

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 06/01/10;
Decision Issued: 06/07/10; Agency: VCCS; AHO: Lorin A. Costanzo, Esq.; Case No.
9320; Outcome: Full Relief.

**COMMONWEALTH OF VIRGINIA
VIRGINIA COMMUNITY COLLEGE SYSTEM**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 9320

Hearing Date: June 1, 2010
Decision Issued: June 7, 2010

PROCEDURAL HISTORY

On January 20, 2010 Grievant was issued a Group I Written Notice for "*Unsatisfactory Performance*" and "*Failure to follow instructions and/or policy*". On February 16, 2010 Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to Grievant and Grievant requested a hearing on March 30, 2010. The matter was qualified for hearing by Agency Head on March 31, 2010. On May 3, 2010 undersigned was appointed hearing officer in this matter and grievance hearing was held on June 01, 2010.

APPEARANCES

Grievant (who also testified as witness)
Grievant's Counsel and counsel's legal assistant
Associate Professor
Research Analyst
Department Staff

Agency Presenter
Agency Party Representative
Procurement Officer
Director
Interim Library Director

ISSUES:

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law and policy?
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. 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.¹

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 has approximately 21 years employment with Agency (17 years full time and 4 years part time) and is currently employed as an Information Technology Specialist II.² Grievant's Employee Work Profile states that she is responsible for Audio Visual ("AV") and Information Technology ("IT") equipment inventory.³ Her Career Group Description provides, "Work ranges from moderately complex and varied to working on multiple, complex projects independently".⁴

Grievant was issued a Group I Written Notice for "Unsatisfactory Performance" and "Failure to follow instructions and/or policy" (date of Offense 12/10/2009) on January 20, 2010. On February 16, 2010 Grievant filed a grievance to challenge the Agency's action and on March 30, 2010, Grievant requested a hearing. The matter was qualified for hearing by Agency Head on March 31, 2010.⁵

Agency provided Grievant notification of the offense and an explanation of the Agency's evidence in support of the charge contemporaneously with or within a few minutes of the issuance of the Group I Written Notice.⁶

As a part of her duties, Grievant was instructed to conduct an inventory of "AV" and "IT" equipment. The inventory initially involved approximately 717 items of "IT/AV" equipment which were to be accounted for. The initial inventory process determined 27 items were missing/not able to be located. Management directed that Grievant further investigate and report, as soon as possible, on the 27 missing items.⁷

On August 4, 2009, Procurement Officer requested a final completed inventory from Grievant. She was instructed to provide DSLCC ID#'s, serial numbers, description, and physical location in her final inventory and this was due by August 17, 2009 when the mandated bi-annual physical inventory was to be conducted. Grievant had met with management on several occasions prior to August 4, 2009 to reconcile the "IT/AV" inventory with the AIS inventory records.⁸

On August 17, 2009 Procurement Officer met with Vice President as to her concerns over Grievant's delay in providing the completed "IT/AV" inventory. And, on August 19, 2009, Vice President met with Grievant and discussed her concerns as to the inventory with Grievant. An E-mail of this date to Grievant confirmed the discussion and confirmed that a physical inventory of all "IT/AV" related equipment was to be completed by 9/30/09 and all records in the "IT" system would

¹ Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

² Testimony of Grievant.

³ Agency Exhibits Tab D. pg. 84B.

⁴ Agency Exhibits Tab L. pg. 104.

⁵ Grievant's Exhibits Tab 15; Agency Exhibit Tab A. and B.

⁶ Agency Exhibit B. pg. 5 and Testimony.

⁷ Testimony; Agency Exhibits E pg. 88 and 89; Grievant's Exhibits Tab 12 pg. 119.

