

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 12/15/16; Decision Issued: 02/01/17; Agency: DVS; AHO: Lorin A. Costanzo, Esq.; Case No. 10909; Outcome: No Relief – Agency Upheld; **Judicial Review: Appealed to Pulaski County Circuit Court (02/16/17); Outcome pending.**

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

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10909

Hearing Date: December 15, 2016

Decision Issued: February 1, 2017

PROCEDURAL HISTORY

Grievant was issued a Group I Written Notice (offense date: 6/29/16) on August 3, 2016 which set forth Written Notice Offense Codes:

11 - Unsatisfactory Performance,

13 - Failure to follow instructions and/or policy, and

99 - Other, identified in Section IV, as:

1. Failure to perform assigned duties and responsibilities with the highest degree of public trust.
2. Failure to demonstrate respect towards agency customers.
3. Failure to resolve work related issues and disputes in a professional manner and through established business process.¹

On August 21, 2016 Grievant grieved issuance of the Group I Written Notice and matters proceeded through the Resolution Steps. When matters were not resolved to Grievant's satisfaction, on 10/17/16 she requested a grievance hearing and the grievance was qualified for hearing.² Undersigned was appointed as Hearing Officer effective November 22, 2016.

A grievance Hearing was held on December 15, 2016. At hearing, the parties agreed to written closing statements being submitted by January 12, 2017 and both parties filed written closings statement.

APPEARANCES and EXHIBITS

A. The following appeared at hearing:

Agency's attorney

¹ A. Tab 1.

² G. Tab 2

Agency Party Representative (who also was a witness)
Grievant's Advocate at Hearing
Grievant (who also was a witness)
Witnesses

- B. Exhibits were admitted *en masse*, by agreement of the parties, and consists of:
1. One binder of Grievant's exhibits (Grievant listed 25 documents placed under 8 tabs (Hearing Officer marked the tabs as A through H)
 2. One binder of Agency's exhibits (tabbed 1 through 25).
 3. Two additional exhibits admitted at hearing by agreement.

ISSUES

Whether the issuance of a Group I Written Notice was warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.³

The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.⁴

FINDINGS OF FACT

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

01. Grievant is employed by Agency at Facility and has been employed by Agency since January of 2011. She was initially employed as a "Burial Operations Manager". However, due to restructuring in February of 2016, her Work Title was changed to "Office Administrations Supervisor".⁵

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

⁴ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

⁵ G. Additional Exhibit.

02. Facility is a cemetery operated by Agency providing services to qualified state veterans and their families.⁶

03. Qualified veterans are entitled to receive military honors at their cemetery service at Facility. Members of a local area VFW Post and a local area American Legion Post often join to provide a honor detail to provide military honors to deceased veterans. Additionally, the National Guard can provide a honor detail to perform military honors for a deceased Veteran at Facility.⁷

04. The deceased was a decorated veteran who was a member of both a local area VFW Post and the Local area American Legion Post. He was a member of the local area VFW/American Legion honors detail and, as such, had participated a number of time on details providing military honors to deceased veterans.⁸

05. Veteran had purchased a plot at cemetery operated by Agency. At the request of Veteran's next of kin ("NOK"), who indicated she wanted military honors, Funeral Home initially scheduled military honors at his June 29, 2016 graveside service.⁹

06. NOK initially indicated she wanted VFW/American Legion involved with honors but later she indicated she desired the National Guard to perform the honors.¹⁰

07. On June 29, 2016 a graveside service was held for Veteran at Facility. As a part of the services, military honors were to be rendered the deceased Veteran. Both a National Guard and a VFW/American Legion honors detail appeared at the Facility to provide military funeral honors for the deceased Veteran. Additionally, two chaplains/ministers appeared for the service. Grievant informed members of the VFW/American Legion honors team that they were not to participate in military honors.¹¹

08. Matters related to Veteran's June 29, 2016 internment were addressed in a Group I Written Notice issued to Grievant on July 29, 2016. However, this Written Notice was retracted by Agency on August 1, 2016 as a result of due process concerns.¹²

09. On August 3, 2016, Agency issued Grievant a Group I Written Notice addressing matters related to Veteran's June 29, 2016 service and military honors.¹³

⁶ A. Tab 6.

