

Issue: Group II Written Notice with Suspension (failure to follow instructions/policy);
Hearing Date: 05/03/11; Decision Issued: 05/17/11; Agency: DSS; AHO: Lorin A.
Costanzo, Esq.; Case No. 9555; Outcome: No Relief – Agency Upheld.

Commonwealth of Virginia
DEPARTMENT OF SOCIAL SERVICES

DECISION OF HEARING OFFICER

In the matter of: Case No: 9555

Hearing Date: May 03, 2011

Decision Issued: May 17, 2011

PROCEDURAL HISTORY

Grievant was issued a Group II Written Notice with a 10 day suspension on December 21, 2010 for "failure to follow instructions and/or policy".¹

On January 13, 2011, Grievant timely filed a grievance to challenge the Group II Written Notice with 10 day suspension. The grievance proceeded through the resolution steps. On March 10, 2011, when the parties failed to resolve the grievance, the agency head qualified the grievance for a hearing.² The Department of Employment Dispute Resolution assigned this matter to the undersigned Hearing Officer effective April 12, 2011.

Pursuant to certain representations and pursuant to the April 18, 2011 written request of Grievant an "Order for Appearance of Witness at Grievance Hearing" was issued. The named individual indicated in an e-mail that she would not be able to appear and provide a legal opinion as Grievant was seeking. The matter was discussed in a telephone conference held on April 27, 2011 with Grievant and Agency. During the conference the Hearing Officer's expressed concern as to his authority to compel, over the person's objection, the provision of a legal opinion from an attorney/attorney with the Office of the Attorney General.

Hearing was originally scheduled for May 2, 2011 but was continued, with agreement of the parties, to May 3, 2011. Hearing was held on May 3, 2011 beginning at 10:00 A.M. at the District Office of VDSS. Grievant was present at hearing. At hearing, the exhibits were admitted, by agreement, *en masse*.

APPEARANCES

Grievant, who was a witness
Agency's representative
Agency party designee, who was a witness

¹ A. Ex. Tab 1, pg. 1.

² A. Ex. Tab 2, pg. 26.

ISSUES

Whether issuance to Grievant of a Group II Written Notice with 10 day suspension was warranted and appropriate under the circumstances?

Whether there was retaliation?

FINDINGS OF FACT

After reviewing the evidence presented at hearing, the Hearing Officer makes the following findings of fact:

Grievant has been employed by Agency for almost 5 years³ and is currently employed by Agency as a Support Enforcement Specialist.⁴ Agency is charged with collecting and disbursing child support to children in Virginia and in other states, establishing administrative orders, enforcing court orders, and establishing paternity for children born out of wedlock, and locating absent parents.

Agency issued Grievant a Group II Written Notice with 10 day suspension on 12/21/10 (Offense Date: 12/1/10) which indicated under Type of Offense: Group II and the Offense Category of 13, "Failure to follow instructions and/or policy". Under Nature of Offense and Evidence it was indicated 9 pages of documentation were attached and stated:

Failure to follow established procedures regarding implementation of a court order income withholding for child support. On December 1, 2010 the custodial parent made a complaint via certified letter to the District Manager concerning [Grievant's] failure to honor the April 5, 2010 order of the [J&DR] Court. Review of this case showed that on September 17, 2010 [Grievant] released two wage withholdings that were in place at the request of the Non-Custodial Parent's (NCP's) current wife and in light of the NCP's military service. [Grievant's] actions on this case were in direct violation of the court order, and the agency has absolutely no authority to violate any court order. [Grievant's] actions withheld much needed child support from a six year old child whose mother states she was put in a position to borrow money to make up for the lack of the full amount of support ordered by the court. [Grievant's] actions resulted in a severe hardship for this mother and child, and are in direct violation of the court's order and the written policy of this division.⁵

Agency met with Grievant on 12/15/10 to discuss matters and gave Grievant a written "Notice of Intent Memorandum" on 12/15/10. The discussion and memorandum provided Grievant notice of Agency's intent to issue disciplinary action, notification of the offense, and an explanation of the agency's evidence in support of the charge. Grievant was given until 12/16/10 at 9:00 A.M. to respond. Grievant provided an e-mail response at 5:08 P.M. on December 15, 2010.⁶

³ A. Tab 2, pg 41.

