

Issues: Group III Written Notice with Suspension (unsatisfactory performance, failure to follow instructions/policy, customer neglect, negligence), Discrimination (disability), and Retaliation (complying with any law); Hearing Date: 01/31/19; Decision Issued: 02/25/19; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11301; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EQUAL EMPLOYMENT DISPUTE RESOLUTION**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 11301

Hearing Dates: January 29 & 31, 2019

Decision Issued: February 25, 2019

PROCEDURAL HISTORY

On September 12, 2019 Grievant was issued a Group III Written Notice with a three workday suspension citing Written Notice Offense Codes 11,13, 81, and 99 (“Unsatisfactory Performance”, “Failure to follow instructions and/or policy”, “Patient/inmate/client abuse”, and “Other ”).

The Written Notice had attached a letter and a Claims Errors Reference Sheet setting out matters concerning the Nature of Offense and Evidence. The letter addressed a dropped claim which came to Agency attention on 8/5/18 when a Veteran came in requesting the status on a claim filed with Grievant on June 27, 2017. Upon investigation, it was determined, even though Grievant’s BeneVets notes stated the claim was filed, Grievant never submitted the claim, never tracked the claim, and never caught the error during end of month tracking. The attached letter expressed Agency’s belief Grievant’s conduct was part of a continued pattern of substandard work performance and indicated:

... I am giving you a Group III Written Notice and suspension without pay for a period of 3 days for unsatisfactory performance, failure to follow instructions or policy, customer neglect, and negligence of duty resulting in the exposure of the State to potential liability claims.¹

Grievant grieved issuance of the Group III Written Notice with three day suspension and matters proceeded through the resolution steps. When matters were not resolved to Grievant’s satisfaction Grievant requested a hearing.² The grievance was qualified in full for a hearing, and undersigned was appointed hearing officer effective December 26, 2018.

At a pre-hearing telephone conference was held January 2, 2019, the time, date, and location of the grievance hearing was agreed to by the parties. The hearing was set by agreement for January 29, 2019. On January 22, 2019 Grievant requested Hearing Officer order the appearance of an individual as a witness at the 1/29/19 hearing. Grievant’s request was addressed at a conference

¹A. Tab 10.

²G. Ex. 11.

call held on 1/23/19, with both parties present, and Agency presented issues as to the witness being able to appear in person on 1/29/19. After discussion, the parties agreed to a waiver of the 35 day period and agreed that the witness could testified via conference call on January 31, 2019.

The grievance hearing was convened on January 29, 2019 and the testimony of Grievant's witness was presented, via conference call, on January 31, 2019.

On January 29, 2019, at hearing, the parties agreed written closing statements/arguments would be submitted by February 7, 2019. As Grievant had expressed concern as to e-mail, it was further agreed written closing statements/arguments would be either received by February 7, 2019 or be postmarked/have proof of being placed with a delivery service by February 7, 2019. Both parties timely submitted written closings statements/arguments.

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. 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)?
4. Whether there were mitigating circumstances justifying reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

As this is a disciplinary matter, the burden of proof is on the Agency to show by a preponderance of the evidence that its 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 more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.³

HEARING and EXHIBITS

The following appeared at the grievance hearing commenced:

Grievant.

Agency attorney.

Agency Party Representative at Hearing (who was a witness).

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

Witnesses.

Agency exhibits are tabbed numbered 1 through 38 and Grievant exhibits tabbed numbered 1 through 16. These exhibits were timely exchanged and were admitted into evidence *en masse* by agreement of the parties. Additionally, at hearing Agency offered for admission one document which was not timely exchanged. Grievant objected to its admission into evidence. Upon consideration, the offered document was not admitted into evidence. A copy of the document offered by Agency but denied admission is to be included in the record.

Grievant's exhibits are referenced herein as "G. Tab ___" with the tab number inserted in the "___" and Agency's exhibits are referenced herein as "A. Tab ___" with the tab number inserted in the "___".

FINDINGS OF FACT

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

01. Grievant has been employed by Agency since late of 2015 as a Veterans Service Representative ("VSR") and Grievant stated in his opening statement that he has been employed with the Commonwealth approximately 23 years. As a VSR, his duties involve providing assistance to Veterans and their families who come to Agency seeking to file claims with the US Department of Veterans Affairs ("VA"). In his capacity as a VSR, he is accredited by Agency and the VA to analyze veterans' personal, financial, and medical records in the context of benefits legally available to the veteran.⁴

02. Grievant's duties as a VSR include conducting interviews and meetings with Veteran and their family, determining what is in the best interest of the Veteran/family member to do if the he/she wants to file a claim, analyzing the Veteran's records in the context of benefits legally available to the Veteran, and securing an Advocacy Agreement ("AA"), securing a Power of Attorney ("POA"), securing any other necessary forms, and filing claims.⁵

03. Agency has established protocols and procedures which require certain actions when contacting or providing services to a Veteran or family member. These actions include documenting/noting all contacts, establishing a BeneVets profile, establishing notes are kept current, detailed, and accurate, ensuring Agency has an updated POA and Advocacy Agreement in BeneVets, e-filing documents within 24 hours of the encounter, and requiring an ITF ("Intent to File") be e-filed if a claim is pending. Grievant is required to insure communications and contacts with the Veteran and/or their family are entered in an Agency approved program and to electronically file necessary documents and claims for

⁴ G. Tab 12 and Testimony.