⁷ Testimony.

⁸ Testimony.

⁹ Testimony.

¹⁰ Testimony.

¹¹ G. Tab F, testimony.

¹² G. Tab H.

¹³ G. Tab B.

10. On June 26, 2016 Funeral Home indicated the National Guard and the local VFW/American Legion honors detail were being scheduled to provide military honors at Veteran's June 29, 2016 service.

11. On or about June 28, 2016 Grievant called Veteran's next of kin (NOK). In that conversation she addressed matters with her concerning military honors and the VFW/American Legion honors detail participation in the military honors which had previously been scheduled by the Funeral Home.¹⁴

12. After having received the call from Grievant, NOK called Grievant asking if the National Guard could do the full honors and provide a Chaplain. Grievant told NOK she would do what she could and involved herself with scheduling military honors and who would be participating in those military honors.¹⁵

13. Grievant does not have any active Written Notices. On September 1, 2015 Grievant was given an "Employee Written Counseling/Communications" addressing the cemetery policy regarding military funeral honors and reiterating the necessity of following directions to complete assigned cemetery tasks.¹⁶

CONCLUSIONS

Grievant's Group I Written Notice was issued for matters related to her actions occurring before and during the 6/29/16 Veteran's cemetery service. Additionally, the Written Notice addressed the impact of her actions.

Grievant contends she did not violate policies or procedures and she did not disobey or violate verbal instructions or directions provided to her. She contends she did exactly what the next of kin (NOK) requested concerning honors. Grievant also raises that she was not provided any level of due process and Agency's disciplinary action violated policy and procedure.

Policy 1.60¹⁷

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:

¹⁴ Testimony and A. Tab 13.

¹⁵ Testimony.

¹⁶ A. Tab 23.

¹⁷ A. Tab 3.

"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."

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

DHRM Policy 1.60 - *Standards of Conduct* organizes offenses into three groups according to the severity of the behavior. Group I Offenses are the least severe and include acts of minor misconduct that require formal disciplinary action. Group I Offenses generally includes offenses that have a relatively minor impact on agency business operations but still require management intervention.

Attachment A to Policy 1.60 lists *Unsatisfactory work performance* as an example of a Group I Offense and lists *Failure to follow supervisor's instructions or comply with written policy* as an example of a Group II Offense.

Under Written Notice Offense Code 99 ("Other") the Written Notice raised failure to perform assigned duties and responsibilities with the highest degree of public trust, failure to demonstrate respect towards agency customers, and failure to resolve work related issues and disputes in a professional manner and through established business process.¹⁸ These matters are not specifically listed in the *Standards of Conduct* as examples of Group I Offenses. However, the *Standards of Conduct* provides that the examples of offenses set forth therein are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. It further provides any offense not specifically enumerated in the *Standards of Conduct* that, in the judgment of the agency head or his/her designee, undermines the effectiveness of agency's activities may be considered unacceptable and treated in a manner consistent with the provisions the *Standards of Conduct*.¹⁹

Cemetery:

Agency provides services to qualified Virginia Veterans, including the operation of a number of cemeteries within the Commonwealth. Agency has promulgated *Cemetery*

¹⁸ A. Tab 1.

¹⁹ A. Tab 3.

Operations Policy and Procedures which sets forth procedures and requirements for cemetery operations of Agency, including Facility at which Grievant works.

Section 15.22 of *Cemetery Operations Policy and Procedures* provides cemetery employees will conduct themselves in a manner that will reflect credit on themselves and the Commonwealth of Virginia, and will promote and maintain good relationships with veterans and their families, veteran's organizations and the general public.

Section 15.25 of the *Cemetery Operations Policy and Procedure* provides, among other matters, that it is the responsibility of the funeral home to schedule military honors and procure the casket flag.²⁰ The *National Cemetery Administration: Scheduling Office Update* also provides that military honors is the responsibility of the funeral home or family member requesting interment.²¹

The evidence indicates Agency would only take on the responsibility to schedule military honors in instances where a funeral home declines or is unable to do so for a veteran, this may occur on account of a veteran being indigent. In these instances, Agency would step in and take on the responsibility to schedule military honors in order to insure every veteran receives the military hours he or she was entitled to.

