

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 01/15/14;  
Decision Issued: 01/28/14; Agency: VDOT; AHO: Lorin A. Costanzo, Esq.; Case No.  
10243; Outcome: No Relief – Agency Upheld.

**Commonwealth Of Virginia**  
**Office of Employment Dispute Resolution**

**Decision of Hearing Officer**  
**Grievance Case No. 10243**

**Hearing Date: January 15, 2014**  
**Decision Issued: January 28, 2014**

**PROCEDURAL HISTORY**

On August 19, 2013 Grievant was issued a Group I Written Notice for “Unsatisfactory Performance” alleging:

[Grievant] signed an invoice from [Corporation] for materials and supplies, totaling \$60,023.74 for supplies on order and not received. This action resulted in a payment to [Corporation] that was not in accordance with the terms specified in the contract. Based on the Assurance and Compliance Office report this action is a violation of the Standards of Conduct-DHRM Policy 1.60 “Failure to follow policy and/or falsification of records” – Agency Procurement and Surplus Property manual (APSM) 10.2 Contractor Administrator and the Virginia Department of Accounts CAPP Manual.

Grievant filed a grievance on September 17, 2013 and matters proceeded through the resolution steps. On October 22, 2013, when matters were not resolved to his satisfaction, Grievant requested qualification of his grievance for hearing. His grievance was qualified for hearing and undersigned was appointed as Hearing Officer in this cause by the Department of Human Resources Management effective December 17, 2013. A pre-hearing telephone conference was held on December 27, 2013 and the grievance hearing was held on January 15, 2014 at Agency Facility.

**APPEARANCES**

Grievant (who also was a witness)

Agency Presenter

Agency Party Designee

Other Witness: Procurement Manager

Procurement Officer

Program Administrator

District Equipment Manager

Director of Assurance and Compliance (via speakerphone)

Audit Services Manager (via speakerphone)

**ISSUES**

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

**BURDEN OF PROOF**

As this is a disciplinary action, 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 more convincing than the opposing evidence.<sup>1</sup>

### FINDINGS OF FACT

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

01. Grievant is employed by Agency.

02. Agency desired to convert a bus into a "Mobile Command Center" as per Agency specifications.<sup>2</sup> On March 22, 2012 an Invitation For Bids ("IFB") for such conversion was issued. Corporation, who submitted the only bid, was awarded the contract. A Purchase Order was issued dated 4/25/12 for the bus conversion pursuant to attached specifications. Corporation was to pick up and renovate a bus as per specifications provided and return the completed bus back to Agency. Funds were to be disbursed in four progress payments with ¼ of the total price paid on each such disbursement. Payments to Corporation were to be paid as follows:

- 1<sup>st</sup> payment payable at demolition.
- 2<sup>nd</sup> payment payable at 1/3 of the build.
- 3<sup>rd</sup> payment payable at 2/3 of the build.
- 4<sup>th</sup> payment payable upon completion.<sup>3</sup>

03. On May 24, 2012 Agency processed and paid the 1<sup>st</sup> payment to Corporation at the completion of the demolition phase. On the Corporation's invoice for 1<sup>st</sup> payment Grievant noted on 5/23/12, "Demolition phase is complete".<sup>4</sup>

04. An *Accounts Payable Voucher Transmittal* regarding payment and demolition phase completion was entered. This document stated the matter related to a Purchase Order [number provided] and stated the "Goods and Services Receipt Date of 5/23/2012". Grievant signed the "Certification Statement for Approver" on the document 5/24/12. Another employee signed the "Certification Statement of Preparer" certifying that the related goods/services are appropriately documented as received.<sup>5</sup>

05. On June 4, 2012 Agency received an invoice from Corporation for materials and supplies totaling \$60,023.74. Grievant signed the invoice below the stamped words "Received" and "JUN 06 2012" with the word "Materials" handwritten above the Received Stamp. Below Grievant's signature was written "6-6-12".<sup>6</sup>

---

<sup>1</sup> *Grievance Procedure Manual*, Office of Employment Dispute Resolution, Dept. of Human Resources Management, §5.8 and §9.

