

Issue: Group I Written Notice (unauthorized use of State property); Hearing Date: 11/15/10; Decision Issued: 11/27/10; Agency: VDH; AHO: Lorin A. Costanzo, Esq.; Case No. 9441; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HEALTH**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 9441

Hearing Date: November 15, 2010
Decision Issued: November 27, 2010

PROCEDURAL HISTORY

Grievant filed a timely appeal from a Group I Written Notice issued on July 14, 2010 for "Unauthorized use of State property or records". Following failure to resolve the matter at the resolution steps, the grievance was qualified for hearing on September 20, 2010.¹ The undersigned was appointed hearing officer effective October 25, 2010. Hearing was held on November 15, 2010.

APPEARANCES

Agency Presenter
Agency Party Representative (who was also a witness)
Field Director
Grievant
Assistant District Engineer

ISSUES

Whether the issuance of a Group I Written Notice to Grievant 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 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.²

FINDINGS OF FACT

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

¹ A. Tab 1. Grievance Form A.

² A. Tab 3. Dept. of Employment Dispute Resolution, *Grievance Procedure Manual*, Sections 5.8 and 9.

Grievant is employed by Agency in Field Office as an Environmental Health Specialist Supervisor and has held this position since April of 2002. Prior to this date he was an Environmental Health Inspector for 12 years.³

Agency is charged with providing regulatory oversight of over 2800 water systems across the Commonwealth. Agency has six field offices responsible for providing necessary inspection, analysis, technical assistance, and oversight. As a part of its duties, Agency assesses an owner's management, financial, and technical capabilities to properly operate a water system.

The Virginia Drinking Water State Revolving Fund ("DWSRF") is a program which reviews applications and awards grants and loans to water systems. Agency oversees the requirement of the DWSRF.⁴

"Waterworks" is a privately owned community water system that provides water to approximately 28 or 29 connections.⁵ A June 11, 2008 Agency Memo noted that inspections of "Waterworks" found:

"The system is in imminent danger of failure because of a meaningful leak in the 5,000 gallon hydropneumatic tank. Should the hydropneumatic tank fail catastrophically, the system will likely be without water for a minimum of several days and possibly longer. Loss of pressure could potentially result in cross connection contamination of the distribution system..."⁶

Grievant and Agency have strong concerns as to the ability of "Waterworks" to maintain system reliability and conduct necessary repairs and maintenance. Grievant noted the system has few meters, leaky mains, and faulty well house infrastructure. He believed the only way to insure continued service to the community was to improve infrastructure through a loan or grant and he took action to seek a Planning Grant for "Waterworks" through the Virginia Drinking Water State Revolving Fund.⁷

Grievant's job duties involve providing technical assistance. Agency was aware that Grievant was providing technical assistance to "Waterworks" owner in making an application to DWSRF. However, upon investigation being conducted into matters, Agency determined that Grievant took actions concerning "Waterworks" which exceeded his authority and which involved the unauthorized use of state resources. Agency was also concerned that Grievant's actions violated procurement requirements and raised conflict of interest issues.⁸

On June 22, 2010 Grievant received two memorandums from Agency. One was from Director indicating Grievant was being placed on pre-disciplinary leave. The second memorandum was from Engineering Field Director and addressing due process matters. These memorandums stated that Grievant was "being placed on pre-disciplinary leave with pay for up to fifteen (15) workdays effective immediately (close of business 6/22/10) pending agency investigation of your alleged inappropriate workplace conduct". The memorandums informed Grievant of the allegations including specific allegations as to the documents of 2/11/09, 2/20/09, 2/23/09, 3/31/09, and 6/11/09. Additionally, they provided Grievant notice that he had until close of business June 29,

³ G. Tab 3.

⁴ Testimony.

⁵ Testimony and Agency Tab 1.

⁶ G. Tab 7.

⁷ G. Tab 2 Memorandum of 6/23/10.

⁸ G. Tab 2 and Testimony.