There is no evidence that Veteran was indigent. The evidence indicates Funeral Home had scheduled military honors for Veteran's 6/29/16 cemetery service.

Veteran and Military Honors:

Veteran was a decorated Virginia veteran who had been a member of both the local area VFW Post and the local area American Legion Post. He had participated as a member of their military honors detail which provided military honors to other veterans at their cemetery services.

Upon Veteran's passing, arrangements were made by Funeral Home for military honors to be rendered at Agency operated cemetery. On 6/29/16 he was buried at the cemetery with military honors.

Military honors may be provided at Agency cemeteries for qualified veterans. Military honors may include the presence of a uniformed honors detail, the presentation of the U.S. flag, playing of taps, and a rifle volley. The detail providing honors to a deceased veteran may be provided by active duty, National Guard, VFW, American Legion, or by a combination of these entities.

²⁰ A. Tab 6.

²¹ A. Tab 8.

A local VFW Post and a local American Legion Post often join together to provide a military honors detail. Often a National Guard detail and a local VFW/American Legion detail will together provide military honors.

Sgt. was a member of the National Guard honors detail present at the service on 6/19/16. Sgt. confirmed the National Guard and the VFW/American Legion frequently engage with honors and join. Sgt. had only worked once with the local VFW/American Legion detail and never had any issues.

Sgt. testified the VFW/American Legion detail appearing on 6/29/16 thought they were going to be doing honors. Sgt. didn't observe their interaction with Grievant and but observed the VFW/American Legion detail saluting the hearse.

6/29/16:

NOK initially had indicated to the Funeral Home she wanted the VFW/American Legion detail involved in honors. At a later date she stated to Grievant she wanted the National Guard doing the full honors without the VFW/American Legion detail participating.

Grievant also testified she discussed with Commander that he was more that welcome to be present and she may have said something to Commander to the effect that she wanted the VFW/American Legion to do honors. Additionally, NOK testified when she was told about paying honor at the service that she did not know this meant military honors.

NOK was present at the Veteran's service but did not observe Grievant's interactions with the VFW/American Legion detail on 6/29/16. She was aware, at one point, of them being loud. There was no evidence she talked with the VFW/American Legion honors detail that appeared for the service.

On 6/29/16 the VFW/American Legion detail arrived at the cemetery early and initially made contact with another Agency employee who was described as being very polite and helpful. This employee asked the Commander to back his automobile two car lengths, which was done. After doing this, Commander introduced himself to Grievant indicating the honors detail was there to do the military rights for Veteran. Issues developed when Grievant told Commander they were not going to do the military honors at this funeral. Commander was concerned not only with being told this but with how the situation was handled by Grievant.

Commander had been contacted by the NOK for their Chaplain to perform the ceremony, their Chaplain agreed and appeared at the cemetery. However, there was another minister present who indicated he had been contacted to do the service. Commander was concerned with Grievant saying, "in a forcible manner and with a raised voice" that they were not going to do the service.

Commander also indicated after the hearse arrived they were following it to the pavilion and, as he slowed to get a word with Grievant, “she boisterous told me to follow the hearse and she would talk to me after the funeral”. Commander indicated further, “We saluted the casket and, because we were so upset, we left and went directly to [elected official’s] office to report the incident.”²²

Grievant indicated the VFW/American Legion detail were slamming doors to their car when leaving and disruptive to the service. Members of the VFW/American Legion detail believed Grievant was rude.

Scheduling Honors:

The evidence indicates Funeral Home contacted Agency staff on 6/26/16 via telephone indicating they would be getting the National Guard and the VFW Post/American Legion Post Rifle team. They related they initially had trouble getting in touch with the VFW Post/American Legion Post Rifle Team and set up for the National Guard to do full honors but then the Rifle Team got in touch with the Funeral Home. The Funeral Home then changed matters and scheduled the National Guard to do the folding of flag and the VFW Post/American Legion Post Rifle team to do the Rifle volley.²³

Administrative Coordinator testified when Grievant learned of the involvement of the VFW/American Legion detail, Grievant stated she didn’t think the VFW Post/American Legion detail needed to be there, she didn’t want them to be there, and she wanted to know why they were called. Grievant was also heard saying the VFW/American Legion detail was unprofessional.