⁴ A. Tab 10.

⁵ A. Tab 1.

⁶ A. Tab 1.

On April 5, 2010, the J&DR Court entered an "Order of Support (Civil)" ordering Non-Custodial Parent ("NCP"), to pay monthly child support to Custodial Parent ("CP") in an amount set forth therein. The first child support payment was ordered due on the 1st day of May 2010, and subsequent payments due on the 1st day of each month thereafter. Furthermore, the Court ordered, "Withholding from income is ordered payable through the Virginia Department of Social Services by administrative order for income withholding." Additionally, the Court Order provided, "This order shall remain in full force and effect until amended or annulled by this court or a court of competent jurisdiction to which an appeal may be taken." ⁷

On December 1, 2010, Agency received a letter dated November 29, 2010 from Custodial Parent ("CP") concerning Grievant's actions with her child support case. In the letter the Custodial Parent indicated that payment of child support stopped being deposited into her bank account in the beginning of October 2010. She further indicated her concern that Grievant allowed Non-Custodial Parent ("NCP") to be able to make payments on his own without her being informed of any changes. She expressed concern that the child support payments were set by the Court and changes should be made in Court when all persons involved are present. CP also stated in the letter she felt Grievant was not impartial. She indicated Grievant said she was going to be sent a record of NCP's payments, as she had requested, but she didn't receive the payment record. CP requested another social worker assigned to her case. ⁸

Upon receipt of CP's November 29, 2010 letter Agency conducted an investigation of matters.

Pursuant to the April 5, 2010 J&DR Court Order of Support (Civil) wage withholding for child support was established. Two wage withholdings for child support were put in place with NCP's employers. However, on September 17, 2010, at the request of NCP's wife, Grievant released both wage withholdings. Upon Grievant's release of these two wage withholdings there were no wage withholdings for child support in existence. ⁹

Grievant does not contest that on 9/17/10 he released the two wage withholdings for child support due the CP. ¹⁰

On November 19, 2010 CP called Agency and spoke to Grievant. Grievant documented in the Agency's computer system that CP had complained about releasing the withholding orders. Grievant documented in the computer:

... WW IS ORDERED, I SHOULD NOT HAVE RELEASED MY WW. CP NOW FEELS I HAVE GIVEN UNFAIR PREFERENCE TO NCP. I SUPPOSE THAT I DID, BUT IT WAS IN LIGHT OF HIS MILITARY SERVICE... ¹¹

On November 19, 2010 Grievant sent a document indicating he issued a wage withholding again to one of NCP's employers. In this document Grievant indicated:

I HAVE SENT A WAGE WITHHOLDING BACK TO [name redacted]. I AM SORRY FOR THE INCONVIENANCE THIS HAS CAUSED YOU. OUR INTENT IS ALWAYS TO COLLECT

⁷ A. Tab 1, pg. 9, 10, & 11.

⁸ A. Tab 1, pg. 15.

⁹ A. Tab 1 and 2.

¹⁰ G. Exhibit 1, pg. 51; A. Tab 1, pg. 19; Testimony of Grievant.

¹¹ A. Tab 7, pg. 129

REGULAR PAYMENTS, AS ORDERED BY THE COURT. I SHOULD NOT HAVE RELEASED OUR WAGE WITHHOLDING. THANK YOU.¹²

On November 18, 2010 CP filed a "Motion for Show Cause Summons or Capias" in the J&DR District Court moving that NCP be "imprisoned, fined or otherwise punished or dealt with according to law" for failure to provide support as ordered on April 2010 ...". The Show Cause Motion further indicated the support arrearage of \$380.00 as of 11/18/10 and contained the handwritten statement, "Note: My case is handled through DCES. Social Worker allowed father to make payments on his own. Is this right, since arrangement about payments was set up in court (?)".¹³

At the hearing on the "Motion for Show Cause Summons or Capias" held January 3, 2011 DCSE legal counsel presented to the Court that a wage withholding had been reinstated by DCSE and that the NCP was current in his child support payments. By Court Order entered January 3, 2011 the J&DR Court dismissed the Motion.¹⁴

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that the disciplinary action taken 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.¹⁵

APPLICABLE LAW, POLICY, AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 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. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and 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).