<sup>2</sup> A. Ex. 5.

<sup>3</sup> G. Ex. pg. 197; A. Ex. 5.

<sup>4</sup> G. Ex. pg. 4.

<sup>5</sup> G. Ex. pg. 3.

<sup>6</sup> G. Ex. pg. 14; A. Ex. 3, pg. 16.

06. An *Accounts Payable Voucher Transmittal* was completed regarding issuance of a payment to Corporation for the sum of \$60,023.74. The document indicates a *Goods & Services Receipt* date of 6/6/12, a *Gross Invoice* amount of \$60,023.74, and the matter related to a Purchase Order [number provided]. The Preparer (an agency employee other than Grievant) signed the "Certification Statement for Preparer" on such document stating, "I certify that the related goods/services are appropriately documented as received; and that the invoiced amounts are correctly calculated." Agency made payment to Corporation on or about July 6, 2012 in the amount of \$60,023.74.<sup>7</sup>

07. On or about September 5, 2012 a change order was executed between Agency and Corporation in the amount of \$16,043.06 to address additional costs associated with hidden damage discovered during the demolition phase and to provide additional safety enhancements.<sup>8</sup>

08. On April 24, 2013 Agency issued a "Notice of Determination of Default" to Corporation.<sup>9</sup>

09. On May 14, 2013 Agency received back its unfinished bus from Corporation. Grievant and representatives of Corporation performed an inventory of materials as well as an assessment of the work performed. The inventory and assessment disclosed that items totaling \$29,975.32 were missing from the original material list/invoice of \$60,023.74 paid for by Agency. Corporation claimed \$3,000.00 of the \$5,000.00 amount for paint supplies on the invoice was used on the conversion thus reducing the total value of unaccounted for items to \$26,975.32.<sup>10</sup>

10. On May 20, 2013 Agency sent a demand letter to Corporation requiring payment in the amount of \$29,975.32. The certified letter sent to Corporation was returned as unclaimed.<sup>11</sup>

11. The Agency Assurance and Compliance Office ("ACO") conducted a review/investigation of matters related to Corporation and the bus conversion. The ACO's review/investigation identified a number of non-compliance with policy issues.<sup>12</sup>

#### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (a) sets forth the Virginia grievance procedure and provides, in part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

---

<sup>7</sup> G. Ex. pg. 13; A. Ex. 2, pg. 13 and A. Ex. 3, pg. 12.

<sup>8</sup> A. Ex. 3, pg. 10, A. Ex. 5, pg. 44-57; G. Ex. pg. 364, 428-439.

<sup>9</sup> A. Ex. 3, pg. 10.

<sup>10</sup> A. Ex. 3, pg. 10 and 11; G. Ex. pgs. 475-479.

<sup>11</sup> A. Ex. 3, pg. 11.

<sup>12</sup> G. Ex. pg. A1-A3; A. Ex. 3.

**Policy 1.60:**<sup>13</sup>

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*. 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.

The *Standards of Conduct* divides offenses into three groups according to the severity of the misconduct or behavior and also provides that the listed examples of offenses are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted.

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

Group II Offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or law. Attachment A of Policy 1.60 additionally provides that failure to comply with written policy is an example of a Group II Offense.

**Agency Procurement and Surplus Property Manual:**<sup>14</sup>

10.2 **Contract Administrator.** The administrator should be the end user of the contract or one who has a vested interest in the procurement who will be responsible for the proper adherence to all contract specifications by the contractor. Contract administration shall be delegated in writing by the using agency designating a specific individual or position, highlighting important aspects of the contract, and distinguishing between the administrator’s authority and that which must remain a function of the purchasing office. Specific delegated tasks should be outlined in the designation letter which may include acceptance of goods or services, approval of invoices, scheduling and monitoring of project progress, coordination of the provision of agency or other resources when part of the contract, and favorable or critical feedback to the contractor and buyer. All continuous or term contracts shall be assigned an administrator in writing. (See Annex 10-C) For agency specific term contracts procured on behalf of an agency by DPS, upon award the agency shall designate a contract administrator.

