Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 01/25/10; Decision Issued: 03/31/10; Agency: VDOT; AHO: John V. Robinson, Esq.; Case No. 9244; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9244

Hearing Officer Appointment: December 7, 2009
Hearing Date: January 25, 2010
Decision Issued: March 31, 2010

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge termination of his employment effective September 11, 2009, pursuant to a written notice, dated September 11, 2009 (the "Written Notice") by Management of Department of Transportation (the "Department" or "Agency"), as described in the Grievance Form A dated October 8, 2009.

The Written Notice described the nature of the offense and evidence as follows:

> Violation of DHRM Policy 1.60, Standards of Conduct, for failure to follow supervisor's instructions. [Grievant] was instructed by his supervisor in a counseling letter dated 6/23/09 that a physician's note would be required for all absences due to illness, injury, or doctor appointments and 24 hours' advance notice would be required for all requests for annual leave for other purposes (see attached due process letter for details leading to the issuance of formal discipline). In the due process meeting that was conducted on 9/11/09 at the [H] Residency Office, [Grievant] acknowledged that he was aware a physician's note was needed for his absence on 8/31 and 9/1, but he did not seek treatment until Wednesday, 9/2. He indicated that he understood he had placed his job in jeopardy by not obtaining a note from his physician documenting the need for his absence from work on 8/31 and 9/1.

During the proceeding, the Grievant was represented by his attorney (the "Attorney") and the Agency was represented by its advocate (the "Advocate"). The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on December 9, 2009 at 4:00 p.m. The Attorney, the Advocate and the hearing officer participated in the call. The Grievant is seeking the relief requested in his Grievance Form A, namely, reinstatement and confirmed, by counsel, during the call that he is also seeking back-pay, restoration of all benefits and attorney's fees.

The parties moved for a relatively short continuance. The Attorney had the holiday season and a busy trial schedule to contend with and the Agency was undergoing a reorganization and also has the holiday season to contend with. The hearing officer found that the process is best served if the Grievant is represented by an attorney of his choosing and that, under the facts and circumstances of this proceeding, a relatively short continuance would serve the interests of justice. Accordingly, just cause existed for the continuance. The hearing officer scheduled the hearing for January 25, 2010 at the Agency's residency office where the Grievant was formerly employed (the "Residency"). Following the pre-hearing call, the hearing officer issued a Scheduling Order entered on December 10, 2009, which is incorporated herein by this reference.

In this proceeding the agency bears the burden of proof and must show by a preponderance of the evidence that the termination was warranted and appropriate under the circumstances.

At the hearing, both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely Agency Exhibits 1 through 14 in the Agency's binder and Grievant Exhibits 1-13 in the Grievant's binder.[1]

APPEARANCES

Representative for Agency
Witnesses
Grievant

FINDINGS OF FACT

1. The Grievant was a Transportation Operator II, previously employed by the Agency at the Residency.

2. The Grievant has an active Group II Written Notice dated and issued October 6, 2008, for failure to follow a supervisor's instructions in providing adequate documentation to authorize an absence from work during the period August 11-12, 2008. AE 5.

3. The Grievant was employed by the Agency essentially as an equipment operator and laborer on a maintenance crew from approximately May 2000 until September 11, 2009, the effective date of the termination of his employment.

[1] References to the Grievant's exhibits will be designated GE followed by the fax page number. References to the agency's exhibits will be designated AE followed by the exhibit number.

4. During the period of his employment, the Grievant was directly supervised by JC (the "Supervisor"), who in turn was supervised by his supervisor ("KM").

5. From 2000 until approximately the Spring of 2007, the Grievant was a good employee of the Agency. Beginning in approximately the Spring of 2007, the Grievant or his family began to call in to work frequently for the Grievant to take sick leave. This and the rapid depletion of his various leave balances began to present an issue to the Agency.

