sup> Agency Ex. at Tab 27.

<sup>64</sup> Agency Ex. at Tab 27.

<sup>65</sup> Grievant Hearing Ex. Z.

<sup>66</sup> The Department of Human Resources Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

employee or client in imminent danger, cause irreparable harm or violate laws, policy or protocols.<sup>67</sup>

DHRM Policy 1.60 Standards of Conduct provides that “Agencies may address multiple offenses through the issuance of one or more Written Notices.”<sup>68</sup>

### **Whether Grievant engaged in the behavior alleged and whether the behavior constituted misconduct**

#### **The First Group II Written Notice**

Grievant was instructed to perform the phone tree test on November 2, 2022. Agency witnesses credibly testified that an important component of the phone tree test is to document and share the results of the test.<sup>69</sup> Indeed, the email thread where Supervisor advised Grievant that he should perform the phone tree test on November 2, 2022, shows that the employee responsible for conducting the Spanish-speaking portion of the test had noted that the phone tree had “passed” and she also attached “results” from her test.<sup>70</sup> Grievant did not share results of a phone tree test on November 2, 2022. Grievant did not share any results of a phone tree test on November 2, 2022, or when he returned to work on November 4, 2022, not even after he was repeatedly instructed to do so by Supervisor.<sup>71</sup> Grievant asserts that he conducted the phone tree test on November 2, 2022, but there is no evidence to support his claim. To the contrary the preponderance of the evidence demonstrates that Grievant did not share results of a phone tree test as instructed on November 2 or on November 4 because he had no results to share. Grievant does not dispute that on November 2, 2022, he did not provide results of the phone tree test he was instructed to perform. Contrary to Grievant’s assertions, the evidence shows that on November 4, 2022, Grievant did not share results from a phone tree test, rather he repeatedly referenced that Coordinator had conducted the test and shared the results.<sup>72</sup> Grievant failed to follow instructions when he did not perform the phone tree test on November 2, 2022, as instructed.

Grievant also was instructed to “[r]espond to all emails, Google instant messages, text messages, and phone calls within 15 minutes, or less.” Given Grievant’s history of failing to respond to his Supervisor, the Hearing Officer finds this instruction to have been reasonable. Grievant failed to follow this instruction when he failed to respond at all to Supervisor’s email sent at approximately 9:09 am on November 4, 2022, and then took

---

<sup>67</sup> DHRM Policy 1.60, Standards of Conduct, Attachment A, Glossary of Offenses and Terms Used in Disciplinary Actions.

<sup>68</sup> DHRM Policy 1.60, Standards of Conduct.

<sup>69</sup> Hearing Recording at 1:18:36-1:21:33, 1:21:53-1:23:07, 1:46:11-1:49:44, 1:57:35-1:57:42, 3:02:25-3:04:03, 4:01:25-4:01:51.

<sup>70</sup> Agency Ex. at Tab 25.

<sup>71</sup> Agency Ex. at Tab 25, Hearing Recording at 1:46:11-1:49:18, 1:51:25-1:53:33, 1:57:35-1:57:42, 3:04:36-3:05:04.

<sup>72</sup> See Agency Ex. at Tab 25.

approximately 54 minutes to reply to Supervisor's second emailed request that day for information about whether Grievant actually performed the November 2, 2022, phone tree test.

The Agency had made Grievant aware that the Agency was concerned with Grievant's attendance and punctuality as well as his responsiveness to emails and had provided Grievant with specific and reasonable instructions to address those performance issues requiring that Grievant: "(1) Respond to all emails, Google instant messages, text messages, and phone calls within 15 minutes, or less" and "(2) Check-in daily via the team chat upon arrival to and departure from work, prior to going on break and upon your return from break, including lunch break".<sup>73</sup> On November 7, 2022 Grievant failed to follow those instructions when he failed to check-in via the Team chat when he began working that day and then again when he took approximately one hour to reply to Supervisor's email inquiring as to his work status.<sup>74</sup> Because Grievant did not check-in as instructed on November 7, 2022, Supervisor was unsure of Grievant's work status when she looked at the document processing system and could see that Grievant had not yet processed any documents in the system. Supervisor emailed Grievant to determine whether he was working. The Agency had made Grievant aware that the Agency was concerned with Grievant's attendance and punctuality as well as his verbal and written communications and responsiveness and had provided Grievant with specific and reasonable instructions to address those performance issues that Grievant failed to follow on November 7, 2022.