Virginia Code Section 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 Section 2.2-3001."

¹² A Tab 5, pg. 117.

¹³ A. Tab 1, pg. 17.

¹⁴ A. Tab 6, pg 119.

¹⁵ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

To establish procedures on standards of conduct and performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resources Management promulgated the *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 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.

To assist management in the assessment of the appropriate corrective action, the *Standards of Conduct* organizes offenses into three groups according to the severity of the misconduct or behavior. *Group I Offenses* include acts of minor misconduct that require formal disciplinary action. *Group II Offenses* include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. *Group III Offenses* include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.¹⁶

Failure to follow supervisor's instructions or comply with written policy is listed as an example of a Group II Offense in *Attachment A of the Standards of Conduct*. The *Standards of Conduct* also provides that the 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 the Commonwealth of Virginia's Department of Human Resource Management Policies and Procedures Manual, *Standards of Conduct*, Policy No. 1.60 provides that:

*"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."*¹⁷

Attachment A of the Standards of Conduct further provides, under a normal disciplinary action, that for a first Group II Written Notice, in addition to the Group II Written Notice, the agency has the option of suspending the employee without pay for up to 10 working days. For a second Group II Offense, discharge is indicated, or, in lieu of discharge, the agency may (1) suspend without pay for up to 30 workdays, and/or (2) demote or transfer with disciplinary salary action.¹⁸

§ 63.2-1915 of the Code of Virginia, 1950, as amended provides:

All administrative orders issued by the Department shall have the same force and effect as a court order. However, any order issued by a court of this Commonwealth supersedes an administrative order.

¹⁶ A. Tab 4, Standards of Conduct, Policy 1.60, Effective Date: April 16, 2008.

¹⁷ A. Tab 4, § B.2, Standards of Conduct.

¹⁸ A. Tab 4, pg. 115.

§ 63.2-1924 of the Code of Virginia, 1950, as amended, provides in pertinent part:

A. As a part of every administrative support order directing a noncustodial parent to pay child or child and spousal support or by separate order at any time thereafter, provision shall be made for withholding from the income of the noncustodial parent the amount of the withholding order plus an amount to be applied towards liquidation of arrearages if the noncustodial parent fails to make payments in an amount equal to the support payable for one month. ...

F. Administrative orders for withholding from income shall be promptly terminated or modified by the Department when (i) the obligation to support has been satisfied and arrearages have been paid, (ii) the whereabouts of the child or child and custodial parent becomes unknown, or (iii) modification is appropriate because of a change in the amount of the obligation.

Agency has adopted and promulgated THE VIRGINIA DIVISION OF CHILD SUPPORT ENFORCEMENT, FEDERAL REGULATION DESKTOP GUIDE, (SEPTEMBER 2008). This policy provides that the Federal Regulation Desktop Guide is designed to give VDCSE workers a basic tool for understanding the requirements of federal regulations for the child support enforcement program. It provides, "As an agency, DCSE is required to comply with federal regulations

The DESKTOP GUIDE provides that Federal law requires all states to use the standardized *Income Withholding for Support (IWO)* when implementing an income withholding and states:

ENFORCEMENT

If there is an order for immediate income withholding, notice must be sent to the employer within 15 calendar days of the date the support order was entered (or the date the appeal period elapsed on an Administrative "Support Order) if employer was known, within 15 calendar days of locating employment information, or within 2 business days of the date information regarding a newly hired employee is interned into the State Directory of New Hires or locating the employer's address, whichever occurs later.¹⁹