⁵ G. Tab 12 and Testimony.

benefits with the VA through the Agency's approved program. He is required insure a confirmation of receipt is received from the VA and to track matters associated with any claim.⁶

04. At time relevant to this proceeding, Agency utilized "BeneVets" as its approved software program for matters, including the submission, processing, and tracking of claims filed with the VA. BeneVets was required by Agency to be used to document contacts and actions by Grievant. The BeneVets program was replaced by Agency on or about September 1, 2018. While some documents were not migrated to the replacement program they remain in BeneVets.⁷

05. On May 24, 2018, Grievant saw a Veteran requesting to file a claim with the VA for pension benefits. Grievant had the Veteran fill out and sign an Advocacy Agreement and advised the Veteran additional records were required to file the claim and that the Veteran should the records back once he obtained them. Veteran returned to Grievant's office on June 7, 2018.

Grievant did not upload the Advocacy Agreement the Veteran filled out, did not file an "Intent to File", made no BeneVets notes or entries documenting the visit, did not catch the error during end of month tracking, and did not properly track the contacts and actions as required by Agency.⁸

06. Since May of 2018 Agency was made aware of more than five instances where Grievant has improperly dropped a claim/submission or committed a substantive error on a Veteran's claim. Two of these instances resulted in verbal counseling and one a Letter of Counseling dated June 15, 2018.⁹

07. In his verbal counseling of June 1, 2018, Grievant was given direction to take responsibility for claims and not submit a claim without understanding the background and reasoning going into a claim. He was told, per his EWP, that he is required to review the case file for any client he is submitting matters for including appeals. Grievant was further told he was to recognize when a duplicate claim is being filed, and to bring it to a supervisor's attention before submitting.¹⁰

08. On June 15, 2018 Grievant was issued a written Letter of Counseling concerning a Veteran's request to file a claim for pension (initial office visit on 5/24/18). Grievant's actions resulted in this being a "dropped claim". In the Letter of Counseling, management expressed concern with there being a "dropped claim", that he did not upload the Advocacy Agreement signed by the Veteran, that he neglected to file an Intent to File form with the VA, and he made no BeneVets notes for the visit. Additionally, Agency expressed concern that Grievant did not catch the error during his end of month tracking and did not properly track Veteran contacts and actions as was required. The Letter of Counseling discussed methods to improve claims tracking and reviewed Agency protocols.

⁶ A. Tab 2. and Testimony.

⁷ A. Tab 2, G.Tab 12, and Testimony.

⁸ A. Tab 2, A. Tab 18, and Testimony.

⁹ A. Tab 3.

¹⁰ A. Tab 1 and Testimony.

Additionally, Grievant was informed in the Letter of Counseling it was expected this situation will not occur again, but, should it occur again within the next 12 months, it may result in further disciplinary actions in accordance with the Standards of Conduct.¹¹

09. On July 11, 2018 Grievant received a “Notice of Improvement Needed/Substandard Performance” (“Notice”) which, among other matters, addressed performance with regards to claims filing and claims tracking. The Notice raised, in the past 2 months, Grievant had made errors on 5 different occasions resulting in exposing the state to liability claims. Agency expressed concern as to two dropped claims and concern that Grievant had knowledge of one of these dropped claims but failed to report it to his supervisors. On three instances Grievant duplicated claims or forms submitted due to not checking the VA system before submission.

An Improvement Plan was set out for Grievant in the July 11, 2018 Notice of Improvement Needed/Substandard Performance which set forth, among other matters, expectations Grievant would:

- maintain his own references, do his own research, and develop his own claims;
- have zero liability-related claims issues or dropped claims, which cross the end of the month during the performance period;
- track contacts and claims in accordance with standards to catch any errors at the end of the month;
- report any dropped claims or liability issues to his supervisor immediately upon learning of them;
- comply with Standards of Conduct (Policy 1.60).

The performance improvement plan began on 7/12/18 and provided it would be reassessed October 12, 2018. The Improvement Plan indicated failure to meet the required standards may result in Grievant’s termination from employment.¹²

10. On September 12, 2018 Grievant was issued a Group III Written Notice with a three workday suspension. Written Notice had documents attached including a letter and a one page *Claims Errors Reference Sheet* setting out 13 items/matters. The attached letter stated, in pertinent part:

... I am giving you a Group III Written Notice and suspension without pay for a period of 3 days for unsatisfactory performance, failure to follow instructions or policy, customer neglect, and negligence of duty resulting in the exposure of the State to potential liability claims.

11. Since employed by Agency in late 2015 Grievant has attended Agency’s one week Basic VSR Course twice, received hands on training at several offices around the state, received one-on-one

¹¹ A. Tab 2.