2010 to respond and provide information for consideration before the final decision concerning disciplinary action, up to and including termination, was to be made.⁹

The June 22, 2010 memorandum from Engineering Field Director to Grievant expressed Agency concern that Grievant potentially placed Agency at risk and violated federal, state, agency, and/or office procurement requirements. Agency further indicated his actions constitute inappropriate and unauthorized use of state resources, misrepresentation of himself as an agent for a waterworks, a perceived or actual conflict of interest, and Grievant exceeded his authority.¹⁰

Grievant timely provided Agency his "Due Process Memo Response" dated June 23, 2010 and addressed the allegations raised by Agency. In his response Grievant acknowledged allegations numbered 1-5 of the 6/22/2010 Memorandum (Subject: Due Process Memo)¹¹. Grievant agrees that:

1. On February, 11, 2009, correspondence on Agency letterhead was authorized by Grievant, soliciting proposals for providing engineering services to correct serious infrastructure problems with "Waterworks" dated February 11, 2009.¹²
2. On February 20, 2009, Grievant authored letters of regret to those engineering firms that submitted proposals but were not awarded funds. In the letters Grievant stated that he reviewed and did not award the bids "on behalf of the owner of "Waterworks"]¹³
3. On February 23, 2009, an award letter was signed and sent by Grievant on Agency letterhead in which Grievant stated that he reviewed and awarded the bid on behalf of the owner of "Waterworks"]¹⁴
4. On June 10, 2009, an invoice on behalf of owner of "Waterworks" generated on the letterhead of "Waterworks" for payment of \$11,800.95 for engineering services rendered was submitted to an Office of Agency. This invoice was prepared by Grievant and typed by administrative staff in Agency Field Office.
5. As required by the Agency Funding Procedural Guidelines, a MBE/WBE Compliance Checklist included in the procurement/contract information provided to Office, dated March 31, 2009 was submitted indicating the name of Recipient/Prime contractor to be [owner of "Waterworks"]. However, this document was signed by Grievant as "Recipient/Contractor".¹⁵

On July 14, 2010 Grievant was issued a Group I Written Notice (Offense Dates February 11, 20, 23 & June 10, 2009) (Offense Code "51", "Unauthorized use of State property or records"). Agency Memorandum of this date further indicated Grievant was being issuance "a Group I Written Notice under the State Standards of Conduct Policy for inappropriate and unauthorized use of state resources, misrepresentation of yourself as an agent for a waterworks and a perceived or

⁹ G. Tab 2.

¹⁰ A. Tab 1; G. Tab 2, Memorandum of 6/22/10.

¹¹ A. Tab 1, G. Tab 2, Memorandum of 6/22/10 and Memorandum of 6/23/10.

¹² A. Tab 1; G. Tab 2, Letter of 2/11/09.

¹³ A. Tab 1; G. Tab 2, Letters of 2/20/09.

¹⁴ A. Tab 1; G. Tab 2, Letter of 2/23/09.

¹⁵ G. Tab.2.

actual conflict of interest, and exceeding your authority as an Environmental Inspector Supervisor".¹⁶

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 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 the Standards of Conduct and Performance for employees of the Commonwealth and pursuant to § 2.2-1203 of the Code of Virginia, the Department of Human Resources Management has promulgated Policy No. 1.60, *Standards of Conduct*. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct of employees 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.

The *Standards of Conduct* organizes Offenses into three groups according to the severity of the behavior with Group I Offenses being the least severe. 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.

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 operations and/or constitute neglect of duties, insubordination, the abuse of state resources, violations of policies, procedures, or laws.¹⁷ The "unauthorized use or misuse of state property" is listed as an example of a Group II Offense in "Attachment A: Examples of Offenses Grouped by Level" of the *Standards of Conduct*.

The *Standards of Conduct* provides that the examples of offenses are not all-inclusive and provides:

*Examples of offense, 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.*¹⁸

¹⁶ G. Tab 2.

