

Issues: Group II Written Notice (failure to follow instructions/policy and failure to report without notice); Hearing Date: 06/26/17; Decision Issued: 07/23/17; Agency: DBHDS; AHO: Lorin A. Costanzo, Esq.; Case No. 11016; Outcome: No Relief – Agency Upheld.

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

**DECISION OF HEARING OFFICER**

In the matter of: Grievance Case No. 11016

Hearing Date: June 26, 2017  
Decision Issued: July 23, 2017

**PROCEDURAL HISTORY**

On March 21, 2017 Grievant was issued a Group II Written Notice with termination for “Failure to report without notice” and “Failure to follow instructions and/or policy”.

On April 20, 2017 Grievant filed her *Grievance Form A* to challenge the Agency’s action.<sup>1</sup> The matter was qualified for hearing and undersigned was appointed hearing officer effective May 4, 2017.

On May 15, 2017, at the pre-hearing telephone conference, the parties waived the 35 day period for a hearing to be held and each party confirmed such waiver via e-mail dated 5/15/17.

On June 26, 2017 the grievance hearing was held at Facility with Grievant present. Grievant had not timely exchange a list of witnesses or a copy of documents to be presented at hearing but she offered same at hearing. There being no objection, Grievant’s Witness List and copy of Exhibits were accepted and admitted.

At the conclusion of the grievance hearing, Grievant requested to submit a written closing statement and, by agreement, written closing statements of each parties were due by 5:00 p.m. on July 7, 2017.

Agency e-mailed its closing statement on July 6, 2017. Grievant e-mailed her closing statement on July 8, 2017, however, there being no objection, Grievant’s written closing statement was accepted, admitted, and taken into consideration.

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<sup>1</sup> G. pg. 9

## **APPEARANCES and EXHIBITS**

- A. The following appeared at hearing:  
Agency's Advocate at Hearing  
Grievant  
Witnesses
- B. Exhibits were admitted, by agreement of the parties, *en masse* and consists of:
- a. One binder of Grievant's exhibits (page numbered by Hearing Officer 1-45 with a cover letter and with a one page witness list).
  - b. One binder of Agency's exhibits (tabbed A through M).
  - c. Document admitted by agreement at hearing and marked "Agreed Exhibit 1".
- C. Grievant's Exhibits are referenced herein as "G. pg. \_\_\_\_" with the page number inserted at the "\_\_\_\_". Agency's Exhibits are referenced herein as "A. Tab. \_\_\_\_" with the tab number inserted at the "\_\_\_\_".

## **ISSUES**

Whether the issuance of a Group II Written Notice with termination was warranted and appropriate under the circumstances?

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.<sup>2</sup>

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

## **FINDINGS OF FACT**

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

01. Facility is a residential institute providing mental health and other services to individuals, placed in its care. Facility generally provides services to around 72 to 75 patients who are cared for in 3 Units. While the number of individuals in a Unit will vary, generally each Unit will have about 24

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<sup>2</sup> Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

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

to 29 individuals. Facility seeks to have 2 Registered Nurses or 1 Registered Nurse and one LPN on duty in each Unit.<sup>4</sup>

02. Grievant is an RN and has approximately 22+ years employment with Facility. Grievant's Work Title was Nurse Manager 1 and she was Unit Nursing Manager for one of the three Units housing patients at Facility. She provided general management to her Unit and her duties include ensuring safe and effective nursing services are provided on all shifts.<sup>5</sup>

03. Grievant was issued a Group II Written Notice with termination (on account of accumulation) on March 21, 2017 for "Failure to report without notice" and "Failure to follow instructions and/or policy". The Written Notice indicated Offense Dates of 01/31/17, 02/01/17, 02/02/17, and 02/23/17.<sup>6</sup>

04. Grievant was approved for intermittent leave under the Family and Medical Leave Act ("FMLA") on June 17, 2016.<sup>7</sup>

05. All Facility employees are required by policy to provide advance notice when they are going to be late for work or absent.<sup>8</sup>

06. Grievant was instructed, orally and in writing, to notify the shift administrator's office and Chief Nurse Executive, when she was going to be late reporting for work. Grievant was also instructed, orally and in writing, she needed to report to the shift administrator's office to receive "Report" when she comes into work and also before she leaves work for the day.<sup>9</sup>

07. On 1/7/17 Grievant acknowledged, by her signature, she discussed, in a Supervisory Counseling Session, and was informed that when she was going to be late to work she was required to notify shift administrator's office and Chief Nursing Executive and she needed to receive Report when arriving at work and when leaving work.<sup>10</sup>

08. On March 21, 2016, at a meeting between management and Grievant, it was agreed Grievant's work schedule would be changed, as an accommodation, to 8:00 a.m. to 4:00 p.m.<sup>11</sup>

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<sup>4</sup> Testimony.

<sup>5</sup> A. Tab A and A. Tab K.

<sup>6</sup> A. Tab A.

<sup>7</sup> Agreed Exhibit 1.

<sup>8</sup> Testimony and A. Tab G.

<sup>9</sup> A. Tab B, A. Tab D.

<sup>10</sup> A. Tab E.