⁸ Agency Exhibit Tab E. pg. 88.

be made current with equipment purchased through 9/15/09. Additionally, inventory records were required to be in agreement with the information gathered during the physical inventory with a 95% or greater accuracy rate.⁹

On September 30, 2009 Vice President met with Grievant and her supervisor. Vice President received a copy of the "Inventory Missing Items List as of 9/30/09" signed by Grievant. This list only provided DSLCC identification numbers and did not provide any of the other inventory information required in the August 19, 2009 E-Mail from Vice President.¹⁰

On September 30 2009, after Vice President received the "Inventory Missing Items List as of 9/30/09" Grievant's supervisor directed Grievant to address the missing information as to the 27 missing/not located items of equipment referenced thereon. Grievant was told that the 27 items that were not completely documented were to be reconciled and researched as soon as possible.¹¹

In early December 2009 Procurement Officer informed Vice President that an updated inventory of the missing 27 "IT/AV" items had not received. An updated inventory (entitled "Inventory Missing Items List as of 9/30/09. Updated 10/26/09") was signed by Grievant on 12/10/09 and was provided Vice President on December 10, 2009. On January 13, 2010 management raised concerns as to the number of missing items, that the missing items had not been thoroughly researched, and had not been reported as directed.¹²

In early January of 2010 Vice President started a review of the inventory list of missing items. During this review of the inventory it was noted that the information was incomplete and some items still did not have descriptions. Vice President discussed this with Grievant's supervisor and Grievant's supervisor discussed this with Grievant on January 13, 2010. Vice President followed up with an e-mail of 1/13/10 setting forth her concerns, and her expectation for completion and accuracy.¹³

On January 14, 2010, Agency personnel began researching the 27 items reported by Grievant as missing. On January 14, 2010 management determined that some of the items listed by Grievant as missing were, in fact, not missing as was indicated in Grievant's inventory. Two projectors, a VCON Video conferencing unit, and a computer were located/accounted for.¹⁴

APPLICABLE LAW AND OPINION:

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth 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

⁹ Grievant's Exhibits Tab 12 pg. 119; Agency Exhibits Tab E. pg. 89; Agency Exhibits Tab B. pg. 8 & 11.

¹⁰ Agency Exhibits Tab F. pg. 90-91; Grievant's Exhibits Tab 13 pg. 120-121.

¹¹ Tab B. pg. 11; Grievant's Exhibits Tab 13 pg. 120-121; Agency Exhibits Tab F. pg. 90-91 and Testimony.

¹² Grievant's Exhibits Tab 14 pg. 122-123; Agency Exhibits Tab G. pg. 92-93; Agency Exhibits Tab H. pg. 94.

¹³ Agency Exhibits Tab B. pg. 11 & 12; Agency Exhibits Tab H. pg. 94.

¹⁴ Agency Exhibits Tab B. pg. 5 & 12 and Testimony.

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."

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*. 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.

Section B. 2. of Policy No. 1.60, "Standards of Conduct" effective April 16, 2008, provides, "To assist management in the assessment of the appropriate correction action, offenses are organized into three groups according to the severity of the misconduct or behavior." The *Standards of Conduct* also provides that the listed examples of offenses are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted.

Section B. 2. of Policy No. 1.60, "Standards of Conduct" also provides:

*"Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense **not specifically enumerated**, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*

Note: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance."¹⁵

Group I Offenses include acts of minor misconduct that require formal disciplinary action. This level is appropriate for repeated acts of minor misconduct or for first offenses that have a relatively minor impact on business operations but still require formal intervention. Listed examples of Group I Offenses include "unsatisfactory work performance".

Attachment A of Policy 1.60 also indicates, "First Offense: Typically, counseling is appropriate although an agency has the discretion to issue a Group I Written Notice." Attachment A of Policy 1.60 additionally provides that failure to follow supervisor's instructions or comply with written policy is an example of a Group II offense."¹⁶

Section B. 2.b of Policy No. 1.60, "Standards of Conduct" provides:

Group II Offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty,

¹⁵ Policy No. 1.60 "Standards of Conduct" Agency Exhibits Tab C & Grievant's Exhibits Tab 17,

¹⁶ Policy No. 1.60 "Standards of Conduct Attachment A." Agency Exhibits Tab C; Grievant's Exhibits Tab 17.

insubordination, the abuse of state resources, violations of policies, procedures, or laws.