The Division of Child Support Enforcement, Chapter 20, ENFORCEMENT BY INCOME WITHHOLDING (07-07-2010) provides, in pertinent part:

A. General (07-01-2008)

1. Federal law requires all states to use the standardized Income Withholding for Support (IWO) when implementing an income withholding. **Issue an IWO against all income except the following, which are exempt from garnishment under federal and state law. ... (emphasis added)**
2. Issue an IWO (Income Withholding for Support) when there is a new hire date match or an employer is found or provided.
4. When the NCP has more than one employer, serve the IWO on the employer that provides sufficient income to the total amount to be withheld. When the income from one employer

¹⁹ A. Tab 3, pg. 71.

is not sufficient to meet the total amount to be withheld, serve the IWOs on other employers as necessary to withhold the total amount.

5. Transfer the income withholding order to the NCP's new employer if the NCP changes employers.
 1. The NCP cannot stop the withholding by paying the overdue support.²⁰

The Division of Child Support Enforcement, Chapter 26, JUDICIAL SUPPORT ACTIONS (04-01-2009) provides, in pertinent part:

- Q. Enforcing Virginia Court Orders-Instate Cases (01-01-1997)
 2. Juvenile and Domestic Relations District Court Orders
 - q. If the court orders a mandatory payroll deduction and requests DCSE to complete the income withholding, follow the court's direction. Refer to Chapter 20, Enforcement by Wage Withholding.²¹
- T. Modification of Court Orders (03-01-1999)

Court Orders remain in effect until changed or vacated by the court, or terminated by operation of state law.²²

Grievant:

Grievant testified at hearing, "I did violate policy by releasing this wage withholding but it was done as a matter of a practicality on a case that was over collecting."

Grievant further stated that when CP made her complaint (i.e. on 11/29/10) the case was \$115.99 in arrears and on December 1st the NCP was \$634.69 behind. NCP payments were received on December 8th and 13th. He further testified that on Dec 13, 2010 there was a zero arrears balance.

Grievant testified there was no evidence that the child was endangered in this case. He testified that \$8723.64 in child support was due in 2010, all of it was collected, and the only issue was in December when CP was, for a brief period, behind in what she should have received. Grievant contends when the household income of CP is taken into consideration with the amount of arrearages, that the health and welfare of a minor child was not placed at risk.

Grievant contends that the Order of Support (Civil) issued by the J&DR Court on 4/15/2010 does not compel him or even DCSE to do anything specific. Grievant contends, as set forth in the statement of February 22, 2011, that he did not violate a court order and, as he was not in violation of a court order, the Group II Offense and 10 day suspension is excessively harsh.²³

The evidence indicates that the J&DR District Court Order of April 5, 2010 found that the child was entitled to support from the NCP who was ordered to pay a set amount per month of child support. The Order provided, "Withholding from income is ordered payable through the Virginia Department of Social Services by administrative order for income withholding". Also, the

²⁰ A. Tab 3, pg. 73.

²¹ G. Exhibit 6, 26-22 and 26-23.

²² G. Exhibit 6, 26-26.

²³ A. Tab 2, pg. 29.

Order provided, "THIS ORDER SHALL REMAIN IN FULL FORCE AND EFFECT UNTIL AMENDED OR ANNULLED BY THIS COURT OR A COURT OF COMPETENT JURISDICTION TO WHICH AN APPEAL MAY BE TAKEN."