Administrative Coordinator testified to hearing Grievant say she would call the NOK and she will fix this so that just the National Guard comes and not the VFW/American Legion. Administrative Coordinator suggested to Grievant that she not call the deceased Veteran’s NOK expressing her concern that this would start World War III. However, Grievant called the NOK.

Administrative Coordinator was present and heard Grievant’s end of her telephone conversation with NOK. She testified hearing Grievant talking to NOK and stating, as to the VFW/American Legion detail, that the funeral home was having trouble with that group, they are unprofessional, and she really didn’t think the NOK should have them there. She heard Grievant saying the National Guard does a great job, they are young, and perform so much better. She also heard Grievant saying the VFW/American Legion detail are not going to do a good job and you don’t want them there to ruin the funeral.²⁴

²² A. Tab 20.

²³ A. Tab 13 and testimony.

²⁴ Testimony.

After Grievant's call to NOK, the NOK called Grievant back to say she did not want to use the VFW/American Legion detail at the service.

The evidence indicates Grievant was aware Funeral Home had scheduled military honors. She was also aware policy provided that the Funeral Home was responsible for scheduling military honors. She stated, in her response to her "Employee Written Counseling/Communication" of September 1, 2015, "We were told that it was not our responsibility to schedule honors. Actually we were instructed not to schedule honors so that if there was an issue it did not come back on us."²⁵

Grievant had worked at Agency's cemetery for a number of years. She was aware or should have been aware of the stress and emotion many next of kin are subject to when a loved one passes. She was aware or should have been aware how many veterans feel, when a fellow veteran passes and the importance placed on providing military honors and respect to their fellow veteran. She was aware, or should have been aware, of the impact matters related to funeral/internment services could have on family members, veterans, the cemetery, and the community.

Section 15.22 of Agency's *Cemetery Operations Policy and Procedures* charges Agency employees with acting in a manner to promote and maintain good relationships with veterans and their families, veteran's organizations and the general public while transacting cemetery business.²⁶

Actions:

Grievant failed to follow policy when she involved herself with scheduling military honors. Additionally, Grievant presented her personal opinions to NOK concerning an honors detail. However, she had not made management aware of any of her concerns, even though her concerns addressed matters she perceived to have been going on for some time.

Grievant's e-mail of 6/29/16, sent after the service was held, confirmed that she contacted NOK the day before the service. They discussed honors and later that day NOK called Grievant back asked her if she could get the National Guard to do full honors and a chaplain. Grievant told her she would do what she could. Grievant also noted she had jumped through hoops and made it happen.²⁷

Grievant had knowledge of changes being desired and/or made as to who would be scheduled to perform military honors. She interjected herself into the change/rescheduling. She had opportunity to, but did not, make management aware in advance of potential problems with the honor detail and/or the scheduling an honor detail. Management expressed concern that, in not being made aware of matters until after the incident occurred, they were denied have opportunity to address matters or provide guidance to Grievant. Testimony indicated the

²⁵ A. Tab 23.

²⁶ A. Tab 6.

²⁷ A. Tab 13.

proper procedures when a disruption occurs during a funeral service work up would be to contact a supervisor or the Cemeteries Director.

Concern was expressed by the Agency that Agency files show several notes written by Grievant indicating she discouraged the NOK of using the VFW/American legion honors detail.²⁸ Deputy Commissioner expressed concern with a breakdown of both procedures and customer services that occurred on in this matter.²⁹ Agency was concerned Grievant did not act in a professional manner and did not follow policy. The funeral home had responsibility for scheduling military honors but she chose to involve herself, as an employee of Agency, with scheduling military honors.

Members of the VFW/American Legion detail complained Grievant did not show respect towards them. Testimony was received of more than one veteran of Grievant being rude and disrespectful to members of the VFW/American Legion detail. A number of veterans expressed concerns about feeling angry at the cemetery and feeling hurt at how they were treated.

Vice Commander testified to concerns of having had a prior interaction that he felt was very strained and having the impression he was not wanted. However, he appeared at the service as the deceased Veteran and he had worked on honor details, were close, and he felt he owed Veteran a duty to do the honors. Vice Commander noted a good relation with the National Guard and felt there was no problem with them doing honors jointly.