10.5 **Inspection.** Agencies are responsible for inspecting and accepting goods or services purchased. Inspection is the close and critical examination of goods or services delivered to determine conformance with applicable contract requirements or specifications. It includes the determination that:

- a. Unless otherwise specifically ordered, the delivery consists of new and unused merchandise.
- b. Goods or services of the quality, quantity, grade, or standard specified in the purchase order or contract have been delivered. ...

---

<sup>13</sup> A. Ex. 4, Policy 1.60 Standards of Conduct.

<sup>14</sup> A. Ex. 6.

10.6 **Acceptance.** Proper notification of the acceptance of goods or services usually involves the requisitioner, the purchasing and accounting departments. Notification of the acceptance of the delivery should be noted on a receiving document such as a packing slip or copy of the purchase order. Timely and proper payment of invoices requires expedient review and acceptance of the delivery against the terms of the purchase. ...

10.12 **Modifications and Change Orders.** Any request for change affecting price, quality, quantity, delivery or cancellation requires a thorough written explanation by the agency prior to approval. ...

## Office of the Comptroller, Topic No 20305, Topic: Receiving Reports <sup>15</sup>

Policies and procedures, Topic Number 20305 “Receiving Reports” indicates in pertinent part:

### Overview

**Introduction** Receiving reports document the satisfactory receipt of goods, materials, equipment, and supplies. Receiving reports provide an auditable source of verification that goods are received in a manner acceptable to the condition and requirements of the contract or purchase order prior to the authorization of invoices for payment.

**Policy** The following policies apply to receiving reports:

- Receiving reports should be prepared when goods, materials, equipment, and supplies are received. Agencies must provide for a comparable level of confirmation for the receipt of services,
- Receiving reports should be compared with and maintained on file with their respective invoices, purchase orders, and requisitions,
- Agencies should not approve an invoice for payment without first obtaining a receiving report bearing the signature of an authorized individual which verifies the receipt of the items consistent with the conditions and requirements of the contract or purchase order, and ...

### Procedures

**Operating Procedures** The agency’s receiving official should obtain a copy of the authorized purchase order or requisition prior to receipt approval. The quantity, price, and description of the goods, materials, equipment, and supplies received should be comparable to the purchase order or requisition.

Items received should be carefully inspected to ensure they are received in an acceptable condition. ....

**Essential Elements of Receiving Reports** Receiving report format and method of implementation are at the discretion of the agency. However, agencies must ensure that the following items of information, at a minimum, are included on receiving reports:

- Date received,
- Date receiving report was completed,
- Vendor name,
- Purchasing order or requisition number, if applicable,

---

<sup>15</sup> A. Ex. 7.

- Quantity and description of the items received, and
- Authorized signature verifying that the items were received in good condition.

**Receiving Report Alternatives** In lieu of a separate receiving report document, a packing slip, delivery receipt, requisition, or electronic receiving report may be used, provided all of the required information listed in Subsection 200, "Essential Elements of Receiving Reports," are recorded. ...

## Accounts Payable Policy Overview <sup>16</sup>

### Advance Payment Policies

Normally, goods and/or services must be received prior to payment. However, advance payments are allowed for expenditures normally prepaid as standard industry practice... Documentation supporting the reason for prepayment should be attached to the payment transmittal.

Corporation bid on and was awarded a Purchase Order to convert an Agency bus into a "Mobile Command Center" pursuant to Agency's specifications.<sup>17</sup> Grievant was acting as the "Contract Administrator" and Procurement Officer was the "Contract Officer". Four progress payments with a ¼ contract price payment to be made at each scheduled payment point were specified with:

- 1<sup>st</sup> payment payable at completion of demolition activities.
- 2<sup>nd</sup> payment payable at completion of 1/3 of the bus conversion.
- 3<sup>rd</sup> payment payable at completion of 2/3 of the bus conversion.
- 4<sup>th</sup> payment payable upon completion of the bus conversion.

Agency made the first scheduled contract payment to Corporation on or about May 24, 2012 upon completion of demolition activities.