6. The due process letter from the Supervisor to the Grievant dated October 3, 2008 the "First Due Process Letter") leading to the issuance of the formal discipline provided details of the earlier Group II offense and evidence, including the following:

> The purpose of this letter is to inform you that disciplinary action is planned as a result of your failure to follow supervisory instructions related to your absences from work on August 11-12, 2008.
>
> On August 11, 2008, and again on August 12, 2008, you called into the B. Area Headquarters at approximately 6:30 a.m. and advised another operator that you did not feel well and would not be coming into work that day. On August 12 at approximately 6:45 a.m. I attempted to return your call; however, there was no answer. At approximately 11:30 a.m. I called your home a second time and spoke with your spouse. At that time I advised Mrs. C that you would need to provide a physician's note excusing you from work for all days missed due to illness. Mrs. C acknowledged this requirement and assured me that she would make sure you were able to provide the necessary documentation upon your return.
>
> On August 13, 2008 you called the area headquarters and again advised an operator that you did not feel well and would not be coming into work that day. On August 14 and 16 Mrs. C called in and spoke with a B Area supervisor, BH, and advised that you were not able to report to work. During both conversations BH advised Mrs. C that you would need a physician's note excusing you for all days missed due to illness. On the morning of August 18 you called the B Area Headquarters and I spoke to you directly. I again advised you that you would need a

physician's note covering all days that you were out of work due to illness.

On August 19, 2008, the attached letter was mailed to your home reminding you of the requirement that you report any absences from work to a supervisor prior to 7:00 a.m. each day. This letter also reminded you that any period of time that you were absent from work that was not covered by a physician's note would be considered an unauthorized absence and you might be subject to disciplinary action under the Standards of Conduct.

Upon your return to work on Monday, September 29, 2008, you provided physician's notes covering all days of absence except for August 11 and 12. I again advised you that you would need a note for these days. I requested this note on Tuesday, September 30, and again on Thursday, October 2. On Thursday you advised that you were unable to provide a physician's note as required.

Your actions constitute a failure to follow supervisor's instructions, which is a Group II offense under DHRM Policy 1.60, Standards of Conduct.

I have scheduled a meeting at the B Area Headquarters at 8:00 a.m. on Monday, October 6, 2008. If you are unable to provide information to mitigate the disciplinary actions referenced in this memorandum and detailed in the attached letter dated August 19, 2008, or if you choose not to attend the meeting, we will proceed with the issuance of a Group II written notice at that time . . .

August 19, 2008

[To Grievant]

Dear [Grievant]:

I understand that you were absent from work due to illness from August 11, 2008 through August 18, 2008. During this period, you or a family member called in each day to report your absence; however, on several occasions, you left messages with individuals other than a member of the supervisory staff at the B Area Headquarters.

While I appreciate your efforts to communicate daily, let me be very clear that it is my expectation that you speak directly to me, JS, or BH whenever you are unable to work due to illness. You must report your absence before 7:00 a.m. each day. Our cell phone numbers are listed below for your convenience.

[Supervisor] – [cell number]
[JS] – [cell number]
[BH] – [cell number]

You were advised by me when you called in on Monday, August 11, 2008, and on several occasions thereafter last week that you would be required to provide a physician's note to document the entire period of your absence due to illness. Please be aware that any period of time you were absent from work that is not covered by a physician's note will be considered as leave without pay. Further, as this will be considered an unauthorized absence, you may also be subject to disciplinary action under the Standards of Conduct.

Today I was advised by HC, Human Resources Manager, that you will be undergoing some additional treatment that will necessitate your absence from work for one week. Please be aware that your physician's note must also include the requested period of absence for your treatment that begins this week. Also, you and your treatment provider will need to contact your Fitness for Duty Program Coordinator, SB, before you are authorized to return to work.

If you have any questions or need further information, please contact me at (phone number).

Sincerely,

[Supervisor]

AE 5.

7. On June 23, 2009, KM issued a letter of counseling concerning leave approval and usage to the Grievant detailing clearly the employer's reasonable expectations of the Grievant:

> June 23, 2009
>
> **MEMORANDUM**
>
> **TO:** [Grievant]
>
> **FROM:** [KM]
>
> **SUBJECT:** Letter of Counseling – Leave Approval & Usage
>
> Last month you were out of work for seven consecutive work days (May 11-19, 2009), and during this time you were not required to provide a physician's note or other documentation, even though you exhausted all of your sick leave and began using vacation to cover the last three days of your absence.
>
> During the month of June, the same pattern of leave usage has occurred. You have called in each day for the past seven work days (June 15-23) to report that you are not coming to work. Call-ins such as this make it extremely difficult to plan and schedule work, and in the past two months you have used all of your sick leave and your annual leave balance is quickly depleting.
>
> As we discussed today on the phone, a physician's note will be required for all absences due to illness, injury, or doctor appointments (whether charged to sick or annual leave) and 24 hours' advance notice will be required for all requests for annual leave for other purposes. And, so there are no misunderstandings, a physician's note cannot be backdated to cover previous days of absence. Failure to comply with these instructions will result in an unauthorized absence from work, and the time will be charge to leave without pay. You will not accrue annual or sick leave during any pay period in which time has been charged to leave without pay, and formal discipline under the Department of Human Resource Management (DHRM)

> Policy 1.60, Standards of Conduct, will also be considered for any unauthorized absences.
>
> Since you already have an active Group II written notice that was issued in October 2008 for failure to follow supervisory instructions related to your absences from work, any additional discipline under the Standards of Conduct could include several possibilities, including termination of employment.
>
> I hope that your attendance will improve with these measures and that no further action will be necessary. However, appropriate discipline will be taken if you do not follow the instructions that have been provided in this counseling letter and your attendance does not improve.
>
> If you have any questions or concerns, please let me know.

AE 4.

8. The Supervisor explained during his testimony that all employees in his maintenance crew are required to call in by 7:00 a.m. and to speak to one of the three (3) supervisors listed above if they want to take sick leave.

9. The additional requirement for a physician's note is not automatically required of all employees but is an additional, special requirement imposed in special circumstances when management suspects abuse or misuse of the Agency's leave policies or when an employee has low leave balances.

10. The Acting HR Manager for the District testified that management examines each individual situation, has individuals subject to the physician note requirement in each residency within the District and that there are approximately 15 or 20 persons out of a total of approximately 500 employees within the District subject to this additional requirement.

11. On September 9, 2009, the Supervisor issued to the Grievant a Second Notice of Due Process Letter dated September 9, 2009 (the "Second Due Process Letter"). AE 11.

12. The Second Due Process Letter provides:

> September 9, 2009
>
> **MEMORANDUM**

TO: [Grievant]

FROM: [Supervisor]

SUBJECT: Notice of Due Process

The purpose of this letter is to inform you that disciplinary action is being considered as a result of your unauthorized absences from work last week. I had informed you, both verbally and in writing, of the requirements you would have to meet for leave requirements to be approved in a counseling letter that was issued to you on June 23, 2009. The following language was taken directly from the counseling letter (copy attached):

As we discussed today on the phone, a physician's note will be required for all absences due to illness, injury, or doctor appointments (whether charged to sick or annual leave) and 24 hours' advance notice will be required for all requests for annual leave for other purposes. And, so there are no misunderstandings, a physician's note cannot be backdated to cover previous days of absence. Failure to comply with these instructions will result in an unauthorized absence from work, and the time will be charge to leave without pay. You will not accrue annual or sick leave during any pay period in which time has been charged to leave without pay, and formal discipline under the Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct, will also be considered for any unauthorized absences.

On Monday, August 31, you contacted me to report that you were having stomach problems and would not be coming in to work, at which time I reminded you of the counseling letter you received in June 2009 and the requirements outlined for an absence from work to be authorized. For the remainder of that week (September 1-4), you or your wife contacted either me or a supervisor at the [B] Area Headquarters to report that you were not coming to work, and on Thursday, September 3, your wife reported that you were in the hospital.

You returned to work on Tuesday, September 8 (Monday, September 7, was a state holiday), with a physician's note

from Dr. CMH dated 9/4/09 requesting that you be excused from work from September 2 through September 5.

Based on the instructions you received in the June 23rd counseling letter, August 31 through September 3 are being considered unauthorized absences at this time due to the following reasons:

- You have not provided any type of physician's note to cover your absence on Monday, August 31, and Tuesday, September 1; therefore, these absences will be charged to leave without pay and you will not accrue leave for the pay period ending September 9, 2009, unless you can provide additional documentation from a physician to indicate that you were receiving care as early as August 31.
- The September 4th physician's note was backdated to cover a period of absence from 9/2 through 9/5. As indicated in the instructions above, a physician's note should not be backdated to cover previous days of absence. However, if you can provide documentation to indicate that you were seen by the physician on 9/2 (or hospitalized if that may be the case), we will consider approving September 2-3 as an authorized absence from work.