¹² A. Tab 4 and A. Tab 5.

assistance, attended the one-week American Legion VSR course in Washington, attended ten live quarterly training sessions, and attended two annual one-week training conferences.¹³

12. Grievant was previously placed on a performance plan for substandard performance in May of 2016.¹⁴

13. In September of 2017 Grievant received a Letter of Counseling for inappropriately accepting and distributing football tickets on behalf of Agency without proper authority.¹⁵

14. No evidence was presented of there existing any active Written Notices.

15. Grievant underwent an Agency Standard On-Site Assessment on June 26, 2018 which found he had a good understanding of the VSR job and the material which was on par with other VSRs with his experience level. Among other matters, regarding BeneVets, his ability to create/update a record, the quality of notes, and his proficiency of filing were evaluated to be "very good".¹⁶

CONCLUSIONS

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 Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*.¹⁷ The *Standards of*

¹³ A. Tab 3.

¹⁴ A. Tab 3.

¹⁵ A. Tab 3.

¹⁶ G Tab 13.

¹⁷ A. Tab 36.

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 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. Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally would warrant termination.

Attachment A: of Policy 1.60 (Effective April 16, 2008) provides failure to follow supervisor's instruction is an example of a Group II Offense, unsatisfactory work performance is an example of a Group I Offense, and abuse or neglect of clients is an example of a Group III Offense. Attachment A also provides:

*Note that in certain extreme circumstances, and offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. ... Should any such elevated disciplinary action be challenged through the grievance procedure, management will be required to establish its legitimate, material business reason(s) for elevating the discipline above the levels set forth in the table above.

§ B. 2. of DHRM Policy 1.60 provides the examples of offenses presented in Attachment A. 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.

Business of Agency:

Agency maintains a number of offices throughout the Commonwealth to provide services to Veterans and their families seeking Agency's assistance. This assistance including accessing benefits they may be lawfully entitled to receive, filing claims for such benefits, and filing matters necessary to maintain eligibility for claims. The Commonwealth may be held liable if, on account of Agency's actions, a Veteran or family member suffers a loss of benefits they otherwise would have been entitled to receive.¹⁸

¹⁸ Testimony.

In carrying out its responsibilities, Agency has established and promulgated policies and procedures to be used by its employees in providing assistance to Veterans and their families. Grievant is one of a number of Veteran Services Representatives employed by Agency to assist in Agency’s business of providing assistance to Veterans and their families. Agency requires him and all Veteran Services Representatives to document his communications, meetings, contacts, and actions. Additionally, as a VSR, he is required to do end of month tracking to ensure matters being handled in a timely manner and are not dropped, lost, or neglected.

At times relevant to this proceeding, Agency required Grievant to utilize Agency’s approved claims management system, BeneVets to, among other matters, electronically file claims, track the status of claims, ensure the claims are received and submitted to the VA, and provide notes documenting meetings, communications, and actions.¹⁹

On or about September 1, 2018 Agency switched from BeneVets to a different program but, while some documents were not migrated to newer adopted by Agency, those documents are still available within BeneVets.²⁰

Written Notice:

In issuing the September 12, 2018 Group III Written Notice, Agency addressed its concern Grievant was exhibited a “continued pattern of substandard work performance”. The Written Notice set forth a number of instances where he dropped claims, he subjected the Commonwealth to potential liability claims, and he made procedural, tracking, and claims development errors. The Written Notice indicated since briefed on management’s intent to place Grievant on an Improvement Plan, seven claims development/procedural errors were found, four of which were made during the performance plan.²¹

Included in the Written Notice was a document entitled, “Claims Errors Reference Sheet” which set out thirteen matters giving rise to Agency concerns. As to each matter Agency provided the date the matter occurred and when it was discovered by Agency, the Veteran involved, facts, and the issues and concerns raised by Grievant’s actions .²² The table below is a brief summary of the matters related to 13 separate the Veterans contained in the Written Notice’s “Claims Errors Reference Sheet”.

Claims Errors:

** ID Number and name of each Veteran provided on “Claims Errors Reference Sheet” but only identified herein by number designated by Hearing Officer*

Date Error	*	Date of	Error(s) by Grievant	Type of Error(s)	Dropped	Potential
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¹⁹ A. Tab 3, G.Tab 12, and testimony.

²⁰ Testimony.

²¹ A. Tab 10.

²² A. Tab 10.