After the first payment, Corporation informed Grievant they did not have the money to keep moving the project forward at the pace Agency desired. Corporation indicated if Agency could help paying for materials they could then get the work done on schedule. Issues arose as to the payment of \$60,024.74 Agency made to Corporation for materials.

Grievant indicates he discussed paying for materials with Contract Officer but there is a discrepancy between what Grievant and Contract Officer remember being said as to this matter:

- Grievant indicates Contract Officer told him as long as the Corporation provided an invoice and purchase orders identifying items that were to be received, Agency could make payment for the materials.
- Contract Officer indicated Grievant was told to make sure the material was there and to "lay his eyes on it" before making payment.

On June 4, 2012, Agency received an invoice and copies of Purchase Orders and other documents from Corporation seeking a payment for materials totaling \$60,024.74.

---

<sup>16</sup> G. Ex. pg. 130 et seq.

<sup>17</sup> A. Ex. 5.

Grievant acknowledges the invoice was stamped "Received" and he signed the invoice under the "Received Stamp". However, Grievant testified he did not do so in acknowledgment of materials being received but did so based on the Purchase Order ("P.O.") documentation. He further testified that at no time has he ever told anyone that the materials were actually received. He does acknowledge he signed off on the invoice for the purpose of obtaining Agency payment for the invoice.

The \$60,024.74 invoice from Corporation was stamped:

RECEIVED  
JUN 06 2012  
[Agency Section]

Grievant signed his name below this stamped information and wrote in the date "6-6-12" below his signature. Additionally he added, in handwriting, the word "Materials" above the "Received Stamp".

Agency contends the document indicates Grievant certified and acknowledged the materials listed in the invoice were actually received. Agency indicated that it was a normal business requirement that, before paying for goods or materials, their actual receipt had to be documented. Agency received, reviewed, and relied upon the invoice with the Received Stamp, Grievant's signature, and handwritten information. Agency believed receipt of the goods listed was verified and so documented by Grievant. An *Accounts Payable Voucher Transmittal* was then completed and payment was made to Corporation on or about July 6, 2012 in the amount of \$60,023.74 for the materials listed.

**Default:**

Due to lack of progress on the bus conversion, after a number of communications addressing progress, on April 24, 2013 Agency issued a "Notice of Determination of Default" to Corporation.

On May 14, 2013 Agency went to the Corporation's site and picked up their bus. Grievant and Corporation representatives performed an inventory of materials and an assessment of the work done on the bus. The inventory and assessment disclosed that materials were missing that Agency had paid for. Materials valued at \$29,975.32 were missing but had been paid for by Agency pursuant to the \$60,023.74 invoice. Corporation claimed \$3,000.00 of the \$5,000.00 amount for paint supplies paid for was actually used on the bus and Corporation contended this reduced the total amount unaccounted for to \$26, 975.32.

On May 20, 2013 Agency sent a demand letter to Corporation seeking payment of \$29,975.32. The demand letter was returned as unclaimed.

**Investigation:**

Agency Assurance and Compliance Office ("ACO") conducted a review/investigation of matters concerning the bus conversion. ACO identified a number of issues of non-compliance with policy and determined that staff had:

- Modified the terms and conditions of the contract without executing a contract modification.
- Facilitated payment for goods and services not received under the contract.

ACO's review/investigation of matters led to a corrective action request. As a result of the review/investigation Agency took a number of actions including the issuance of disciplinary to Grievant and to two other employees involved in this matter. All three individuals received Written Notices.

Agency was concerned with Grievant's facilitating payment for goods and materials that were not, in fact, received by Agency. Agency was also concerned the \$60,023.74 payment made was not provided



for within the terms and provisions of the contract. No contract modification had been executed authorizing it to be made.

There is no evidence indicating Grievant or any Agency personnel received any personal benefit or compensation in matters associated with the bus conversion.

**Grievant:**

Grievant raised a number of contentions including:

- Pressure to spend prior to the end of the fiscal year.
- Corporation needed assistance as they did not have the money to keep moving forward at the pace Agency desired.
- As he did not receive the written Contract Administration delegation document, he wouldn't be capable of fully understanding his responsibilities.
- Contract Officer indicated payment could be made as long as Purchase Order documentation was received supporting the items were on order.
- He signed the invoice only to show having received the invoice with Purchase Orders and did not sign the invoice to indicate actual receipt.