¹⁷ DHRM Policy 1.60, Effective Date: April 16, 2008, *Standards of Conduct*.

¹⁸ G. Tab 1., *Standards of Conduct*, § B.2.

Under the *Standards of Conduct* an agency has the ability to reduce the level of corrective action if there are mitigating circumstances. The *Standards of Conduct* indicates:

Agencies may reduce the level of a corrective action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of fairness and objectivity, or based upon an employees' otherwise satisfactory work performance.¹⁹

The *Standards of Conduct* also provides:

Counseling is *typically* the first level of corrective action but is not a required precursor to the issuance of Written Notices. Counseling may be an informal (verbal) or formal (written) communication which conveys that an employee's conduct or performance was improper and must be corrected. ...

Counseling may be documented by letter or memorandum, but not on the Written Notice form. Documentation regarding counseling should be retained in the supervisor's file, and not in the employee's personnel file, except as necessary to support subsequent formal disciplinary action.²⁰

Activities:

Grievant is an employee of Agency which is charged with providing oversight and enforcement of the operations of community water systems in the Commonwealth. Agency also administers the Virginia Drinking Water State Revolving Fund ("DWSRF") which makes available loans and grants for drinking water projects.

Both Grievant and Agency have strong concern as to the ability of "Waterworks" to conduct the repairs and maintenance necessary to maintain its system reliability. Grievant expressed concern that the only way for "Waterworks" to be able to insure continued service to the community was to improve infrastructure through a loan/grant. Grievant took action to seek a planning grant for "Waterworks" through the DWSRF and a DWSRF planning grant was awarded "Waterworks".²¹

Grievant utilized, without authority, Agency letterhead soliciting bids and providing notifications on behalf of owner of "Waterworks". In one of two letters to unsuccessful bidders dated 2/20/09 Grievant stated, on Agency letterhead, "On behalf of the owner of ["Waterworks"] I have carefully gone through your competitive bid. I have found you proposal to be accurate ..." Grievant also indicated, "I regret to inform you that the owner of ["Waterworks"] has elected not to award the contract to [name redacted herein]. This choice was made entirely on the cost of the bid. The bid was, in my estimation, the most professional." Grievant also stated, "I enjoyed working with you in my request to get wide participation in the bidding process. If you have any questions about this decision or the bid review process, please give me a call."²²

In a second letter of 2/20/09 to an unsuccessful bidder Grievant stated on Agency letterhead, "On behalf of the owner of ["Waterworks"] I have carefully gone through your competitive bid. I found you proposal to be accurate ..." Grievant also indicated, "I regret to inform you that the owner of ["Waterworks"] has elected not to award the contract to [name redacted herein]. This choice was made entirely on the cost of the bid." Grievant also stated, "I enjoyed

¹⁹ G. Tab 1. *Standards of Conduct* § B. 3.(a.)

²⁰ G. Tab 1. *Standards of Conduct* § B.1.

²¹ G. Tab 2. Memorandum of 6/23/10.

²² A. Tab 1. Letter of 2/20/09.

working with the professional staff at [name redacted herein] in my request to get wide participation in the bidding process. If you have any questions about this decision or the bid review process, please give me a call." ²³

Grievant's letter of 2/23/09, on Agency letterhead, thanked the winning bidder and noted, "On behalf of the owner of ["Waterworks"] I have carefully gone through your competitive bid. I found your proposal to be accurate..." He indicated, "I am pleased to inform you that the owner of ["Waterworks"] has elected to award the contract to [name redacted herein]. This choice was made based on several factors including the cost of the bid, our knowledge of [name redacted herein] past work and anticipated response time for this project." Additionally Grievant stated, "I would like to urge action on this project as soon as possible. ..." Furthermore, Grievant stated in this letter, "I intend to take this information and use it as part of the submission of a construction grant application with the Drinking Water State Revolving Fund (DWSRF)." ²⁴