The responsibility of the hearing officer is to determine whether the agency has proved by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) 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) and, finally, (iv) 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. Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operation.¹⁷

Inventory and inventory of 27 missing items:

Agency is charged with the responsibility for the equipment in its possession. State Auditors have the right to conduct an audit of Agency equipment at any time. Additionally, Procurement Officer is required by the Commonwealth to conduct a physical inventory each two years and is required to physically put her hand on each piece of equipment.¹⁸

The Procurement Officer utilizes *Accounting Information System* ("AIS") to keep track of equipment received by Agency. However, equipment designated in the "AIS" as assigned to the "IT" Department may be physically located at other locations throughout the campus. The physical location of equipment assigned to the "IT" Department is kept by and tracked by the "IT" Department itself. "AIS" does not account for where actually the piece of "IT" equipment is physically located on campus.

Equipment Trust Fund is used to purchase the majority of "IT" equipment and special monitoring with 100 % accuracy is required or Agency may not be able to be reimbursed for its purchases. Equipment Trust Fund items are required to be tracked and kept for a period of 5 years.

Grievant was given a Group I Written Notice due to Agency's concerns over her actions/lack of actions in addressing inventory matters assigned to her. An initial inventory involving approximately 717 "IT/AV" items was assigned to Grievant. This inventory disclosed 27 items which could not be located and/or accounted for. Grievant was then assigned the task of locating or determining the status of these 27 items and reporting certain information concerning these missing items. It is her action and/or lack of action as to these 27 missing/unaccounted for items that is of prime concern in this matter.

When Grievant conducted her initial inventory she reported 27 items as missing/not accounted for. Agency was concerned over the number of missing items and wanted further investigation into these 27 items.

¹⁷ Section VI.B. of the Department of Employment Dispute Resolution, Rules for Conducting Grievance Hearings.

¹⁸ Testimony and Agency Exhibits Tab. M. pg. 107.

Management had ongoing issues over Grievant's timeliness in her providing the information Agency requested throughout the inventory process and particularly as to the 27 missing items she was directed to address. Agency was also concerned with accuracy, compliance with instructions, and the completeness of Grievant's reports.

In November 2008 Procurement Officer presented Grievant with her "AIS" inventory list of equipment shown to be in the "IT" Department's control. Procurement Officer gave Grievant the "AIS" equipment list and Grievant was directed to reconcile this list with the "IT" Department's inventory information and physical location information tracking that the "IT" Department is responsible to maintain.

Missing items:

An inventory process was assigned to be completed by Grievant. Accuracy, compliance with instructions, completeness of reports, meeting timelines, and accuracy are at issue. Grievant was assigned to complete an inventory of "IT/AV" equipment. The inventory involved approximately 717 items ("AV"-131 items, "IT"-586 items).¹⁹ Grievant submitted a report listing 27 of the "AV/IT" items as not being located/not being accounted for. Agency then directed Grievant provide additional information and reporting on these 27 missing items. She was directed by management to specifically research and reconcile these 27 items in a timely manner.

Grievant had met with management on several occasions prior to August 4, 2009 to reconcile the "IT/AV" inventory with the "AIS" inventory records.²⁰ On August 4, 2009 Grievant was e-mailed Agency concerns over the progress of locating and updating inventory equipment. A final and complete inventory from the "IT" Department with DSLCC ID Number, serial number, item description, and the physical location of each item was requested to be done by Grievant by August 17, 2009.²¹

On August 17, 2009 management had concerns over Grievant's delay in providing the completed "IT/AV" inventory. The inventory was not completed by August 17, 2009 and a new completion date was set of September 30, 2009. On August 19, 2009 Vice President met with Grievant and discussed her inventory concerns. An August 19, 2009 E-mail to Grievant confirmed that the completed physical inventory of all "IT/AV" related equipment was to be done by 9/30/09 and that all records in the "IT" system would be made current with equipment purchased through 9/15/09. The E-Mail specified that:

"Satisfactory completion of this task will ensure that all IT/AV related equipment purchased by DSLCC is listed on the IT inventory system, with the correct serial or ID number, correct DSLCC inventory tag number and current location (including building and room number) of each piece of equipment. All lost and/or stolen inventory must be recorded with an explanation noted. Any equipment that had originally been included in the IT records, but has now been determined to be surplus property and removed from the campus also be documented as such, with a disposal date and a reason for the disposal."