Grievant contends he never accepted or received in writing his responsibilities as the contract administrator.

Contract administration is required to be delegated in writing and specific delegated tasks should be outlined in the designation letter. Grievant has been designated contract administrator ("CA") numerous times prior to the bus conversion contract and he has attended Agency contract administrator training prior to the bus conversion matters. Management noted in the Written Notice he has been a contract administrator for 10 plus years. On a number of prior occasions Grievant was provided the Agency memorandum form setting forth generic responsibilities when designated contract administrator.

Agency Exhibit 9 entitled ASD-30 "Supplemental Form for Requisitions" dated February 24, 2012, regarding requisition [number] and describing, "Alteration Services to a Faber Specialty Vehicles K2 Motor Coach that upon completion will be used as [Agency] statewide Mobile Command Center" does indicate in writing/designate that Grievant is the "Contract Administrator". This document sets forth, among other matters, the contract period, estimated value, funding source, and suggested vendors.

Agency indicated their practice had been to designate in writing the Contract Administrator and the Contract Administrator's duties when there was an award of a contract but not when there was an award of a Purchase Order and the bus conversion involved issuance of a Purchase Order. Agency further indicated use of a generic list of responsibilities for Contract Administrators and testimony indicated that Grievant had been provided this generic list of responsibilities in the past on numerous occasions. Agency further indicated Grievant was typically the Contract Administrator within his Division. Grievant's EWP notes 45% devoted to contract management.

Grievant was involved from the start with the bus conversion project. He requested the conversion of the bus and he was the person who Agency communicated to regarding the specifications. Grievant was in contact with the Corporation and was in contact with the Contract Officer.

Grievant does not contest he signed the invoice for \$60,024.74 under the RECEIVED stamp or that it was signed in furtherance of securing its payment by Agency. The invoice form indicated "BILL TO:" with Agency name, address, and Grievant's name typed in. The invoice further indicated "DATE IN" of "April 23, 2012". The invoice set forth "QUANTITY", "DESCRIPTION" (of goods), "UNIT PRICE", and "AMOUNT" (quantity x unit price) with a total of \$60,023.74 indicated. A number of documents were attached concerning materials. These documents are labeled invoice, order-parts breakdown, Production Order, etc. and generally identified goods or materials but most often did not provide price information.

On the face of the document, looking at the Invoice with the affixed stamped words, handwriting, and signature, the document indicates a certification that the goods and materials itemized (with Quantity, Description, Unit Price, and Amount) were received and that this was being so certified by the signature thereon (i.e. Grievant's signature). The invoice certification (the RECEIVED Stamp information imprint on the invoice with signature and handwriting) does not indicate Grievant signed the invoice only to show having received the invoice with Purchase Orders. The invoice certification indicates an actual receipt of the materials being acknowledged. It states on its face and Grievant certified in writing "materials" received and not "purchase orders" received.

Grievant contends Contract Officer told him as long as the Corporation provided an invoice and purchase orders identifying items that were to be received, Agency could make payment for the materials. This is contested by Contract Officer. Grievant presented a witness indicating Contract Officer said in a conversation Grievant could make a payment for materials but he can't pay for anything sight unseen he hasn't laid his hands on, he can't pay up front moneys to keep a contractor working, but also, later in the conversation, said he could make payment on materials if he pays off a purchase order and has a copy of the purchase order. The witness was not sure when the statement was made or if it was made in person or in a call. Neither Grievant nor anyone else has any documentation, e-mail, or letter confirming this matter. The witness, when asked, indicated the conversation may have got confusing. Contract Officer received a Written Notice concerning matters related to the bus conversion.

The evidence indicates Grievant made a certification which on its face indicated he was certifying the receipt of materials totaling \$60,023.74 but he did not actually inspect or verify the materials were present. The evidence also indicates he did so to facilitate a payment of \$60,023.74 which was being made to Corporation. Additionally, as a payment for materials was not provided for in the contract, the payment acted to modify the terms and conditions of the contract and this was done without executing a contract modification.