Discovered	#	Error		Claim	Liability Issue
4/20/18	1	2/2/18	Missent med. receipts to VAMC Prosthetics not VA.	<i>Claims Procedural Error</i>	x
5/31/18	2	5/24/18	Filed claim duplicating 3 items currently on appeal.	<i>Claims Procedural Error</i>	
6/5/18	3	4/9/18	Misfield DIC vs Death Pension - Error crosses end of month.	<i>Claims Error</i>	
6/7/18	4	5/24/18	Input BeneVets notes stating he was filing an Intent to File ("ITF") but no ITF filed. No Advocacy Agreement uploaded. Error not caught during end of month tracking/RFC confirmations.	<i>3 Claims Procedural Errors Tracking Procedural Error</i>	x x
6/19/18	5	6/5/18	Filed claim which duplicates 2 conditions currently on appeal.	<i>Claims Procedural Error</i>	
6/19/18	6	6/15/18	Incorrectly labeled efile as COMP vs PMC.	<i>Claims Procedural Error</i>	
6/19/18	7	5/23/18	Uploaded 4138 but did not submit it. Noted efilng in notes. No merger notes, no RFC. Error not caught during end of month tracking/RFC confirmations.	<i>Claims Procedural Error Tracking Procedural Error</i>	x
7/11/18	8	7/10/18	Notes not put into BeneVets. Matter subsequently caught by COE.	<i>Claims Procedural Error</i>	
7/26/18	9	7/24/18	Did not select COMP or PENSION on 21-0966 (ITF form).	<i>Claims Development Error</i>	
8/14/18	10	8/13/18	Did not put notes in BeneVets - subsequently caught by COE.	<i>Claims Procedural Error</i>	
8/14/18	11	6/27/17	Took a signed claim but did not file it. Notes said it was filed. No merger notes and no RFC exists. COE verified claim not sent. ITF also not filed to save effective date (within 3 da. of end of month). Error not caught during end of month tracking/ RFC confirmations.	<i>2 Claims Procedural Errors Tracking Procedural Error</i>	x x
8/14/18	12	7/9/18	Misspelled Veteran's name. BV address and VBMS don't match. Advocacy Agreement not executed and uploaded.	<i>Claims Development Error Claims Procedural Error</i>	x
8/28/18	13	12/28/17	Failed to file 21-22 with the claim as noted in BeneVets. This delayed tracking for the Veteran causing a longer wait and a 2 nd visit to office. BeneVets notes do not mention an error or that it was discussed with the Veteran.	<i>Claims Procedural Error</i>	

Potential Liability and Dropped Claims:

re. Veteran #1... On 4/18/18 Agency discovered an issue with Grievant's work that occurred on or about 2/2/18. The Veteran was receiving a pension benefit which was tied to the Veteran's level of income. The VA conducted reviews of the Veteran's income to determine continuing eligibility for the Veteran to receive pension benefits. As was authorized by the VA, the Veteran's level of income used to determine benefit entitlement could be adjusted to reflect a deduction for medical bills if receipts for those bills were timely received.

Veteran's daughter came to Agency to check on the status of a medical expense report and indicated she has spoken with the VA who stated the medical expenses had not been received. Grievant sent the medical expense to the Prosthetics department. Agency was concerned that, by mis-directing the medical receipts, the Veteran may loose what would be otherwise be authorized deductions to his level of income and this could cause the Veteran to suffer a monetary loss for which the Commonwealth could be held liable.²³

²³ Testimony and A. Tab 34.

Grievant appears to raise he sent the receipts to the VA and submitting the receipts to a different department within the VA was not material or relevant. Agency has a valid business concern in the proper department within the VA receiving the medical receipts. The incorrect department receiving matters, may or may not choose to timely forward the receipts to the VA department who needs the information. The Prosthetics department may or may not do choose to anything with the receipts, may not know what to do with the receipts, or may even throw away the receipts. If the medical receipts were not timely received by the appropriate department, the Veteran's benefits could be adversely affected and the Commonwealth could be held liable.

The evidence indicates Grievant's actions resulted in a claims procedural error and a potential liability for the Agency and/or Commonwealth.

re Veteran # 4... On 6/7/18 Agency discovered an issue with Grievant's work that occurred on 5/24/18. Grievant made BeneVets notes saying he was filing and Intent To File ("ITF") form but he did not do so. Additionally, no Advocacy Agreement was uploaded. Grievant did not catch these matters during his required end of month tracking.

Applications for VA benefits require time in order to secure necessary documentation and/or information to complete the application. Benefits may be received from the date the application for benefits is received by the VA. The VA also authorizes the filing an Intent to File ("ITF") form to establish the date from which benefits could be received even though the application itself is received at a later date. This form acts to lock in and establish an earlier effective date from which benefits could be received.

Grievant was required to obtain and upload an Advocacy Agreement from a Veteran seeking assistance through Agency. Agency's Advocacy Agreement, among other matters, addresses liability limitation for Agency when a Veteran comes in seeking assistance in filing for a benefit being sought in the last 5 days of a benefit period. In this case no Advocacy Agreement uploaded

Agency has in place requirements for documentation of contacts and actions and utilizes a end of month tracking procedure to track actions and catch errors. Grievant did not catch his errors during his end of month tracking and did not file the ITF form after documenting he filed same. Had he filed the ITF form Grievant would have establish an earlier date for the Veteran's benefits to begin. His failure to file the ITF form could affect Veteran's claim for benefits from this earlier claim date. The Agency/Commonwealth could be liable for the Veteran not receiving benefits from this earlier claim date. Grievant's actions in not filing the ITF amounted to a dropped claim. Additionally, this was a tracking procedural errors and multiple claims procedural errors.

re Veteran #7... On 6/19/18 Agency became aware of a error occurring on 5/23/18 in which VA Form 21-4138 "Statement in Support of Claim" requesting a reevaluation exam concerning Veteran's left knee was signed, uploaded, but not filed. However, BeneVet Notes indicated it was filed and the error was not caught during the end of month tracking.²⁴

²⁴ A. Tab 38.