The Agency instructed Grievant to "[c]heck-in daily via the team chat upon arrival to and departure from work, prior to going on break and upon [his] return from break, including lunch break."<sup>75</sup> Supervisor credibly testified that Grievant did not check-in via the Team chat on the following dates: Tuesday, October 18, 2022, Wednesday, October 19, 2022, Thursday, October 20, 2022, Friday, October 21, 2022, Monday, October 24, 2022, Wednesday, October 26, 2022, Thursday, October 27, 2022, Friday, October 28, 2022, Monday, October 31, 2022, Tuesday, November 1, 2022, Wednesday, November 2, 2022, Friday, November 4, 2022, Monday, November 7, 2022, Monday, November 14, 2022, Wednesday, November 16, 2022, Thursday, November 17, 2022, Friday, November 18, 2022, Monday, November 21, 2022, Tuesday, November 22, 2022, Monday, and November 28, 2022.<sup>76</sup> Supervisor testified that the dates identified were dates when Grievant did not check-in via the Team chat at all. If Grievant had checked-in at least one time on a particular date (for example, upon arrival or prior to going on break), Supervisor did not include that date on the list.

Grievant argues that the Agency cannot meet its burden of proof because the Agency did not provide documents showing Grievant's absence from the Team chat on those specific dates. Such documentation could be helpful but is unnecessary for the Agency to meet its burden in this case. Supervisor credibly testified regarding the dates when Grievant did not check-in. Although Coordinator did not keep track of specific dates when Grievant did not check-in, she credibly testified that she observed that Grievant

---

<sup>73</sup> Agency Ex. at Tab 19.

<sup>74</sup> See Agency Ex. at 22.

<sup>75</sup> Agency Ex. at Tab 19.

<sup>76</sup> Hearing Recording at 2:51:02-2:53:31.

“quite often” did not check-in via the Team chat. And, Grievant admits that “sometimes” he did not check-in via the Team chat, though he says he “sometimes” did.<sup>77</sup>

Grievant argues that checking-in via the Team chat was not an instruction but rather an expectation or an “improvement plan.” This Hearing Officer does not see a difference between an instruction and an expectation or an improvement plan in this case. The Agency put Grievant on notice that his performance needed to improve and set forth in specific detail several directions preceded by the phrase “you must,” including “you must: ... [c]heck-in daily via the team upon arrival to and departure from work, prior to going on break and upon your return from break, including lunch break.” Grievant also argues that if it had been really important to Supervisor that he “check-in”, she would have made that clear to him by contacting him each time he failed to do so. Contrary to Grievant’s argument, it is hard to see how Supervisor could have been clearer. Supervisor and the Agency were clear in expressing their concerns with Grievant’s performance in the Notice of Improvement Needed/Substandard Performance and when they instructed Grievant that he “must” “check-in daily via the Team chat.”<sup>78</sup>

Grievant also argues that he should not have been expected to follow an instruction to check-in to the Team chat because there were other methods Supervisor could have used to determine whether Grievant was working, for example, she could confirm through the Agency’s security system whether Grievant had “swiped in” with his work identification badge on a day when he was working in the office, she could look for him in the office or, on days when he was teleworking, she and/or the Coordinator could observe him participating in Team “stand-up” meetings on the days when the “stand-up” meetings were held. Grievant’s argument seems to be that if Supervisor wanted to know whether Grievant was working on a particular day, she should spend her time tracking Grievant down rather than simply requiring that Grievant follow the reasonable instruction that he was given to use the Team chat like other members of his Team. Although Supervisor could have used other methods for determining when Grievant was working, she chose instead to instruct Grievant to use the Team chat.