Additionally, inventory records were required to be in agreement with the information gathered during the physical inventory with a 95% or greater accuracy rate.²²

¹⁹ Agreed Exhibit A.

²⁰ Agency Exhibits Tab E. pg. 88; Agency Exhibits Tab B. pg. 10-11.

²¹ Agency Exhibits Tab E. pg. 88

²² Grievant's Exhibits Tab 12 pg. 119; Agency Exhibits Tab E. pg. 89 and Tab B. pg.11.

On September 30, 2009 Vice President met with Grievant and Grievant's supervisor. Vice President received a copy to the "IT/AV" inventory list and a copy of the "Inventory Missing Items List as of 9/30/09". The "Inventory Missing Items List as of 9/30/09" indicated 27 Items that have not been found from the inventory compare sheet. It listed the 27 DSLCC numbers but did not provide any other information requested in the August 19, 2009 E-Mail from Vice President.²³

On September 30, 2009 Grievant's supervisor instructed her that the 27 missing items not completely documented by Grievant were to be reconciled and researched as soon as possible.²⁴

In early December 2009 Procurement Officer informed Vice President that an updated sheet on the missing 27 "IT/AV" items had not been received. The update was provided on December 10, 2009 and signed by Grievant and her supervisor on 12/10/09. This sheet included the 27 DSLCC inventory tag numbers and certain other notations related to the missing items but still did not conform to the instructions given to Grievant as to content.²⁵

On January 11, 2010 management raised concerns that missing items had not been thoroughly researched and reported as directed. A review of the inventory list of missing items disclosed that information was incomplete and some items still did not have descriptions. Vice President discussed this with Grievant's supervisor who discussed this with Grievant. Vice President confirmed matters in writing with an e-mail dated 1/13/10 setting forth her concerns, expectation, and instructions for completion and accuracy. Time considerations in providing the required information was again stressed in the E-mail as was the need that a correct and complete report to be filed.²⁶

On January 14, 2010 management investigated the 27 missing items Grievant reported. It was determined that 5 of the 27 items listed by Grievant as missing were, in fact, not missing.²⁷ These included two projectors, a VCON Video conferencing unit, and a computer which were found/accounted for.²⁸ In at least one instance, one item was located by management making a phone call.²⁹

Grievant contends:

Grievant contends that the reason she did not make the inventory deadline was that what Agency was asking for was not realistic in the time period provided her. She additionally raised the fact that the department had down sized over the last 5 years and contends she did not receive clear instructions.

The evidence indicates Grievant received specific instructions from her supervisors as to her inventory responsibilities and she was also given opportunity to ask questions and seek clarification and guidance. She received the August 19, 2009 e-mail confirming, in writing, her discussions with management.³⁰ She received the January 13, 2010 e-mail which also confirmed

²³ Grievant's Exhibits Tab 13 pg. 120-121; Agency Exhibits Tab F. pg. 90-91.

²⁴ Agency Exhibits Tab B. pg. 11.

²⁵ Agency Exhibits Tab B. pg. 11 ;Agency Exhibits Tab G. pg. 92-93; Grievant's Exhibits Tab 14 pg. 122-123.

²⁶ Agency Exhibits Tab B. pg. 11 & 12 and Tab H. pg 94.

²⁷ Agency Exhibits Tab B. pg. 12 and Testimony.

²⁸ Agency Exhibits Tab B. pg. 5 &12 and Testimony.

²⁹ Agency Exhibits Tab B. pg. 13 and Tab I pg. 97-98.