The evidence indicates that This was a dropped claim and both a claims procedural error and a tracking procedural error.

re Veteran # 11... On 8/14/18 a Veteran came in to get status of a claim he believed was filed on 6/29/17 for lung cancer. Agency found the POA and claim signed in BeneVets but found no RFC and the claim was not received by the VA.

Agency discovered an issue with Grievant's work that occurred on 6/27/17 when he took a signed claim but did not file it. However, he entered in his BeneVets notes that the Veteran's claim was filed. The Center of Excellence ("COE") verified that the claim was not sent. Additionally, Grievant did not send an Intent To File ("ITF") form to the VA which would have acted to lock in the date the ITF was received as the date from which benefits could have been paid. In Grievant's end of month tracking, he did not catch his errors.²⁵ Grievant indicated in writing, dated 8/17/18, that he had inadvertently failed to file the claim.²⁶

Grievant's actions resulted in a dropped claim and potential liability for the Agency/Commonwealth. Grievant was responsible for two claims procedural errors and a tracking procedural error.

re Veteran #12... On 8/14/18 Agency discovered an issue with Grievant's work that occurred on or about 7/9/18. A deceased Veteran's spouse came to Grievant to apply for benefits. Veteran's name and address not matching in Agency and VA systems. No Advocacy Agreement was executed and uploaded as was required. Grievant was responsible for claims procedural and claims development errors. Grievant's actions resulted in a potential liability for the Commonwealth.²⁷

Other errors ...

The evidence indicates a number of other Grievant errors, both procedural and tracking including:

re Veteran #2 ... On 5/31/18 Agency discovered that on 5/24/18 Grievant filed claims duplicating items currently on appeal. Grievant does not deny he filed claims duplicating claims on appeal. Grievant raised that he was ordered to do so. However, the evidence indicates that certain information Grievant provided to management on which its instruction were based was not accurate.

re Veteran #3 ... On 6/5/18 Agency discovered and the evidence indicates on 4/9/18 Grievant misfiled a DIC ("Dependency and Indemnity Compensation") claim instead of a filing a Death Pension claim for spouse of a Veteran. This was not caught at end of month tracking. The error crossed end of month. A subsequent meeting was held with Veteran's spouse and a 21-4138 ("Statement in Support of

²⁵ A. Tabs 25, 26, 27, 28, and Testimony.

²⁶ A. Tab 28.

²⁷ A. Tabs 31 and 3.

Claim”) was subsequently submitted on her behalf to correct the April 2018 filing which should have reflected a Death Pension claim not DIC.²⁸

re Veteran #5 ... On 6/19/18 Agency discovered and the evidence indicates Grievant was responsible for a claims procedural error in that on 6/5/18 Grievant Filed a claim which duplicated two conditions currently on appeal.²⁹

re Veteran #6 ... On 6/19/18 Agency discovered a claims procedural error occurred on 6/15/18. The evidence indicates on 6/15/18 Grievant incorrectly labeled an efile as COMP vs PMC. In his e-mail of 6/19/18 Grievant’s supervisor addressed the matter with Grievant reminding him to ensure that the subject line reflects the correct VA portal destination which should have been PMC.³⁰

re Veteran #8... On 7/11/18 Agency discovered and the evidence indicates that on 7/10/18 Grievant failed to put notes into BeneVets. This failure was caught by the Agency’s Center of Excellence and is a claims procedural error.³¹

re Veteran #9 ... On 7/26/18 Agency discovered claims development error and the evidence indicates that on 7/24/18 Grievant did not select Comp or Pension to indicate the type of claim the Veteran is seeking on Form 21-0966 (Intent to File Claim...). Agency pointed this out to Grievant in an e-mail of 7/26/18 and directed him to re-submit with “correction” in the subject line.³²

re Veteran #10 ... On 8/14/18 Agency discovered a claims procedural error. The evidence indicates Grievant failed on 8/13/18 to put notes into BeneVets. Agency informed Grievant by e-mail of August 14, 2018 of there being no note in BeneVets detailing the Veteran’s visit and any followup.

This was the second claim with no BeneVets noted in the past month, the first being on 7/10/18. Grievant’s Supervisor addressed with him, via e-mail of 8/15/18, the need for him to continue to be diligent with process claims, notes, and tracking to help catch any mistakes at the end of the month.

On 8/16/18 Grievant raised he had problems with Bene Vets and that he was able to upload the claim but did not get the note added before BeneVets went down. Agency determined BeneVets did not go down, and there were no notes issues, only an upload issue but he was able to file/upload the claim. Agency and notified Grievant of this in an e-mail of 8/16/18. The e-mail also addressed Grievant’s June Letter of Counseling, referencing that it was critical to ensure claims forms and notes

²⁸ A. Tabs. 16 and 17.

²⁹ A. Tab 13 and testimony.

³⁰ A. Tab 15.

³¹ A. Tab 22 and testimony.