Each time Grievant did not check-in via the Team chat, he was failing to follow the reasonable instruction he was given. Grievant failed to follow instructions when he did not check-in via the Team chat on the following dates: Tuesday, October 18, 2022, Wednesday, October 19, 2022, Thursday, October 20, 2022, Friday, October 21, 2022, Monday, October 24, 2022, Wednesday, October 26, 2022, Thursday, October 27, 2022, Friday, October 28, 2022, Monday, October 31, 2022, Tuesday, November 1, 2022, Wednesday, November 2, 2022, Friday, November 4, 2022, Monday, November 14, 2022, Wednesday, November 16, 2022, Thursday, November 17, 2022, Friday, November 18, 2022, Monday, November 21, 2022, Tuesday, November 22, 2022, Monday, and November 28, 2022.

The Agency has met its burden of proving that Grievant failed to follow reasonable instructions and performed unsatisfactorily: (i) when Grievant did not perform the phone

---

<sup>77</sup> Hearing Recording at 2:25:01-2:53:31, 1:57:46-1:59:21, 5:29:19-5:29:35.

<sup>78</sup> Agency Ex. at Tab 19.



tree test on November 2, 2022 and when he failed to respond to Supervisor's email sent at approximately 9:09 am on November 4, 2022 and then took approximately 54 minutes to reply to Supervisor's second emailed request that day for information about whether Grievant actually performed the November 2, 2022 phone tree test; (ii) when Grievant failed to check-in via the Team chat when he began working on November 7, 2022 and when he took approximately one hour to reply to Supervisor's email inquiring as to his work status on that date; and (iii) when Grievant did not check-in via the Team chat on the following dates: Tuesday, October 18, 2022, Wednesday, October 19, 2022, Thursday, October 20, 2022, Friday, October 21, 2022, Monday, October 24, 2022, Wednesday, October 26, 2022, Thursday, October 27, 2022, Friday, October 28, 2022, Monday, October 31, 2022, Tuesday, November 1, 2022, Wednesday, November 2, 2022, Friday, November 4, 2022, Monday, Monday, November 14, 2022, Wednesday, November 16, 2022, Thursday, November 17, 2022, Friday, November 18, 2022, Monday, November 21, 2022, Tuesday, November 22, 2022 Monday, and November 28, 2022.

### The Second Group II Written Notice

Because of the significance and impact of appeals deadlines, timely processing of documents is essential to the Division's work. Team members, including Grievant, were expected to process documents within 30 minutes or less. If it would take longer than 30 minutes to process a document, Team members were instructed to notify Coordinator or Supervisor so that they could provide assistance and manage the workload and work flow of the Team.<sup>79</sup> Additionally, Grievant received Written Counseling that he was expected to process documents in 30 minutes or less and that if he was having trouble doing so, he was instructed to notify Coordinator or Supervisor.<sup>80</sup> On October 31, 2022, Supervisor reviewed the document management system and observed that by 4:06 pm Grievant had processed only 13 documents as of that time with the last document processed at 2:53 pm. Supervisor ran another report at 4:47 pm on that date and it showed that Grievant had not processed any additional documents between 2:53 pm and 4:30 pm. This information indicated that either Grievant was not working after 2:53 pm or it was taking him more than 30 minutes to process documents. Grievant did not contact Coordinator or Supervisor about any issues that would have affected his ability to process a document in 30 minutes or less. When Supervisor inquired as to Grievant's slow progress, Grievant replied that he was "working on a document during that time, with the new process in place it sometimes takes me more than an hour to process one document."<sup>81</sup> Supervisor tried repeatedly and unsuccessfully to get details from Grievant about the document that had taken him so long to process on October 31, 2022.<sup>82</sup>

---

<sup>79</sup> Hearing Recording at 1:49:43-1:50:58, 2:56:46-2:57:13.