Agency has adopted and promulgated THE VIRGINIA DIVISION OF CHILD SUPPORT ENFORCEMENT, FEDERAL REGULATION DESKTOP GUIDE, (SEPTEMBER 2008) which provides, "As an agency, DCSE is required to comply with federal regulations²⁴

DCSE Program Manual, Chapter 26, provides that Court Orders remain in effect until changed or vacated by the court, or terminated by operation of state law.²⁵ Additionally, it instructs that if the court orders a mandatory payroll deduction and requests DCSE to complete the income withholding, follow the court's direction.²⁶

Grievant documented on 11/19/10 in the "A P E C S" (Automated Program to Enforce Child Support) that he had released the two wage withholdings for NCP and that he should not have done so. He stated:

" ... I HAD RELEASED BOTH HIS WW FOR [name redacted] AS WELL AS HIS FULL TIME EMPLOYER, [name redacted]. NCP'S WIFE, WHO IS AUTHORISED, HAD ADVISED ME THAT SHE SET UP A PREAUTHORISED PAYMENT FROM THEIR BANK TO MAKE THIS PAYMENT, IN THAT NCP STILL GETS PAY FROM [name redacted] WHILE HE IS ACTIVE DUTY, AND OUR TWO WW CAUSED SOME UNCERTANTY WITH HIS PAYCHECKS. WW IS ORDERED, I SHOULD NOT HAVE RELEASED MY WW. CP NOW FEELS I HAVE GIVEN UNFAIR PREFERENCE TO NCP. I SUPPOSE THAT I DID, BUT IT WAS IN LIGHT OF HIS MILITARY SERVICE. I ADVISED CP THAT I WOULD REISSUE MY WW THIS DATE, TO [name redacted]. ////[Grievant]²⁷

On 11/19/10 Grievant sent the following "Notification of Action Taken by the Division of Child Support Enforcement (DCSE).

I HAVE SENT A WAGE WITHHOLDING BACK TO [name redacted]. I AM SORRY FOR THE INCONVIENANCE THIS HAS CAUSED YOU. OUR INTENT IS ALWAYS TO COLLECT REGULAR PAYMENTS, AS ORDERED BY THE COURT. I SHOULD NOT HAVE RELEASED OUR WAGE WITHHOLDING. THANK YOU.²⁸

DCSE Chapter 20, *Enforcement by Wage Withholdings* A. I. provides 10 enumerated exemptions from issuing an IWO (Income Withholding for Support). These are described as matters being exempt from garnishment under federal and state law. Pay from employers and pay for military personnel is not so listed.²⁹

Grievant had been employed by Agency for nearly 5 years. He is currently and has been a Support Enforcement Specialist since 2007. His EWP, effective date 1/30/07, indicates as Purpose of Position, "Serve as program agent for assigned child support cases in order to locate non-custodial parents; gather evidence for establishment of paternity, determine child support and medical coverage, and execute enforcement action. Manages cases using administrative processes when possible, provides testimony in court proceedings when required." Additionally,

²⁴ A. Tab 3.

²⁵ G. Exhibit 6, 26-26.

²⁶ G. Exhibit 6, 26-22 and 26-23.

²⁷ G. Exhibit 1, pg. 51.

²⁸ A. Tab 5, pg. 117.

²⁹ A. Tab 3, pg. 73.

the EWP includes as competencies to successfully perform the work: knowledge of collection procedures and techniques as well as ability to interpret and apply policies and procedures.

Grievant's EWP, effective date 10/25/09, includes serving as program agent for assigned child support cases and ensuring compliance of child and/or medical support orders through a number of administrative and judicial enforcement actions.

Grievant's EWPs over the years indicate Grievant has received both formal out-of-office and in-office training since his employment with Agency including the following: Initial In Service, Customer Service for the DCSE Specialist, Establishing Paternity & Support Orders, Best Practices Summit Workshop, Overview of DCSE Processes, Enforcement Methods, Part I and Part II, Show Cause Actions, Adding Support Orders, Interstate Case Processing, Child Support Enforcement Network Workshop, and other training.³⁰

The evidence indicates that on 9/17/10 Grievant released the two wage withholdings for child support due CP against Agency policy. His actions released all wage withholding for child support. The evidence indicates Grievant failed to follow established policy and procedures regarding a court ordered income withholding for child support. Furthermore, the evidence indicates that Grievant knew or should have known of Agency policies as to income withholding for child support.

Retaliation:

Retaliation is defined in §9 of the Grievance Procedure Manual as "Adverse employment actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. "whistleblowing")."