³² A. Tab 24.

are properly uploaded at the time of the visit, and that his tracking sheet reflect all visits with Veterans to enable him to catch errors.³³

re Veteran #13 ... On 8/28/18 Agency discovered a claims procedural error by Grievant in that on 12/28/17 Grievant failed to file the form 21-22 (Appointment of Veterans Service Organization .../Advocacy Agreement) with the claim as he had noted in BeneVets. The evidence indicates Grievant failed to the Form 21-22 as he had noted he did in BeneVets and the BeneVets notes do not mention an error or that it was discussed with the Veteran.³⁴

Agency:

In regards to Grievant's work performance, among other matters, Grievant received verbal counseling on June 1, 2018, a Letter of Counseling on June 15, 2018, a *Notice of Improvement Needed/Substandard Performance* ("Notice of Improvement") on July 11, 2018, and was placed on an Improvement Plan which began on July 12, 2018.

The *Notice of Improvement* expressed strong concern as to work performance issues, that Grievant's work performance exposed Agency to potential liability claims, that he had two dropped claims and, while having knowledge of one of the dropped claims, failed to report the known dropped claim to his supervisor.³⁵

Grievant was placed on an *Improvement Plan* which began on July 12, 2018 and was to be reassessed on October 12, 2018. The *Improvement Plan* set forth expectations of zero liability related claims issues or dropped claims which cross the end of the month during the performance period, expectations of a limited number of QC denials or misfiles within the performance period, expectations that he will track his contacts and claims in accordance with standards to catch any errors at the end of the month, and expectations that he will report any dropped claims or liability issues to his supervisor immediately upon learning of them.

Since management first briefed Grievant concerning its intent to place him on an Improvement Plan, a number of claims development and procedural errors were discovered. Also, claims development and procedural errors were made by Grievant during the period of his performance plan.³⁶

Grievant failed to make BeneVet notes as to Veteran #8 on 7/10/18 and as to Veteran #10 on 8/13/18). Agency notified Grievant their concerns as to this in the document of 8/15/18, directed these two matters be corrected quickly. Agency also reiterated the need to remain vigilant when

³³ A. Tabs 22 and 23.

³⁴ A. Tabs 32 and 33.

³⁵ A. Tab 5.

³⁶ A. Tab 10.

process claims especially when it comes to notes and tracking as this would help him catch mistakes at the end of month tracking.³⁷

Grievant responded to management, in his e-mail of 8/16/18, and addressed not making notes in BeneVets regarding a Veteran's meeting on 8/13/18. Grievant stated this occurred when there were problems with BeneVets. He indicated he could upload the claim but could not get the note added before BeneVets went down. Agency check and confirmed their finding to Grievant on August 16, 2018 that BeneVets did not go down and there were no notes issues/problems with using BeneVets. Agency confirmed there was an upload issue which did not impact Grievant as he did an upload in the matter.³⁸ On 8/16/18 Agency also cited Grievant's June Letter of Counseling reiterating it was critical to ensure claims forms and notes are properly uploaded and his tracking sheet reflect all visits with Veterans to enable catching errors in the future.

Group III:

Agency raised "Patient/inmate/client abuse" (Written Notice Offense Code 81) and raised Client Neglect. Agency has the burden of proof as to these allegation. Agency has provided what it meant by client neglect. There is no evidence to find physically or mentally abuse.

§63.2-100 of the Code of Virgin defines Adult Neglect stating "Adult Neglect" means an adult as defined in §63.2-1603 is living under such circumstances that he is not able to provide for himself or is not being provided services necessary to maintain his physical and mental health and the failure to receive such services impairs or threatens to impair his well-being... .

The §37.2-100 of the Code of Virginia provides another Agency's definition of neglect stating:

"Neglect" means failure by a person or a program or facility operated, licensed, or funded by the Department, excluding those operated by the Department of Corrections, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of an individual receiving care or treatment for mental illness, developmental disabilities, or substance abuse.

Agency has not met its burden as to allegations raised of Client Neglect. There is insufficient evidence to find Grievant or Agency were responsible for providing services necessary to the health, safety or welfare of individuals receiving care or treatment. Veterans and family were not under Agency, care, supervision, or custody but came to Agency for assistance and services concerning Veteran benefits. Grievant did neglect to carry out his administrative duties and responsibilities owed

³⁷ A. Tab 22.

³⁸ A. Tab 23.

not only to Agency but also to Veterans and their families. His actions may result in lost benefits, economic or otherwise, however, there is insufficient evidence to find Client Neglect.

While failure to follow supervisor's instruction or comply with written policy is an example of a Group II, Attachment A. to Policy 1.60 provides, that in extreme extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense.

In deciding to issue a Group III, Agency took into consideration the unique and negative impact that Grievant's failures to follow supervisor's instructions or comply with written policy over time imposed and could impose upon Veterans, their families, and Agency. Grievant exhibited a pattern of behavior, not just a few isolated instances, of not following his supervisor's instructions or complying with written policy. As more fully discussed above, Grievant's failure to follow supervisor's instruction or comply with written policy continued to occur even after verbal counseling, written counseling, and Notices of Substandard Performance and Improvement Plans.