Grievant's letter of 6/10/09 was on letterhead of "Waterworks" and was addressed to Agency. In this letter Grievant requesting a disbursement of \$11,800.95. The letter requested, if possible a check be made directly to the service provider. The letter was signed by Grievant and listed his title of "Environmental Health Specialist Supervisor below his signature. The letter identified Grievant as "Authorized Representative of the Grantee" and identified the Grantee as "Waterworks". This letter was typed by Agency staff. ²⁵

Action of Agency:

The evidence indicates that management became aware of these matters when, during an enforcement case, a paralegal noted certain letters and inquired of management if Agency was supposed to be soliciting bids on behalf of a waterworks. The paralegal brought to management's attention papers showing bids were solicited on behalf of "Waterworks" on Agency letterhead bearing the signature of Grievant. This led to investigation by Agency and consultations with risk management and others.

In its investigation management determined Grievant's use of Agency letterhead in the activities addressed herein was not authorized. Grievant's representations of his acting on behalf of the owner of "Waterworks" and representations made on Agency's letterhead, particularly in seeking bids, gave strong concern to management over violation of procurement policy, law, and regulation.

Management also determined Grievant's actions gave rise to conflict of interest and/or the appearance of conflict of interest. Management was concerned that the person soliciting bids on behalf of "Waterworks" (i.e. Grievant) was an employee of the Agency which was charged with enforcement of law and regulations applicable to "Waterworks" and Grievant could be conducting inspections and enforcement activities with "Waterworks". Further concern was expressed as to Grievant's involvement in securing a Grant from the DWSRF as Agency oversees the DWSRF. ²⁶

Agency consulted with Risk Management. Risk Management indicated Agency needed to determine if recompense was involved since allegations were raised of an Agency employee, acting without authority, soliciting bids on state letterhead. Risk Management advised this determination needed to be made without the employee having opportunity to affect matters. This

²³ A. Tab 1 Letter of 2/20/09.

²⁴ A. Tab 1 Letter of 2/20/09.

²⁵ A. Tab 1 Letter of June 10, 2009.

²⁶ Testimony.

led to the management's determinations concerning placing Grievant on leave with pay and his being escorted out of the workplace.

Grievant:

Grievant does not contest that he represented he was acting as the owner's representative in the grant process or concerning soliciting and awarding bids. He does not contest utilizing the Agency letterhead for these matters. He contends he openly conducted the activities and Agency knew of his actions. He contends that his actions were taken in response to the needs of the individuals serviced by "Waterworks".

Management was aware Grievant was providing technical assistance to owner of "Waterworks" in making application to DWSRF. Management was not aware of Grievant's representing himself to be the owner's agent/acting on behalf of owner in securing bids or in other matters nor was management aware Grievant was using Agency letterhead in soliciting bids on behalf of owner of "Waterworks" or in other related matters.

Grievant did not request authority from his supervisor prior to his actions or provide his supervisor documents for review.²⁷ Grievant did provide copies of the letters of 2/11/09, 2/20/09, and 2/23/09 to "VDH-ODW-Richmond Central".²⁸ Testimony indicated that, the Director of ODW did not receive such letters and was not aware of matters until the paralegal drew his attention to the letters. The Director testified he is not able to personally read each document transmitted to Central Office due to the volume of transmissions. It is also noted that copies of the letters were transmitted after the fact of the letters and the representations contained therein.

In the first step response Grievant's actions are characterized by his supervisor as "a highly unusual departure" from procedures.

Grievant stated he has received no payments concerning his actions as to "Waterworks". There is no evidence presented at hearing that Grievant received any payment or had any expectation of payment from "Waterworks".

Agent/acting on behalf of:

The evidence indicates that, without authority and during working hours, Grievant took actions as agent of/on behalf of the owner of "Waterworks" and used the letterhead of Agency to conduct activities on behalf of/as agent of owner of "Waterworks". Furthermore, by utilizing Agency letterhead Grievant subjected Agency violation of policy/regulation/law concerning procurement activities.