The evidence indicates Grievant telephoned NOK and discussed military honors at Veteran's services. In the conversation she expressed her opinions concerning the VFW/American Legion honors detail. This conversation occurred before NOK asked for the National Guard to do the full honors. Grievant's notes reflected she had telephone conversations with the NOK discussing military honors and a conversation with the Funeral Home.³⁰

Grievant states she was only doing as the next of kin desired. However, involving herself, as an Agency employee, in changing previously scheduled military honors is an issue. Additionally, the timing of her actions is of concern, as this was done on or about the day before the Veteran's cemetery service. Any need for scheduling or changes to scheduled military honors should have been and could have been referred back to the Funeral Home who has the responsibility to schedule military honors and who did the initial scheduling. The Funeral Home could have addressed scheduling military honors as NOK desired. If Grievant felt there were problems with the Funeral Home being able to do as the NOK desired, Grievant could have addressed this to her supervisor or up her chain of command/chain of supervision.

²⁸ A. Tab 15.

²⁹ A. Tab 15.

³⁰ A. Tab 12 and Tab 13.

When she chose to take on re-scheduling honors she assumed responsibility. Her and actions could, and in this case did, have an impact on Agency. Grievant's actions and decisions were made as an employee of Agency. She should have advised her supervisor when she became aware of the problems, not after matters arise at a cemetery service.

Grievant was aware, or should have been aware, of potential emotional issues that can be present with family of a deceased veteran when addressing funeral and internment services for a loved one. Grievant was aware, or should have been aware, of the potential emotional issues that may arise with veterans when a fellow veteran passes, including their desire and/or need to provide honors and respect to their fellow veteran.

There is no issue with the NOK making determinations as to honors. Agency was concerned Grievant should not have been involved with scheduling honors but referred the matter to the Funeral Home. Agency was concerned with her not notifying supervisor of matters before the service and Agency was concerned with her manner of handling matters, not addressing matters more delicately, and not seeking a more amenable solution.³¹

Impact:

Grievant's handling of matters concerning Veteran's 6/29/16 service and military honors were the subject of numerous concern of veterans, were addressed to elected representatives, and addressed in a local newspaper.

Agency has had to expend time and resources in addressing matters that arose as a result of Grievant's actions. Agency has had to address matters on a number of occasions with individuals, has had to conduct an investigation into matters, and has had to attend meetings with veterans and other individuals concerning these matters.

Director has expressed concern with veterans being upset and aggravated that the VFW/American Legion detail was not allowed to participate. He heard concerns as to how Grievant treated Commander and how the detail had arrived anticipating to be doing honors.

Director noted that all veterans are customers of Agency and all are due respect. He further expressed concerned the Public's trust in Agency may be affected because of Grievant's actions.

Elected Representative expressed his concern in writing to Secretary of Veterans Affairs as to the events occurring on 6/29/19. He indicated he was approached by a group of individuals who reported a female staff member was rude and refused to allow the VFW/American Legion to perform the ceremony. Representative noted that this was not the first time he had heard complaints about this staff member. Representative subsequently

³¹ Testimony and A. Tab 15.

identified Grievant to Commissioner as the person constituents identified as being rude and refusing to allow the VFW/American Legion to perform the ceremony at the cemetery.³²

The evidence indicates that Grievant's actions not only impacted individual members of the VFW/American Legion detail present at the Facility that day but had a less than favorable impact on a number of veterans and their perception of Agency.

The evidence indicates that veterans went so far as to address their concerns over matters occurring 6/29/16 to elected officials. The 6/29/16 incident was a topic of discussion at the state VFW meeting where concerns were raised as to disrespect having been shown to the VFW members in this incident. Also, matters were addressed in a local newspaper.

The evidence in this cause indicates that Agency suffered a negative impact to its reputation as a result of Grievant's actions.

Grievant contends:

Grievant raised issue with Agency's investigation of matters. However, no evidence was presented that there were policy requirements violated in conducting the investigation. The evidence indicates, while Director didn't personally conduct all aspects of the investigation, Director did delegate and assign investigation matters to staff and oversaw the investigation.