<sup>11</sup> Testimony and A. Tabs B and C..

09. Grievant was instructed on a number of occasions of the need to ensure the Unit she was Nurse Manager for had adequate nursing staff prior to leaving work and prior to being off. Grievant and other nurse managers have been instructed and are aware of the need for their Unit to be covered prior to being off. When the Unit cannot be covered, nurse managers are charged with the obligation to cover the shortages themselves.<sup>12</sup>

10. Grievant was late to work on January 31, 2017, February 1, 2017, February 2, 2017, and February 23, 2017. Grievant failed to call in, prior to the beginning of her shift, to report she would be late on these dates.<sup>13</sup>

11. Grievant has one active Group II Written Notice issued August 1, 2016 Falsifying Records". The Written Notice addressed Time Clock Adjustment ("TCA") forms and stated, "According to the Local Access Report, you have falsified TCA forms indicating that you were at work earlier than you actually arrived. The Written Notice indicated falsification of records was a Group III offense, which could result in termination, but the offense was mitigated to a Group II Written Notice."<sup>14</sup>

12. Grievant has been issued 4 *Notices of Improvement Needed/Substandard Performance*:<sup>15</sup>

1.) On 10/11/16 a *Notice of Improvement Needed/Substandard Performance* was issued Grievant addressing parking her car, clocking in, and returning to her car thus actually coming into work at a later time than when she clocked in.

2.) On 10/11/16 a *Notice of Improvement Needed/Substandard Performance* was issued Grievant addressing on that 9/20 it was reported she left work for a Dentist appointment after learning she would have no nurses on her unit. Among other matters, the Notice instructed Grievant, in writing, she was expected to get "Report" by going to the shift administrator's office immediately when she came in to work and to not leave work before staffing issues are resolved by having nursing coverage on the unit.

3.) On 6/16/16 a *Notice of Improvement Needed/Substandard Performance* was issued Grievant addressing her failure in duties as a

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<sup>12</sup> Testimony, A. Tab B, and A. Tab D.

<sup>13</sup> A. Tab B and Testimony.

<sup>14</sup> A. Tabs C.

<sup>15</sup> A. Tab D.

Supervisor based on the attendance policy (523(HRM) 03-15). The notice provided, as to at least one employee who repeatedly reached markers of accumulated points, she failed to assign occurrence points, failed to track occurrence points, and failed to respond to an accumulation of points appropriately.

4.) On 5/18/16 a *Notice of Improvement Needed/Substandard Performance* was issued Grievant addressing the need to notify the shift administrator's office and send a phone message to supervisor whenever there is a need to be late and addressing the need to report to the shift administrator's office to receive "Report" when she comes to work and before she leaves for the day.

### **CONCLUSIONS:**

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

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

#### **1.60**

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*.<sup>16</sup> The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses include acts of minor misconduct that require formal disciplinary action. Group II Offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally would warrant termination.

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<sup>16</sup> A. Ex. Tab H.

The *Standards of Conduct* provides failure to follow supervisor's instructions or comply with written policy and failure to report to work without proper notice are each examples of Group II offenses. Additionally, the *Standards of Conduct* provides the active life of a Group II Notice is three years from its date of issuance and a second active Group II Notice normally should result in termination.<sup>17</sup>

**Attendance Policy - 523(HRM) 03-15**

Facility attendance policy (523(HRM) 03-15) provides daily attendance of staff is critical to facility operations and states this policy is applicable to all employees. This policy defines unplanned absence as an absence from work on a scheduled workday without prior supervisory approval. This policy provides employees must notify their Department Head or Supervisor when there is an absence and this notification should be done in accordance with the call-in policy of the department to which the employee is assigned.

**Grievant:**

Grievant's scheduled work hours were set on March 21, 2016 as being from 8:00 am to 4:00 pm.<sup>18</sup> Grievant was aware of her work hours.<sup>19</sup> Grievant was Nurse Manager and was aware or should have been aware of the need for attendance and providing staffing. She was aware of call in requirements if she was not going to be at work on time. She was aware, as a nurse manager, of the need to ensure her unit is covered and prior to being off , as a nurse manager, she was obligated to cover the shortage herself.<sup>20</sup>

On May 18, 2016 Grievant received a Notice of Improvement Needed/Substandard Performance regarding a.) not notifying the shift administrator's office and sending a phone message to the Chief Nurse Executive whenever she was going to be late and b.) not reporting to the shift administrator's office to receive report when she comes to work and before she leaves for the day. The Notice provided, "This serves as a second written notice to [Grievant], notifying her of the need to improve in these two areas".

On August 1, 2016 Grievant was issued a Group II Written Notice for falsifying records which is currently active. The Written Notice addressed Time Clock Adjustment ("TCA") forms and indicated, "According to the Local Access Report, you have falsified TCA forms indicating that you were at work earlier that you actually arrived.

Grievant's 3/21/17 Group II Written Notice with termination (on account of accumulation) was for "Failure to report without notice" and "Failure to follow instructions and/or policy".

**Work Hours:**

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<sup>17</sup> A. Tab H.

<sup>18</sup> A. Tab B.

<sup>19</sup> A. Tab C.