Without additional documentation to support the entire period of absence from work between August 31 and September 3, formal disciplinary action under Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct, may be taken in the form of a Group II written notice for failure to follow supervisor's instructions. You already have an active Group II written notice in your personnel file that was issued on October 6, 2008, and with the possible addition of a second Group II written notice, your employment could include several possibilities, including termination of employment.

A due process meeting has been scheduled for Friday, September 11, 2009 at 9:00 a.m. at the [Residency Office], at which time you may provide any information that you believe may mitigate or be relevant to the disciplinary action that is being considered. Of course, if you choose not to meet with me or do not present any mitigating

> factors, we will proceed with the review and issuance of appropriate disciplinary action under the Standards of Conduct policy.

AE 11.

13. Ultimately, the Agency accepted the physician's note dated September 4, 2009 excusing the Grievant from work from September 2-5, 2009. GE 7. However, the Grievant has never provided to the Agency any type of physician's note to cover his absence from work on Monday, August 31, 2009 and Tuesday, September 1, 2009.

14. In his Letter of Counseling, KM, the Transportation Operations Manager III of the Agency described with specificity the adverse impact of the Grievant's unauthorized and unwarranted absences upon the Residency's operations:

> Call-ins such as this make it extremely difficult to plan and schedule work, and in the past two months you have used all of your sick leave and your annual leave balance is quickly depleting.

15. Grievant was absent from work at the Residency from August 31, 2009 through September 1, 2009 (the "Period").

16. Grievant did not submit to the Agency by the time of his termination, September 11, 2009, any physician documentation to justify his absence during the Period.

17. In his due process meeting with his Supervisor and DA of the Human Resources Division, the Grievant admitted that he screwed up and understood that he had placed his job in jeopardy by not obtaining a note from his physician documenting the need for his absence from work during the Period. AE 10 and AE 11.

18. At the hearing during cross-examination, the Grievant admitted that he did not call or go to the doctor during the Period. The Grievant said he was ill and could not leave the house but then admitted on further questioning from the Advocate that he could have called 911 or an ambulance.

19. The Department's actions concerning the issues grieved in this proceeding were warranted and appropriate under the circumstances.

20. The Department's actions concerning this grievance were reasonable and consistent with law and policy.

21. The testimony of each of the Agency's witnesses was both credible and consistent on the material issues before the hearing officer. The demeanor of each of the Agency witnesses at the hearing was candid and forthright.

APPLICABLE POLICY AND LAW, ANALYSIS, ADDITIONAL FINDINGS AND DECISION

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 her 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).

Va. Code § 2.2-3000(A) 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.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia,* the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. 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 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. The Standards of Conduct Policy No. 1.60 provides that a second Group II Notice normally should warrant removal from employment. AE 6.

The Grievant's failure to follow supervisor's instructions was appropriately considered by management to be a Group II offense in this proceeding. AE 6.

At the beginning of the hearing, while countering the Advocate's objection to the admission into evidence of GE 10, the Attorney stated to the effect:

> " . . . What we see as the almost single issue in this case, is whether or not it was discriminatory for the Department to require [the Grievant] to have a doctor's excuse if he was sick when that is not a Departmental policy." (Tape 1A).[2]

The Grievant was not discriminated against as the applicable policies (No. 4.57 – Virginia Sickness and Disability Program and No. 4.20 – Family and Medical Leave) allow the Agency to develop internal policies to meet its own needs for verification of employee's leave. AE 8, pages 7-8; AE 9, pages 5-7. Other employees within the Agency whose leave-taking presented issues for the Agency were also subjected to the same physician's note requirements.

The Grievant was familiar with the Family and Medical Leave Act ("FMLA") verification procedures of the Agency, having previously successfully filed with the Agency FMLA Approval Forms on at least two (2) occasions, in 2007 and even in 2009. In both instances, the physician certifications and the Grievant's requests for Department family and medical leave were approved by the Agency. AE 14.