<sup>80</sup> Agency Ex. at Tab 17. Grievant appears to have received this instruction in the Written Counseling in part in response to an incident in November 2021 when Grievant did not timely process documents he was assigned and failed at that time to notify Coordinator or Supervisor when it took him more than 30 minutes to process a document.

<sup>81</sup> Agency Ex. at Tab 21.

<sup>82</sup> Hearing recording at 2:55:40-2:58:32.

Grievant argues that requiring that documents be processed in 30 minutes or less is a goal or aspiration because not all documents can be processed in 30 minutes. Grievant also argues that once he had completed processing the document, he would no longer be able to take a screen shot or provide any other details about the document as requested by Supervisor.<sup>83</sup> Grievant's arguments are unpersuasive. Grievant had been instructed to notify Supervisor or Coordinator if he was having trouble processing a document in 30 minutes or less, Grievant failed to follow that instruction on October 31, 2022. When Supervisor repeatedly instructed Grievant to provide her with information so that she could identify the document Grievant claimed to have been working on for more than 1.5 hours, Grievant repeatedly failed to do so.

On November 23, 2022, after learning that Grievant had come into the office with a fever, Supervisor advised Grievant at 9:00 am that he should not be in the building if he had a fever and instructed him to use leave and be out of the office. Grievant did not leave as instructed, instead noting that he was "already in the office working this morning." At approximately 9:53 am, Supervisor sent Grievant a second email making clear that Grievant was risking the health and well-being of co-workers and potentially members of the public and again instructing him to leave.<sup>84</sup> Approximately 50 minutes later, Grievant replied to Supervisor advising her that he intended to work in the office for an additional 30 minutes to enter his timesheet into cardinal and update his out of office email.<sup>85</sup> It would take yet another email from Supervisor before Grievant finally left the office as instructed. That is over one hour after Supervisor's second instruction to him to leave the office. Grievant now asserts that he did not advise Supervisor that he had a 102-degree fever when he came into the office on November 23, but that he referenced the fever he had on the night before. Grievant appears to suggest that he did not need to follow Supervisor's instruction because, according to him, he did not have a fever. Grievant's assertions are not persuasive. Supervisor gave Grievant a reasonable instruction that he was required to follow. Operations Manager and Supervisor both credibly testified that Grievant sent Supervisor a message on the morning of November 23, 2022 indicating that he had a 102 degree fever when he came into the office that day.<sup>86</sup> At no point on November 23, 2022 did Grievant tell Supervisor that she had misunderstood his prior communication and that he did not currently have a fever when she repeatedly instructed him to leave the building because he was sick with a fever. Although Grievant eventually left the office, Grievant failed to follow Supervisor's instruction and put his co-workers at risk when he did not leave when he was instructed to do so.

At 8:44 am on December 1, 2022, Supervisor instructed Grievant to perform a phone tree test starting at 10:30 am that day and to send an email to Supervisor and others by 9:00 am to let them know what number Grievant would be calling from. Grievant did not provide his phone number to Supervisor and others by 9:00 am as instructed. Supervisor sent Grievant two additional emails at 9:31 am and 10:05 am again instructing him to provide the phone number he would be using to test the phone tree. Grievant replied at 10:18 am with a partial number. Grievant did not provide the phone number he

---

<sup>83</sup> Hearing recording at 5:44:45-5:46:12, 6:20:09-6:25:38.

<sup>84</sup> Agency Ex. at Tab 26.

<sup>85</sup> Agency Ex. at Tab 26.

<sup>86</sup> Hearing Recording at 307:23-3:08:21, 7:12:52-7:14:50.

would be calling from until almost 11 am that morning. Grievant failed to follow instructions when he did not provide the phone number he would be using for the phone tree test to Supervisor (and others) by 9:00 am. Supervisor then had to instruct Grievant twice more (at 9:31 am and 10:05 am) to provide the number before Grievant provided a partial number (five digits) at 10:18 am. Grievant failed to follow the instruction to provide his phone number by 9:00 am which ultimately resulted in a delay of the start of the test that Grievant had been instructed to start at 10:30 am. Grievant argues that he conducted the phone tree test as instructed because Grievant provided his phone tree test results before the noon deadline he had been given for providing the results. Grievant's argument is not persuasive. The Agency is not alleging that Grievant did not perform the phone tree test at all, but rather that he did not follow the instruction he was given to provide the phone number he was planning to use for the phone tree test by 9:00 am, requiring Supervisor to repeatedly ask Grievant for the information he had clearly been instructed to provide and ultimately delaying the start of the test.