Grievant contends that she was just doing as instructed by the deceased Veteran's NOK. However, the Hearing Officer is not persuaded by this argument. The evidence indicates that she took on a more active role concerning NOK than policy provided for. Grievant was aware policy making Funeral Homes responsible for making arrangements concerning military honors, but she chose to involve herself with arrangements for military honors. Grievant also made strong statements of her opinion of the honor detail and made statements of her desire concerning their participation.

There is no evidence indicating Grievant raised any concerns with management as to the VFW/American Legion Honor detail or informed management of any potential matters arising with changes to honor details. She had opportunity to discuss matters with management and afford management opportunity to address potential problems before they arose. The evidence indicates that Grievant did not avail herself of such opportunity.

Section 15.22 of *Cemetery Operations Policy and Procedures* charges Grievant with conducting herself in a manner that will reflect credit on herself and the Commonwealth, and in a manner that will promote and maintain good relationships with veterans and their families, veteran's organizations, and the general public.

While Grievant contends she was only doing as instructed by NOK, concern is expressed as to how she conducted herself in matters before and during the 6/29/16 cemetery

³² A. Tab 15.

service. Grievant's actions and involvement contributed to the events unfolding as they did on 6/29/16. Grievant was aware of Agency policy in dealing with its customers and Agency concerns for matters to be smooth running. Her previous actions contributed to the problems arising at the cemetery. Her words and actions at the cemetery on 6/29/16 were not amicable and were perceived as being rude. Concern is expressed Grievant did not attempt to address matters amicably, did not exploring if it would be possible to joining the chaplains/ministers and/or details to all participate in the service, and did not actively pursue a more amicable resolution.

Due Process:

Grievant contends she was denied due process and raised a number of due process deficiencies contending she was not provided even the minimal level of due process. She contends issuance to her of the Written Notice violated policy and procedure.

Grievant raised concern her supervisor came to facility and worked alongside her and other staff for three days without discussing any pending disciplinary action with her. On 7/29/16 Supervisor issued Grievant a Written Notice. Grievant indicated she was not asked any questions about the subject or substance of the disciplinary and was not given an opportunity to make a statement or offer any evidence. She contents she should have been notified that allegations were being considered for disciplinary action.³³ She further raised she was notified via-email she had 24 hours from when issued the Group I to respond should she wish to appeal.

Allegations pertaining to the Group I Written Notice issued on 7/29/16 are not found to be persuasive. The evidence indicates on 8/1/16 Agency retracted the Group I Written Notice issued Grievant on 7/29/16 due to due process concerns.³⁴ There is no evidence that this Written Notice is active or had been treated by Agency as being active. Furthermore, the 7/29/16 Group I Written Notice was not qualified for hearing in this cause.

The Group I Written Notice issued 8/3/16 was qualified for hearing and is the subject of this proceeding. Grievant raised that the offense date was erroneously listed as "July 29, 2016", however, this Offense Date was marked through and amended by pen to indicate an offense date of "June 29, 2016". The June 29, 2016 date for matters was also addressed within Section II of the *Written Notice*.

Section E of Policy 1.60 - *Standards of Conduct* provides that prior to issuance of Written Notices 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. It also provides that 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

³³ G. Additional Exhibit.

³⁴ G. Tab H.

provided but also based on the nature of the offense, which may or may not require more or less time to refute or mitigate the charge.³⁵

The evidence indicates, Grievant received a written memorandum dated August 1, 2016 in which provided a written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.³⁶ Furthermore, while the 7/29/16 Written Notice was retracted by Agency, it did provide Grievant certain information concerning matters.

Post-disciplinary due process requires employees be provided a hearing before an impartial decision-maker, an opportunity to confront and to cross-examine the accuser in the presence the decision-maker, an opportunity to present evidence, and opportunity for the presence of counsel.³⁷ The grievance statutes provide these basic post-disciplinary procedural safeguards through the establishment of an administrative hearing process.

Office of Employment Dispute Resolution ("EDR") has addressed pre-disciplinary due process deficiencies. In EDR Ruling #2011-2877 (April 29, 2011), EDR has held that, based upon a full post-disciplinary due process, the lack of pre-disciplinary due process can be cured by the extensive post-disciplinary due process.