Interpretation of policy is itself a policy matter and subject to the final say of DHRM. *Virginia State Police v. Barton*, 39 Va.App. 439, 573 S.E.2d 319 (2002). EDR makes final decisions on "procedure" and the hearing officer, provided he has acted in accordance with the grievance procedure, finds facts.

The Grievant, by counsel, also argued that the Agency's additional requirement of a physician's note imposed on the Grievant needed to be specified as a written policy in order for it to be valid. The hearing officer disagrees and decides that the requirement of a physician's note is precisely the type of "reasonable management request for verification of the need for [sick leave]" which Policy No. 4.57 – VSDP contemplates. AE 8. Further, Policy No. 4.20 (Family and Medical Leave) specifically allows an agency to require that a request for family and medical leave be supported by a health care provider's certification of the medical condition of the person affected to include the date when the serious condition began, the probable duration of the condition and other items specified. AE 9. The Grievant knew this and had complied with the procedure in the past.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the termination of the Grievant's employment 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

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[2] There was no court reporter or transcript in this proceeding, only audio tapes. The quotes are the hearing officer's best interpretations of what was said with square brackets used to denote parts of the tape which were not fully clear to the hearing officer or to conform to definitions, or to preserve confidentiality, etc., where appropriate.

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).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Department's actions were clearly consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

The Grievant has not specifically asserted either in his Form A or at the hearing that the Department failed to properly consider mitigating circumstances. DHRM has previously ruled that there is no requirement under an earlier version of DHRM Policy 1.60 that an agency even consider mitigating circumstances. DHRM Policy Ruling, Grievance No. 8636, September 19, 2007. *See also, Jacobs v. VEC*, 69 Va.Cir 66 (2005), which held that the agency's consideration of mitigating factors is permissive not a mandate.

However, this DHRM ruling does not negatively impact the Grievant's situation under the facts and circumstances of this proceeding because under Va. Code § 2.2-3005, this hearing officer is charged with the duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution". EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did consider mitigating and aggravating factors in disciplining the Grievant.

Accordingly, because the Department assessed mitigating and aggravating factors, the Rules only allow this hearing officer to mitigate the discipline further if this hearing officer upon consideration of the evidence finds that the Department's discipline exceeded the limits of reasonableness.

While the Grievant might not have specified all of the mitigating factors below, the hearing officer considered many factors including those specifically referenced above and all of those listed below in his analysis:

1. The Grievant's good service to the Agency from 2000-Spring 2007;

2. The fact that the Grievant was hospitalized from September 2-4, 2009; and

3. The Grievant's entire prior disciplinary history over approximately 9 years is relatively innocuous, although it does involve an active Group II (at the time of the Discipline) for violation of the same policies, which active Group II (as the hearing officer reiterates below) under the facts and circumstances of this proceeding, constitutes an aggravating factor.

For purposes of his analysis and this Remand Decision, the hearing officer considers only the following aggravating factors:

1. The previous discipline, counselings and reminders concerning the Grievant and Agency leave policies specifically referenced in the Written Notice as constituting aggravating factors.

The offense here was serious. EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Clearly, the mitigation decision by the Department was within the permissible zone of reasonableness, particularly when the above aggravating factors are accounted for in the determination.

The hearing officer decides for each offense specified in the Written Notice that the Agency has proven by a preponderance of the evidence that (i) the Grievant engaged in the behavior described in the Written Notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

As the agency argued in this proceeding, the policy requires dismissal. The Department, exercising its professional judgment through the appropriate personnel, and applying the Commonwealth's policy of progressive discipline, decided that termination of the Grievant's employment was warranted and appropriate under the circumstances. Such a decision was entirely appropriate and justified. The agency argues that the action taken by Management was entirely appropriate and that it has, in essence, already taken full account of any mitigating factors. The gravity of the violation in the context of the workforce demands of the Residency and the Grievant's active Group II Written Notice for essentially the same disciplinary infraction preclude a lesser sanction. The hearing officer agrees.

DECISION

The agency has sustained its burden of proof in this proceeding and the action of the agency in removing the Grievant from her employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the agency's action concerning the Grievant in this proceeding is hereby upheld, having been shown by the agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* 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.

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

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

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of

Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 E. Main Street, Suite 301, Richmond, Virginia 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by Certified Mail, Return Receipt Requested, U.S. Mail, e-mail transmission and facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).