Without authority Grievant did generate and sign letters on Agency letterhead. These letters include:

- a. letter of 2/11/09 soliciting proposals for engineering services, for owner of "Waterworks";
- b. letter of 2/20/09 notifying two entities that their proposals were not accepted; and
- c. letter of 2/23/09 notifying one entity of the awarding of the contract.

Grievant authored and signed on "Waterworks" letterhead a letter dated 6/10/09 that he had prepared by Agency staff. This letter requested disbursement of proceeds under the Grant

²⁷ A. Tab 1 and Testimony.

²⁸ A. Tab 1. Letters of 2/11/09, 2/20/09, and 2/23/09.

Agreement and indicated Grievant was the "authorized representative" of the Grantee, "Waterworks". On behalf of "Waterworks" a disbursement of \$11,800.95 was requested by Grievant.²⁹

The evidence indicates, by a preponderance, that Grievant was not authorized represented himself as agent of/acting on behalf of the owner of "Waterworks" and the Agency has proved the unauthorized use of State property or records.

Conflict of interest/appearance of conflict of interest:

Grievant is an employee of Agency. Agency is charged with enforcement of the regulations and law applicable to "Waterworks" and to provide oversight, inspection, review, and evaluation of the activities of "Waterworks" and its owner. Agency is also charged with overseeing the requirements of the DWSRF.

The evidence indicates that Grievant placed himself in a conflict of interest and/or gave the appearance of a conflict of interest when he represented he was acting as an agent of/on behalf of the owner of "Waterworks". Grievant's responsibilities as an Agency employee and his responsibilities as agent of the owner of "Waterworks" are a conflict of interest and/or give the appearance of a conflict of interest. In assuming these two roles Grievant became an agent for both a.) the Agency charged with inspecting/regulating an entity and the entity being inspected/regulated and b.) the Agency charged with overseeing the grant requirements of the DWSRF and an entity seeking/receiving a grant from DWSRF.

Procurement:

Agency letterhead used by Grievant indicated "Commonwealth of Virginia" together with Agency name, address, and contact information. Grievant, using this Agency letterhead with his title of "Environmental Health Specialist Supervisor" printed below his signature stated he was soliciting bids on the redesign of a community water system. On Agency letterhead he also sent letters confirming to the entities if they were awarded or not awarded the contract. These actions were not authorized by Agency. Grievant's actions indicated Agency was soliciting bids or, as a minimum, gave the appearance that Agency was soliciting bids.

Grievant subsequently sought a disbursement of \$11,800.95 for the purposes of payment of Project Costs to the entity he indicated was awarded the bid. While this was not done on Agency letterhead it was done with his title of "Environmental Health Specialist Supervisor" printed below his signature and the statement in the letter that he was Authorized Representative of the Grantee.

³⁰

Grievant indicated that he didn't believe state procurement regulations applied to his activities. Management determined that procurement activities conducted under the under State letterhead should be done pursuant to procurement law, regulation, and policy. Management determined that Grievant's use of State letterhead and statement he was soliciting bids and his other letters and statements did place Agency at risk of being found engaging in procurement activities in violation of procurement requirements.

The unauthorized soliciting of bids for services and related matters conducted on State letterhead raised the issue of Agency's compliance with Virginia's procurement requirements and

²⁹ G. Tab.2.

³⁰ A. Tab 1. Letter of 6/10/09.

whether there was a violation. The evidence indicates that Grievant's unauthorized actions subjected Agency to possible violations of state procurement regulation, policy, and law. His unauthorized use of Agency letterhead and his use of his Agency title in the letters raised the issue of Agency involvement in the procurement of services and the applicability of policy, regulation, and law concerning procurement actions.

Grievant's actions:

The evidence indicates that Grievant's actions were initiated due to his strong desire to assist the consumers of a community waterworks facing severe problems and were based upon his desire to avoid failure of a waterworks.