³⁰ Agency Exhibits Tab E. pg. 89; Grievant's Exhibits Tab 12 pg. 119.

instructions to her.³¹ Her immediate supervisor and other management staff testified as to their meetings and discussions with Grievant of the inventories and inventory requirements.

Grievant was additionally provided assistance by members of the "IT" Department staff and offered the opportunity for assistance from others. Inventory is a job responsibility of Grievant. In November 2008 inventory was listed as a responsibility of Grievant. Grievant's Performance Plan provided for the upcoming year that inventory was a responsibility of Grievant.

Grievant had problems with completion of the inventory process as directed. Agency permitted extensions of the due dates at various times and extended deadlines for submission of inventory corrections/updates. Agency provided Grievant specific counseling as to the inventory requirements, both orally and in writing.

Grievant has had experience in conducting inventories and in the past has completed and maintained a campus-wide inventory. She also has had problems in the past with the timeliness of her work. A past EWP indicated she missed the deadline of providing a finished inventory.³²

Grievant presented an "Inventory Missing Items List as of 9/30/09" containing 27 missing items of equipment, however, a description of each missing item and other information which was required by management was not contained therein as directed. These requirements were verbally given Grievant and were set forth in writing in the E-mail of August 17, 2009 but were not provided by Grievant.³³

A subsequent follow-up submission was required of Grievant and a submission was provided by Grievant on 12/10/09 entitled "Inventory Missing Items List as of 9/30/09 Updated 10/26/09". In this follow-up submission required of Grievant by management the information required as per the E-Mail of August 17, 2009 was still not provided by Grievant.

The evidence does not indicate that time afforded for the inventory process was unreasonable, or that Grievant was not provided clear guidance of her responsibilities. The evidence further does not support Grievant allegations concerning downsizing being a reason for non completion of the inventory process as directed. And, the evidence further indicates that Grievant did not submit the information required of her in an accurate and timely manner.

Mitigation:

Section VI.B.1., of the Rules for Conducting Grievance Hearings provides, "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.

³¹ Agency Exhibits Tab H. pg. 94.

³² Agency Exhibits Tab D. pg. 84 E.

³³ Grievant's Exhibits Tab 13 pg. 120-121; Agency Exhibits Tab F. pg. 90-91.

Policy 1.60 lists "Unsatisfactory Work Performance" as an example of a Group I offense. "Failure to follow supervisor's instructions or comply with written policy" is listed as an example of a Group II offense.³⁴

The Normal Disciplinary Action for a First Group I Offense is typically counseling although the agency has the discretion to issue a Group I Written Notice. It is noted that the Written Notice in this matter also indicates "Failure to follow supervisor's instructions or comply with written policy" under the Written Notice Offense Codes/Categories. "Failure to follow supervisor's instructions or comply with written policy" is listed as an example of a Group II Offense. The Normal Disciplinary Action for the first offense of a Group II is a Group II Written Notice and in addition to the Group II Notice, the agency has the option of suspending the employee without pay for up to ten workdays.³⁵

"Failure to follow supervisor's instructions or comply with written policy" is listed in the *Standards of Conduct* as an example of a Group II Offense. The Agency did give consideration to mitigating circumstances as is evidenced by the Agency's decision to issue one Group I for both offenses alleged in the Written Notice.

The evidence indicates that Grievant received verbal and written counseling. Grievant was told she was being held liable for the inventory work assigned her. Based upon the evidence presented, the Agency's discipline does not exceed the limits of reasonableness.

Policy 1.60 E. and Due Process:

Grievant raised concerns that policy was not followed by Agency in issuing the Group I Written Notice and that Grievant was not afforded proper due process. Grievant contends that the Agency violated Section E. 1. and E. 2. of the *Standards of Conduct* (Policy 1.60) Effective Date: April 16, 2008 which provides:

1. Advance Notice of Discipline to Employees

Prior to the issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions, and terminations employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.