To establish "retaliation" an employee must show he or she (1) engaged in a protected activity; (2) suffered a materially adverse action; and (3) a nexus or causal link exists between the adverse action and the protected activity.

Participating in the grievance process is a protected activity under the grievance procedure. Grievant indicated in his 2/11/11 written document,

On 9/11/10 and 11/17/10 I chose to file two separate grievances in accordance with state personnel policy. It is my sincere belief that the written notice and ten day suspension I received in this incident was initiated by DCSE management in retaliation for filing grievances. ...

Grievant further provided 10 bullets in which he contends retaliation and in which he requested investigation:

- Incorrectly accusing him of violating a court order without seeking an opinion from legal counsel which would prove this allegation to be false
- Incorrectly representing he violated federal and state code, without specifying what codes.
- Incorrectly stating DCSE does not have authority to alter court ordered wage withholdings.
- Allegations his actions put the health and welfare of a child at risk was done to elevate to a Group II.

³⁰ A. Tab 10.

- Accused him of violating DCSE written policy when that policy is never cited.
- The notice of intent memo is a misrepresentation.
- Management intentionally timed the suspension so he lost 3 additional days of holiday pay.
- Second step respondent's comments re mitigating and aggravating circumstances are improper and stray from facts and represent her bias.
- His office goal is to have 64.40% of cases in compliance. This goal is representative of fact 100% compliance is difficult. To punish him so harshly on this case which accumulated minor arrears is evidence of bias.
- The notice of intent memorandum was issued 4:30 pm on 12/15/10 without advance warnings or having any files, or notes and his comments and reactions, when put on the spot, were taken out of context, and represented as an "aggravating circumstance".³¹

"Virginia Department of Social Services Human Resources Division ASSESSMENT REPORT (Report Date: 2/14/11)³² addressed their assessment concerning Grievant's allegation of retaliation. During the grievance process, Grievant alleged that he was issued a Group II Written Notice and suspended for 10 work days on 12/21/10 because he had previously initiated grievances. The Assessment Report of 2/14/11 discussed the two prior grievances of Grievant and determined as follows:

1. The allegation or retaliation was made, not when the grievance was initiated on 1/13/11 but on 2/11/11, after the Grievant received the second resolution step response.
2. A first grievance was made dated 9/22/11. The Report described this as an unsubstantiated complaint alleging a supervisor subjected Grievant to harassment on the basis of his sex. The incident giving rise to this grievance was a supervisor's caution to Grievant that he should be mindful of his work priorities and deadlines when he submits leave requests. Grievant admitted during the grievance process that he did not believe that he was being harassed because of his gender. Management found the grievance was not warranted. Agency's denial of his request for an administrative hearing was upheld by EDR.
3. A second grievance dated 11/17/10 concerned the planned measurements of Grievant's performance for the current performance cycle as per the EWP issued him on 11/15/10. Agency concluded the work activities assigned Grievant were reasonable for the position he held. Agency held the criteria for performance evaluations were developed based on legitimate business needs and were consistent with measures for others in the same work unit who have similar duties. Agency head denied Grievant's request for administrative hearing. Per the Report, EDR is currently reviewing Grievant's appeal of agency head's decision that the grievance of 11/17/10 does not qualify for hearing.
4. The Report's *Findings/Conclusions* indicated that Grievant engaged in protected activities (i.e., prior grievance activity), and he suffered a materially adverse action (i.e., formal discipline that included appended suspension). There are no facts, however, that demonstrate a link between the adverse action and the protected activity, beyond the fact that [Grievant] engaged in protected activities before the incident giving rise to the retaliation allegation.

The Hearing Officer received into evidence the above "Virginia Department of Social Services Human Resources Division ASSESSMENT REPORT, however, he is not bound by the findings in that report. Independently of the findings in the Report, the Hearing Officer determines, based upon review of all the evidence admitted at hearing, as follows:

³¹ A. Tab 2.