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

On January 17, 2016, as an accommodation, Grievant's work hours were changed from 7:00 a.m. to 3:00 p.m. to new work hours of 7:30 a.m. until 3:30 p.m. Then, on March 21, 2016, it was agreed, as an accommodation, that her work hours change to 8:00 a.m. to 4:00 p.m.<sup>21</sup>

Grievant was late to work on the four dates addressed in the Written Notice. Time Detail records of Agency indicate Grievant's in punch/arrival at work and out punch/leave work for those days was:

<u>date</u>	<u>work hours</u>
1/31/17	Grievant punched in at 8:25 a.m. and punched out at 5:58 p.m.
2/01/17	Grievant punched in at 8:29 a.m. and punched out at 4:45 p.m.
2/02/17	Grievant punched in at 8:06 a.m. and punched out at 4:14 p.m.
2/23/17	Grievant punched in at 9:33 a.m. and punched out at 4:27 p.m. <sup>22</sup>

Grievant was instructed orally and in writing of the need to notify the shift administrator's office and Chief Nurse Executive when she was going to be late reporting to work. The 5/18/16 *Notice of Improvement Needed/Substandard Performance* confirmed in writing the requirement to notify the shift administrator's office and Chief Nursing Executive whenever there was a need to be late and also confirmed the need to report to the shift administrator's office to receive "Report" when she comes in.<sup>23</sup>

Grievant was late to work on 1/31/17, 2/01/17, 2/02/17, and 2/23/17. She was instructed to call in before her shift if she was going to be late but failed to do so on 1/31/17, 2/01/17, 2/02/17, and 2/23/17. Additionally, when Grievant did arrive at work she failed to go to the chief administrator's office to receive "Report".<sup>24</sup>

Grievant's Exhibit page 3 provided a "Call in Slip" showing a call in on 2/1 from Grievant and indicated as reason: "I'm going to be there by 0830", however, the call in was made at 8:15 a.m. which was after her scheduled work hours had begun.

No evidence was received concerning the existence of unusual circumstances justifying the failure to call in on any of the 4 dates (i.e. 1/31/17, 2/01/17, 2/02/17, or 2/23/17).

**FMLA:**

Grievant's requested leave under the Family and Medical Leave Act (FMLA). On 6/17/16 Agency notified Grievant her request for for Family Medical Leave was approved for intermittent leave pertaining to a serious health condition.

Grievant contends that her status as an employee approved for FMLA intermittent leave precluded Agency from disciplinary action for tardiness/being late to work. However, employers can

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<sup>21</sup> Testimony and A. Tabs B and C.

<sup>22</sup> A. Tab F.

<sup>23</sup> A. Tab D.

<sup>24</sup> Testimony.



require their employees to comply with call-in procedures even if the employee has been approved for FMLA leave. Employees can be required to comply with an employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.

29 CFR 825.303 addresses employee notice requirements for unforeseeable FMLA leave. 29 CFR 825.303 (c) provides when the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. 29 CFR 825.303 provides:

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a)Timing of notice. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. See § 825.303(c). Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b)Content of notice. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in § 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(c)Complying with employer policy. When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural

requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

Grievant was late to work on 1/31/17, 2/01/17, 2/02/17, and 2/23/17. The evidence indicates she did not call in to notify Agency she was going to be late for work, as all employees were required to do if they were going to be late. No evidence indicating unusual circumstances justifying any failure to call in was presented.

**Mitigation:**

Va. Code § 2.2–3005.1 authorizes a hearing officer to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resources Management ...".<sup>25</sup> The hearing officer must receive and consider evidence in mitigation or aggravation of any offense charged by an agency.<sup>26</sup>

The *Rules for Conducting Grievance Hearings* provide that a hearing officer is not a "super-personnel officer" and, therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.

A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness and, if the hearing officer mitigates the Agency's discipline, the hearing officer is charged with stating in the hearing decision the basis for mitigation.

Grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The Agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.<sup>27</sup>

Consideration is given to Grievant having over 22 years work experience. Additionally, consideration is given to her being the Nurse Manager for a Facility Unit, her having received a Notices of Improvement Needed/Substandard Performance, and her having one active Group II Written Notice which was mitigated from a Group III offense to a Group II offense. Upon consideration of the above the hearing officer does not find, under the record evidence, the agency's discipline exceeds the limits of reasonableness.

## CONCLUSION

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<sup>25</sup> Va. Code § 2.2-3005.

<sup>26</sup> Va. Code § 2.2-3005 (C)(6).

<sup>27</sup> Rules for Conducting Grievance Hearings, § VI. (B.)(2.).

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

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.
5. Grievant had one active Group II at the time the 3/21/17 Group II Written Notice was issued.

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

## **DECISION**

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

## **APPEAL RIGHTS**

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

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

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

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

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

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

**2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR.** This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is [edr@dhrm.virginia.gov](mailto:edr@dhrm.virginia.gov)).

**B. Final Hearing Decisions:**

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

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

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

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

S/ Lorin A. Costanzo

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Lorin A. Costanzo, Hearing Officer

*Copy, via e-mail to:*  
Grievant  
Agency Advocate  
EDR