2. Employee Response and "Reasonable Opportunity to Respond"

Employees must be given a reasonable opportunity to respond after receiving notification of pre-disciplinary or disciplinary actions. Normally, a 24 hour period is a sufficient period of time, however, a "reasonable opportunity to respond" should not be based solely on the quantity of time provided but also on the nature of the offense, which may or may not require more or less time to refute or mitigate the charge.

The Director of EDR has provided:

The essence of due process is notice of the charges and an opportunity to be heard. Moreover, the opportunity to be heard must be provided at a meaningful time and in a meaningful manner. The United States Constitution and state and agency policy generally entitle a non-probationary, non-exempt employee of the Commonwealth to

³⁴ Grievant's Exhibits Tab 17, pg 149, Policy No. 1.60 Attachment A.

³⁵ Grievant's Exhibits Tab 17 page 149, "Policy 1.60 Attachment A".

oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond to the charges, appropriate to the nature of the case. This represents the minimum amount of due process that the employee must receive. To satisfy procedural due process requirements, the agency is required, at a minimum, to give the employee: (1) notice of the charges against him, and (2) a meaningful opportunity to respond. Therefore, a government employee must receive the requisite notice under the "Loudermill" standard for any hearing at which the employee is terminated, demoted, suspended, or otherwise disciplined to be constitutionally proper.³⁶

The evidence indicates Grievant received her Group I Written Notice contemporaneous with or immediately after she received notification of the offense and an explanation of the agency's evidence in support of the charge. At the very most, it was a very few minutes after receipt of the Agency's notification of offense and explanation of their evidence that Grievant received the Group I Written Notice.³⁷

The essential requirements of due process are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why the proposed action should not be taken is a fundamental due process requirement. Grievant is entitled to oral or written notice of the charges against her, an explanation of the employer's evidence, and an opportunity to respond prior to the disciplinary action.

While, as per Policy 1.60, normally, a 24 four hour period is considered a sufficient period of time, consideration is also given to the nature of the offense which may or may not require more or less time to refute or mitigate the charge. Grievant was issued a Group I Written Notice for "Unsatisfactory Performance" and "Failure to follow instructions and/or policy" both of which related to her work assignment on an inventory process that extended over a number of months.

The nature of the charge and the underlying fact allegations and the minimal, if any, time afford the Grievant to respond did not afford the Grievant a reasonable opportunity to respond. The evidence indicates that Grievant was not given a "reasonable opportunity to respond after receiving notification of pre-disciplinary or disciplinary actions" as mandated by Policy 1.60. Policy 1.60 was not followed by Agency.

Accordingly, the Hearing Officer finds that Grievant was not afforded proper due process when she was given her Group I Written Notice. Additionally, the Hearing Officer finds that the Agency did not comply with the requirements of Policy 1.60, *Standards of Conduct*. Therefore, the Agency's discipline was not consistent with law and policy.

Conclusion:

For the reasons stated above, it is found that:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.

³⁶ Administrative Review of Director dated September 21, 2006, Ruling #2007-1409, pg. 6.

³⁷ Testimony.

3. Grievant was not, as required by Policy 1.60 E. given a reasonable opportunity to respond after receiving notification of pre-disciplinary or disciplinary actions. Therefore, Agency's discipline was **not** consistent with law and policy.
4. There were not mitigating circumstances justifying a reduction or removal of the disciplinary action.

The Agency has not met their burden of proof to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances.

DECISION

For the reasons stated above and upon the evidence presented at hearing, the Agency has not proven by a preponderance of the evidence that the disciplinary action of issuing a Group I Written Notice was warranted and appropriate under the circumstances.

The Agency's issuance of a Group I Written Notice on November 4, 2008, is **REVERSED**. The Group I Written Notice issued Grievant on January 20, 2010 for "*Unsatisfactory Performance*" and "*Failure to follow instructions and/or policy*" shall be removed from Grievant's personnel and agency records.

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 are the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state policy 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:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

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:

Director, Department of Employment Dispute Resolution

600 East Main St., Suite 301
Richmond, VA 23219.

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 the 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 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. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Lorin A. Costanzo, Hearing Officer