Grievant's actions resulted in multiple claims procedural errors and tracking procedural errors, multiple dropped claims, and raised multiple liability/potential liability issues for Agency. Agency had a procedure in place to facilitate catching and tracking errors that may occur. Grievant failed to follow supervisor's instructions or written policy to use Agency's procedures that were in place to document contacts, actions, and other matters. Grievant was aware Agency had this system to facilitate tracking and catching errors at the end of the month and thus minimize errors that might affect Veterans, their families, and Agency.

Grievant's actions had a direct affect on Veterans and their families and on Agency. The business of Agency involved assisting Veterans and their families in determining what benefits they may be legally entitled to and assisting them with filing clams. His actions affected Veteran the including monetary benefits that could be received. His actions had had a negative impact on the reputation of Agency and their ability to effectively be able to provide services to Veterans and their families.

Grievant's actions could have a serious financial impact on Agency as the Commonwealth could be held liable for lost benefits resulting from his actions. The evidence has established, by a preponderance, that Grievant's actions were affecting Agency's ability to carry out its business of providing services to Veterans. Management has established it had legitimate and material business reasons for elevating the discipline above the level from a Group II to a Group III offense. Doing so was consistent with policy.

The examples of offenses presented in Attachment A to Policy 1.60 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.

Agency raised negligence of duty resulting in exposing the Commonwealth to potential liability claims. As discussed above, after significant efforts to address matters, Grievant continued to be responsible for dropped claims, errors, and potential liability issues which may have been avoided. His actions indicated a pattern of substandard work performance and negligence as to his duties which affected Veterans, their families, and Agency. His actions in not following policy as to entering Benevets Notes, not tracking, and dropping claims were a significant and a material concern which undermines the effectiveness of the Agency's activities and which exposed the Commonwealth to potential liability claims and are of such a severe nature that would warrant issuance of a Group III.

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 participated in an activity recognized as protected in §4.1(b). §4.1(b) of the *Grievance Procedure Manual* addresses an adverse employment action occurring as a result of one or more of the following matters:

1. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations;
2. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;
3. Arbitrary or capricious performance evaluation;
4. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such law to a government authority, seeking to change any law before Congress or General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law;
5. Informal discipline

To establish retaliation Grievant must show (1.) he engaged in a protected activity; (2.) he suffered an adverse employment action; and (3.) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a non-retaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant shows by a preponderance of the evidence that the Agency's stated reason was a mere

pretext or excuse for retaliation.³⁹ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.⁴⁰

Grievant raised retaliation in his resolution steps, raises it in questioning of witnesses, and raises it in his Closing Statement Argument. He presents he was given the Group III in retaliation for matters related to the outreach event on 8/16/18 and his being involved with matters associated with a court proceeding in which the Commonwealth is the Defendant.

Grievant contend he was disciplined due to his Supervisor's failure to catch him drinking alcohol at an approved Outreach event on 8/16/18. He also raises that this was an attempt at entrapment and he does not drink alcohol.

Agency approved Grievant's absence from the workplace for a two-hour period in order to meeting with an assisted living facility Director to discuss Veteran services. A few days prior to the meeting, Supervisor received an invitation to a wine and cheese tasting event at the facility during the same two hours of Grievant's scheduled meeting. Supervisor, with another employee, went to the assisted living facility to check on matters. Supervisor found Grievant not meeting with the Director as planned but socializing at the wine and cheese tasting. Grievant was not observed to be drinking alcohol. Facility's Director had a conflict and could not meet with Grievant and, instead of returning to work, Grievant chose to stay and socialized.⁴¹ Supervisor did not discipline Grievant for not returning to work when he learned the Director was not able to meet with him.

There is no evidence of entrapment. Agency has a valid business purpose in supervising the activities of its employees during work hours.

The evidence indicates Grievant was named as a witness in a Notice to Take Deposition and an Amended Notice to Take Depositions regarding a matter pending in the United States District Court of Western District of Virginia in which the Commonwealth is the named Defendant.⁴²

The evidence indicates Grievant suffered an adverse employment action in being issued the Group III Written Notice with three day suspension. Grievant engaged in a protected activity in his participation in a Court proceedings. And, even if it were to be also found that he engaged in a protected activity regarding the Outreach event, there is insufficient evidence that a causal link exists between the adverse employment action and either of the protected activities.

³⁹ *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005); Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000).

⁴⁰ See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

⁴¹ A. Tab 12.

⁴² G. Tab 7.

Furthermore, Agency has presented a legitimate non-retaliatory business reason for the adverse action of issuing Grievant a Group III Written Notice with three day suspension and there is insufficient evidence to find that Agency's stated business reason in issuing the discipline was a mere pretext or excuse for retaliation.

Upon consideration of all the evidence presented in this cause and for the reasons stated herein, Retaliation is not found in this cause and there is insufficient evidence to find issuance of the Group III Written Notice was due to or related to retaliation.

ADA:

Grievant raises having short term memory issues in his written closing argument and in his questioning of witnesses. He raises that his short term memory issues was a disability that affected his work.