The Agency has met its burden of proving that Grievant failed to follow reasonable instructions and performed unsatisfactorily when: (i) when Grievant failed to notify Supervisor or Coordinator that he was having trouble processing a document in 30 minutes or less on October 31, 2022 and when he did not follow Supervisor's instructions and identify the document Grievant claimed to have been working on for more than 1.5 hours; (ii) when Grievant did not leave the office when instructed by Supervisor to do so on November 23, 2022; and (iii) when Grievant did not provide the phone number he was planning to use for the phone tree test on December 1, 2022 by 9:00 am as instructed.

### **Whether the Agency's discipline is consistent with law and policy**

Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action."<sup>87</sup> Failure to follow instruction or policy is a Group II offense. Each failure to follow instruction can be treated as a separate offense. In this case, the Agency decided to combine multiple offenses into two Group II written notices.

An accumulation of two or more Group II written notices normally will warrant termination.

Grievant asserts that he never "refused" to follow an instruction and never "intentionally" failed to follow an instruction. Grievant argues that if he engaged in misconduct, it was unsatisfactory performance, a Group I offense. Grievant's argument is not persuasive. Grievant may not have said "I refuse" to a particular instruction but the evidence shows that Grievant repeatedly did not follow instructions or required that he be given the same instruction multiple times in order for him to, sometimes, eventually perform. Grievant's failure to follow his Supervisor's instructions was repeated and pervasive. Additionally, in this case, the Agency grouped multiple offenses into just two written notices.

---

<sup>87</sup> DHRM Policy 1.60, Standards of Conduct.

The Agency's discipline was consistent with law and policy. The Agency has met its burden.

### **Grievant's Claim of Retaliation**

Grievant asserts that he engaged in protected activity when he sent his January 5, 2022, email to Supervisor and when he contacted and then met with the Agency's human resources personnel about filing a grievance in June 2022. In order to succeed with a retaliation defense, Grievant must show that (1) he engaged in a protected activity; (2) he experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.<sup>88</sup> If the Agency presents a nonretaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence that the Agency's stated reason was a mere pretext or excuse for retaliation.<sup>89</sup> Grievant experienced an adverse employment action when he was removed from his employment on December 12, 2022. This Hearing Officer does not need to determine whether Grievant engaged in protected activity, because even assuming Grievant did engage in protected activity, it is clear that the Agency had nonretaliatory business reasons for the disciplinary actions taken against Grievant. The Agency has demonstrated that the Agency identified its performance concerns to Grievant and tried to counsel Grievant to improve his performance beginning in June 2021, but Grievant continued to have performance issues. The Agency's efforts to improve Grievant's work performance culminated in the issuance of the Notice of Improvement Needed in September 2022 after which Grievant repeatedly failed to follow the instructions set forth in the Notice of Improvement Needed as well as the instructions he was given by his Supervisor. Because the Agency had non-retaliatory reasons for its disciplinary actions and Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met his burden to prove the Agency's disciplinary action was retaliation.

### **Mitigation**

Virginia Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management...."<sup>90</sup> Under the Rules for Conducting Grievance Hearings, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has

---

<sup>88</sup> See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

<sup>89</sup> See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

<sup>90</sup> Va. Code § 2.2-3005.

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to Grievant of two Group II Written Notices with termination is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

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

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>91</sup>

---

<sup>91</sup> See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant.

*Angela Jenkins*  
\_\_\_\_\_  
Angela L. Jenkins, Esq.  
Hearing Officer