It is further found that no evidence was presented indicating Grievant received or expected to receive recompense from "Waterworks" or any entity benefiting from the award of a Grant.

Pre-disciplinary Leave and Removal from the workplace:

Grievant contends he was improperly removed from the workplace. On June 22, 2010, Grievant was removed from the workplace upon being placed on Administrative Leave with Pay.

Agency conferred with Risk Management who recommended Agency needed to determine if there was any recompense to Grievant. Risk Management recommended this determination needed to be done without the employee having opportunity to affect matters. In consideration of this recommendation management escorted Grievant from the workplace and placed him on Administrative Leave with Pay.

The *Standards of Conduct* provides for the "Immediate Removal from the Workplace for Disciplinary Reviews or Administrative Investigations". Under the *Standards of Conduct* management may immediately remove an employee from the workplace without providing advance notice when an employee's continued presence may hamper an internal agency investigation. This policy provides that the employee should be immediately advised of the reason for removal from the workplace and management must provide the employee with written notification of the intended corrective action and a summary of the evidence of the offense. Also, when applicable, the employee is to be notified that an administrative investigation of the employees conduct is underway. The employee is to be afforded a reasonable opportunity to respond before taking formal correction action. The *Standards of Conduct* also provides that employees may be placed on pre-disciplinary leave for up to fifteen workdays.³¹

Grievant received the two memorandums on 6/22/2010 (more fully described above). These memorandum advised Grievant, in writing, of the following:

- a. the reasons for removal;
- b. management's intended corrective action;
- c. a summary of the evidence of the offense; and
- d. notice of the administrative investigation.

The two memorandums of 6/22/10 afforded Grievant a reasonable opportunity to respond before taking formal corrective action and also notified him that he was being placed on pre-disciplinary leave with pay for up to 15 workdays, effective close of business 6/22/10, pending agency investigation of alleged inappropriate workplace conduct.

³¹ G. Tab 1. Policy 1.60.

For the reasons stated herein, it is **not found** that Grievant was improperly placed on pre-disciplinary leave or improperly removed from the workplace.

Mitigation:

§ 2.2-3005.1 of the Code of Virginia authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action". § 2.2-3005 of the Code of Virginia charges the hearing officer with considering evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Department of Dispute Resolution.³²

§ VI.B.1. of the Department of Employment Dispute Resolution *Rules for Conducting Grievance Hearings* provides,

Mitigating and Aggravating Circumstances: 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.

Agency gave consideration to mitigating and aggravating circumstances. Counseling is not required prior to the issuance of a Written Notice.³³ In its decision to issue formal discipline Agency gave consideration to the fact that on 2/12/08 Grievant received a written counseling memo for exceeding his authority as an inspector and took into consideration the nature and seriousness of the actions of Grievant. Additionally, Agency took into consideration mitigating circumstances including:

- a. Grievant's ongoing support of public health;
- b. Grievant's desire to protect the drinking water of the citizens of Virginia;
- c. There being no indication of any personal benefit received; and
- d. Grievant's past contributor work performance.

Agency took into consideration that the *Standards of Conduct* lists "unauthorized use or misuse of state property" as an example of a Group II Offense and, in light of the above, Agency made the determination to take formal disciplinary action and issue one Group I Written Notice.³⁴

Upon consideration the evidence in this cause and for the reasons stated above, the Agency's discipline is **not found** to exceed the limits of reasonableness.

CONCLUSION

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. *and*

³² § 2.2-3005 of the Code of Virginia.

³³ G. Tab 1. *Standards of Conduct* Policy 1.60. Section B.1.

³⁴ G. Tab 2., Memo of 7/14/10.

4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

DECISION

For the reasons stated above, the Agency has 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 and Agency's discipline does not exceed the limits of reasonableness. The Agency's issuance to Grievant of a Group I Written Notice on July 14, 2010 is **UPHELD**.

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