The Americans with Disability Act ("ADA") makes it unlawful to discriminate against a qualified individual with a disability because of the individual's disability. A qualified individual with a disability is defined as an individual with a disability who meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of a job.⁴³

Under the ADA, a person is "disabled" if that person (a.) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b.) [has] a record of such an impairment; or (c.) [has been] regarded as having such an impairment."⁴⁴ "Essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires".⁴⁵ Major life activities include "functions such a caring for oneself, performing manual tasks, walking seeing, hearing, speaking, breathing, learning, and working."⁴⁶

To establish a *prima facie* claim of wrongful disability discrimination under the Americans with Disability Act, Grievant must show:

- (1.) he is within the ADA's protected class (i.e., a "qualified individual with a disability");
- (2.) he suffered an adverse employment action;
- (3.) his job performance met her employer's expectations when he suffered the adverse employment action; and
- (4.) his adverse employment action occurred under circumstances that raise a

⁴³ 42 U.S.C. § 12111.

⁴⁴ 42 U.S.C. §12102(2).

⁴⁵ 29 C.F.R. §1630.2(n).

⁴⁶ 29 C.F.R. §1630.2(i).

reasonable inference of unlawful discrimination.⁴⁷

Even if it were to be assumed, for the sake of argument, that Grievant was a "qualified individual with a disability" there is insufficient evidence to find that there is a wrongful disability discrimination. Grievant did suffer an adverse employment action (i.e. Group III Written Notice with 3 workday suspension), however the evidence does not indicate that his job performance met his employer's expectations when he suffered the adverse employment action. Additionally, there is insufficient evidence to find that his adverse employment actions occurred under circumstances that gave rise to a reasonable inference of unlawful discrimination.

While the ADA does not require that an employee ask for an accommodation at any specific time, the timing of a request for reasonable accommodation is important as employers do not have to rescind discipline that occurred before they knew about the disability.

Upon review of the evidence admitted in this cause, including all documents admitted and the testimony of all the witnesses in this cause, there is insufficient to find Grievant notified Agency of his having any memory issues/disability or that Agency knew about his having memory issues or any disability until after Grievant had received the Notice of Pending Disciplinary Action on August 28, 2018.

Grievant admitted a number of documents addressing, among other matters, memory issues. These documents include: Letter of 8/31/18 from NP-C, Letter of 10/30/18 from M.D., Attending Provider Statement noting first consulted for condition was 10/9/18, Letter of 11/13/18 from LPC, Mental Health Evaluation of 12/19/18, and a letter of 12/20/18 noting on 11/19/18 a request regarding Employee Health Condition for the time period 10/31/18 through 3/13/19 noting his request for disability benefits was approved for the time period indicated.⁴⁸ However, the evidence, including these documents, is insufficient to find Agency was informed or aware of Grievant having a disability before his being given the 8/28/18 Notice of Pending Disciplinary Action.

Agency received a Medical Inquiry - Response to an Accommodation Request form dated 9/26/18 signed by NPC which indicated Grievant has diabetes and is being referred to neurology for memory issues. It also stated to please get neurology input for memory impairment. However, in response to , "What limitation(s) is interfering with job performance, and how does it interfere with the employee's ability to perform the job function(s)? The written response was, "None. He has controlled diabetes type II". In response to, "How long will the employee need the reasonable accommodation? ... NPC answered, "N/A". Additionally, no suggestions were presented regarding possible accommodations.⁴⁹

⁴⁷ Rohan v. Networks Presentations, LLC, 2003 U.S. Dist. Lexis 26687, at n.5 (D. Md. Apr. 17, 2003), aff'd, 375 F.3d (4th Cir. 2004).

⁴⁸ G. Tab 1 through 6.

⁴⁹ A. Tab 11.

Mitigation or Aggravation.

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall have the power and duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management pursuant to § 2.2-1202.1.

The hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the 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 the hearing officer finds that (i) through (iii) above, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.

If the agency prevails on all three elements, the hearing officer must then consider whether the 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. 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.

Upon review of all evidence admitted in this cause, Hearing Officer finds that Grievant engaged in the behavior described in the Group III Written Notice, his behavior constituted misconduct, Agency's discipline was consistent with law and policy.

The evidence further indicates Agency took into consideration mitigating circumstances. DHRM Policy 1.60 provides that one Group III Offense normally should result in termination unless there are mitigating circumstances. Agency chose to mitigate and not terminate his employment. Additionally, while it could have given him up to a 30 workday suspension, Agency chose to give Grievant a 3 day suspension. Upon consideration of all the evidence presented in this cause, including taking into consideration Grievant's length of service and otherwise satisfactory work performance, his verbal and written counseling, Notices of Substandard Performance and Improvement Plans, and there being no evidence of any previous active Written Notice, the Hearing Officer does not find, under the record evidence, that the discipline exceeds the limits of reasonableness and mitigation is not found to be warranted and appropriate under the circumstances.

DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds:

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

3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the Agency's issuance to Grievant of a Group III Written Notice with three day suspension is **Upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within 15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EEDR within 15 calendar days of the date the decision was issued. Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

S/Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

- a. A copy of this decision is e-mailed on 2/25/19 to:
Agency Attorney
EEDR
- b. Pursuant to Grievant's request, a copy of this decision is to be mailed to Grievant (via certified mail, ret rec. req.).