³² A. Tab 7, VDSS Human Resources Division "Assessment Report" (Report Date 2/14/11).

1. Participating in the grievance process is a protected activity.³³ Grievant engaged in a protected activity in that he has two prior grievances.
2. Grievant suffered a materially adverse action in that he has received the present Group II Written Notice with 10 day suspension.
3. Insufficient evidence was admitted sufficient to establish a nexus or causal link exists between the adverse action and the protected activity.

For the reasons above stated and in consideration of matters discussed and found within this Decision, **retaliation is not found.**

Mitigating and aggravating circumstances:

The *Rules for Conducting Grievance Hearings, Department of Employment Dispute Resolution, Effective date: August 30, 2004, Section VI, B, 1*, provides:

1. Mitigating and Aggravating Circumstances: The *Standards of Conduct* allow 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 interest 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. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for the mitigation.

A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances and may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.

There is no evidence that Grievant has any active Written Notices. The evidence does indicate that Grievant had a number of prior counseling memorandums and verbal discussions including, but not limited to, the following, and Agency gave consideration to these:

- 10/09/07 Counseling Memorandum - Customer Complaint-failure to properly apply and interpret policy with regard to court order
- 03/07/08 Memorandum - Improper application of policy
- 05/16/08 Counseling Memorandum - Improper case application...
- 04/15/09 Counseling Memorandum - Incorrect interpretation of policy ...
- 10/14/09 Corrective Counseling Memorandum - Customer service/failure to follow policy/procedure
- 06/08/10 Counseling Memorandum - Failure to follow supervisor instructions
- 10/28/10 Corrective Counseling Memorandum - Misapplication of policy/interpretation³⁴

Agency gave consideration to Grievant's *EMPLOYEE WORK PROFILE WORK DESCRIPTION/PERFORMANCE PLAN ("EWP")*, effective date October 25, 2009 which indicated that that Grievant continues to display the desire to be an effective case manager. This *EWP* also

³³ § 2.2-3004(A)(v)(vi) Code of Virginia, 1950, as amended.

³⁴ A. Tab 2, pg. 49 & 50; Tab 8.

noted concerns with regard to Grievant's case management skills and noted three written counseling memorandum (dated October 14, 2009, December 15, 2009, and June 8, 2010) outlining Agency concerns regarding failure to apply policy and procedures, proper case documentation, and continued misapplication of division policy. Additionally the *EWP* noted that management had consulted verbally with Grievant on five other dates (November 19, 2009, December 1, 2009, December 21, 2009, January 4, 2010, and September 29, 2010). These verbal discussions addressed issues concerning follow-through, application of closure procedure, and case documentation. Management expressed concern that three of these cases bordered on unauthorized practice of law.³⁵

Mitigating circumstances and aggravating circumstances were taken into consideration by Agency. In this cause Agency imposed a Group II Written Notice and a 10 day suspension. *Standards of Conduct, Attachment A*, provides that normal disciplinary action for a first offense of a Group II includes a Group II Written Notice and the agency has the option of suspending the employee without pay for up to ten workdays.

The Hearing Officer **does not** find that the agency's discipline exceeds the limits of reasonableness.

CONCLUSION

For the reasons stated herein, the Agency has proven, by a preponderance of the evidence, that:

- Grievant engaged in the behavior described in the Written Notice.
- The behavior constituted misconduct.
- The Agency's discipline was consistent with law and policy.
- No mitigating circumstances are found justifying a reduction or removal of the disciplinary action.
- Retaliation is not found. **and**
- The disciplinary action of issuing Grievant a Group II Written Notice with 10 day suspension was warranted and appropriate under the circumstances.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice with 10 day suspension is hereby **UPHELD**.

³⁵ A. Tab 10, pg. 180,181.

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

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 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 of the 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, Main Street Centre, 600 East Main Street, 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. The agency shall request and receive prior approval of the Director before filing a notice of appeal. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

Lorin A. Costanzo, Hearing Officer

Copies: Grievant
Agency
EDR