EDR Ruling #2011-2877 addresses, among other matters, *Cleveland Board of Education v. Loudermill*, 470 U.S. 545-456 (1985) which indicates prior to certain disciplinary actions, the federal Constitution generally entitles those with a property interest in continued employment absent cause, the right to 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.

Loudermill also indicates the pre-disciplinary notice and opportunity to be heard need not be elaborate, need not resolve the merits of the discipline, and need not provide the employee with an opportunity to correct his/her behavior. It needs only to serve as an "initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action."³⁸

The grievance statutes in Virginia provide basic post-disciplinary procedural safeguards through the establishment of an administrative hearing process. This process provides the employee and the agency may be represented by counsel of their choice or by a lay advocate at hearing, may call witnesses to present testimony, and the witnesses may be cross-examined. Additionally, in Virginia, an independent Hearing Officer presides over the hearing and renders an appealable decision after having heard the evidence.

³⁵ A. Tab 3.

³⁶ A. Tab 3, G Tab H..

³⁷ *Reeves v. Thigpen*, 879 F. Supp. 1153, 1174 (Mid. Dist. Ala. 1995).

³⁸ *Cleveland Board of Education v. Loudermill*, 470 U.S. at 545-546 (1985).

Section VI (B) of the *Rules for Conducting Grievance Hearings* provides an employee is to receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge. EDR has consistently ruled that only the charges set out in the Written Notice may be considered by the Hearing Officer. Under the grievance procedure, charges not set forth in the Written Notice (including attachments) cannot be deemed to have been qualified, and thus would not come before a hearing officer.

The evidence indicates Grievant received full post-disciplinary due process. Grievant had received notice of the charges against her which were set forth in the Written Notice. Grievant had a full hearing before an impartial decision-maker, an opportunity to present evidence, an opportunity to confront and cross-examine the agency witnesses in the presence of the decision maker, and had opportunity to have counsel or a lay advocate.

For the reasons stated above, based upon the evidence admitted in this cause, the Hearing Officer finds that Grievant's due process rights were not violated and Agency's disciplinary action in issuing the Group I Written Notice (issued date: 8/3/16) was consistent with policy and procedure.

Mitigation:

DHRM *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." By law, the hearing officer must "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency."³⁹

A hearing officer is charged with determining whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.⁴⁰ To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determination 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; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

If Agency does not prevail as to any of the elements (i) through (iii) above, the disciplinary action should not be upheld. If the agency prevails on all three elements, the hearing officer must then consider whether Grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances.

³⁹ Va Code § 2.2-3005(C)(6).

⁴⁰ Grievance Procedure Manual, § 5.8.

Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.

§ 5.9 of the *Grievance Procedure Manual* provides in hearings contesting formal discipline, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the agency's discipline exceeds the limits of reasonableness.

Agency has taken into consideration mitigation factors in this cause. Agency issued one Group I Written Notice for all violations raised therein. *Unsatisfactory work performance* is listed in Attachment A to Policy 1.60 as an example of a Group I Offense and *Failure to follow instructions and/or policy* is listed therein as an example of a Group II Offense.

CONCLUSION

Upon review of all the evidence in this cause and for the reason stated above, Hearing Officer finds Agency has met its burden of proof (by a preponderance) that Grievant's performance was unsatisfactory, she failed to follow instruction and/or policy, failed to perform her assigned duties and responsibilities with the highest degree of public trust, failed to demonstrate respect towards agency customers, and failed to resolve work related issues and disputes in a professional manner and through established business process.

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

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The Agency's discipline was consistent with law and policy.
4. There are not mitigating circumstances justifying a reduction or removal of the disciplinary action.
5. The disciplinary action of issuing the Group I Written Notice was warranted and appropriate under the circumstances. Furthermore, Agency's discipline does not exceed the limits of reasonableness.

DECISION

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

APPEAL RIGHTS

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

A. Administrative Review:

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

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

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

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

B. Final Hearing Decisions:

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

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

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

C. Judicial Review of Final Hearing Decision:

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

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

Copy transmitted via e-mail to:
Grievant's Advocate at Hearing
Agency Attorney
EDR