Grievant points out that he was not at work when the invoice was received on June 4, 2012 or at work on June 6, 2012. The evidence indicates he wrote in the date of 6-6-12 below his signature.

Grievant contends he was under pressure from management to make payments before end of the fiscal year due to possible funding concerns. Testimony indicated there was concern that this project could be at risk and Agency may lose funding, have to cancel the project, and have to re-advertise at later date when funding is received. It was also noted that there is a push each year at the end of the fiscal year concerning moneys and to spend or pull back moneys. However, testimony also indicated concerns as to funding are not a justification for operating outside of policy.

Of import in this case is a very basic consideration. Grievant signed an invoice certifying and indicating on its face (as discussed above) that the materials listed in the invoice were received when in fact the materials listed were not inventoried or determined by Grievant to have actually been received. The invoice certification clearly stated "materials" received and did not state "purchase orders" received. The

invoice certification was signed and was made for the purpose of furthering the process of obtaining payment. Grievant was aware or should have been aware that the plain wording of the certification he signed would indicate he was certifying the materials were actually received and that this certification would be viewed in the process required for issuing payment.

Agency furnished at least one document indicating Grievant designation of Contract Administrator and he has considerable experience as a Contract Administrator and was acting as Contract Administrator. Aside from any issues as to his designation and/or any authority provisions, there remains the fact that Grievant was an employee who, while on the job, provided a certification/documentation of receipt of goods that were not actually received. This certification/documentation was justifiably relied upon in the course of the Agency's business.

It was subsequently determined \$29,975.32 worth of goods were missing of the invoice list of the \$60,023.74 paid for by Agency. Even if the Corporation claims that \$3,000.00 of the \$5,000.00 amount for paint supplies was used, the total amount paid for unaccounted for materials would be \$26, 975.32.

Grievant knew or should have known his written certification would be viewed as it was written and relied upon, as it was written, in the payment process. Receipt of goods and documentation of that receipt was required by policy in the payment process and is a valid business concern of Agency. Irrespective of any statements that may or may not have been made by a Contract Officer, Grievant's documentation indicated, on its face, a receipt of the materials invoiced and not a receipt of the Purchase Orders for the materials invoiced for payment.

Agency has met its burden that Grievant's actions constituted unsatisfactory performance and/or failure to follow policy.

***Due Process:***

Grievant was provided a Due Process Memorandum (dated August 15, 2013) with a copy of ACO's report attached. The Memorandum expressed the intent to issue Grievant a Group II Written Notice for failure to follow instructions and/or policy and set a meeting to discuss matters on 8/16/13 at 4:00 p.m. Agency afforded Grievant notification of the offense, an explanation of agency's evidence in support of the charge, and a reasonable opportunity to respond after receiving notification. Grievant provided information that Agency took into consideration.<sup>18</sup>

***Mitigation:***

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with the rules established by the Department of Human Resources Management ...".<sup>19</sup>

Under the *Rules for Conducting Grievance Hearings*, "A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a Hearing Officer may mitigate the agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation."<sup>20</sup>

---

<sup>18</sup> A. Ex. 3. pg. 3-7.

<sup>19</sup> Va. Code §2.2- 3005.

<sup>20</sup> Rules for Conducting Grievance Hearings § VI. B. 2.

Agency took into consideration mitigating circumstances and reduced its discipline from a Group II Written Notice to a Group I Written Notice. The Hearing Officer does not find that the agency's discipline exceeds the limits of reasonableness.

### **CONCLUSION**

For the reasons stated above, based upon consideration of all the evidence presented at hearing, reviewing the facts *de novo* (afresh and independently, as if no determinations had yet been made), 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 and Agency's discipline does not exceed the limits of reasonableness.

### **DECISION**

For the reasons stated above, the Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group I Written Notice was warranted and appropriate under the circumstances and the Agency's issuance 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 DHRM Director.** 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](mailto:edr@dhrm.virginia.gov)).

**b. Final Hearing Decisions:**

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

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision.

**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. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR.

---

Lorin a. Costanzo, Hearing Officer