

Issues: Group I Written Notice (failure to follow policy), and Group III Written Notice with Termination (abuse of State time and unauthorized use of State property);
Hearing Date: 11/03/14; Decision Issued: 12/23/14; Agency: DBHDS; AHO:
Ternon Galloway Lee, Esq.; Case No. 10437, 10475; Outcome: Partial Relief;
Attorney's Fee Addendum issued 01/13/15 awarding \$12,435.00.

DECISION OF HEARING OFFICER

In the matter of

Case Numbers: 10437 and 10475

Hearing Dates: November 3 and 18, 2014

Decision Issued: December 23, 2014

SUMMARY OF DECISION

The Agency had found Grievant violated Agency Policy 053-62, Mutual Respect Through Adherence to Vision, Mission, and Values. It then issued Grievant a Group I Written Notice. The Hearing Officer found the Agency failed to meet its burden to show a violation of Agency Policy 053-62 and therefore the written notice was against state policy. Hence, the Agency was ordered to rescind the Group I Written Notice.

The Agency had also found that Grievant abused state time and engaged in the unauthorized use of state property. The Agency then issued Grievant a Group III Written Notice with removal. Regarding the unauthorized use of state property, the Hearing Officer found the Agency met its burden and showed that Grievant engaged in this offense. She further determined the offense was a Group II offense, not a Group III. Regarding the alleged abuse of state time, the Hearing Officer found the Agency failed to meet its burden to show Grievant abused state time. Moreover, the Hearing Officer found that the Agency failed to meet its burden and establish a legitimate, material business reason for enhancing the Group II Offense. Hence, the Hearing Officer determined the Group III Written Notice with removal was inconsistent with policy 1.60. The Agency was then ordered to amend the Group III Written Notice with removal to a Group II Written Notice for the unauthorized use of state property. In addition, the Hearing Officer ordered 10 days suspension without pay, reinstatement with back pay, and restoration of appropriate benefits and seniority.

HISTORY

On June 27, 2014, the Agency issued Grievant a Group III Written Notice with removal. Specifically, the notice alleged that Grievant abused state time and engaged in the unauthorized use of state property. (A Exh. 10). In addition, the Agency issued Grievant a Group I Written Notice (reduced from a Group II Written Notice). This notice contended that Grievant failed to show mutual respect through adherence to vision, mission, and values of the Agency on June 3, 2014, and other times. (A Exh. 1). Particularly, the Agency alleged that Grievant displayed a disrespectful demeanor towards a hospital vendor as evidenced by Agency staff and vendor complaints. (A Exh. 1). On or about July 24, 2014, Grievant timely filed his grievances challenging the Agency's multiple group notices. (A Exhs. 3 and 12). By ruling issued on September 29, 2014, the Office of Employment Dispute Resolution (EDR) consolidated the grievances filed by Grievant. EDR then assigned the undersigned as the hearing officer to the

consolidated grievance, effective October 6, 2014. (HO Exh. 19).

The Hearing Officer held a telephonic prehearing conference (PHC) on October 14, 2014.¹ During the PHC the parties represented a need for a two (2) day hearing. Being mindful that the Grievance Procedure Manual (GPM) anticipates grievance hearings will conclude in one day, the Hearing Officer determined that fairness dictated scheduling the multi-day hearing requested by the parties. Hence, the Hearing Officer set the hearing for November 3 and 18, 2014.² She issued a scheduling order/directives that, among other matters, set forth the hearing dates and due date for the exchange of witness lists and exhibits.

The Agency moved to exclude from testifying any witnesses of Grievant that were not identified within the timeframe set forth in the scheduling order. The Agency similarly objected to Grievant's proposed exhibits not disclosed by the deadline. After hearing arguments from the parties regarding this motion during a subsequent prehearing conference, the Hearing Officer ruled as follows:

- (i) Grievant's exhibits 1 through 7, 10, and 11 were admitted as evidence during the course of the hearing upon demonstration of relevance and lack of prejudice to the Agency. The Agency's motion to exclude Grievant's witnesses from testifying was denied;
- (ii) In fairness, the Agency was granted leave until 11:59 p.m. on November 10, 2014, to submit additional exhibits and identify additional witnesses to testify on day 2 of the hearing.³

(HO Exh. 23).

The Hearing Officer determined the Agency's disclosures were timely filed.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. As noted above, discussions ensued about Grievant's untimely disclosures. During the hearing the Hearing Officer admitted Agency Exhibits 1 through 16, and as noted above, Grievant's exhibits 1 through 7, 10 and 11 were admitted. Moreover, during the course of the hearing, the Hearing Officer exhibits 1 through 23 were admitted.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party. Further, the parties were granted leave to submit written closing arguments by December 5, 2014.

During the proceeding, the Agency was represented by its advocate. Grievant was represented by his advocate/attorney.

¹ This was the initial availability.

² The parties agreed to this scheduling.

³ Although provided this opportunity, the Agency offered no further witnesses and exhibits.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (6 witnesses)
Grievant's Advocate/Attorney
Grievant
Witnesses for Grievant (7 witnesses, including Grievant)

ISSUE

Was the Group One Written Notice warranted and appropriate under the circumstances?
Was the Group Three Written Notice with removal warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). A preponderance of the evidence is defined as evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

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

1. Grievant had been employed as a fulltime dentist of the Agency⁴ from on or about August 2004, until his termination on June 27, 2014. Immediately preceding this employment, Grievant had maintained a full time private dental practice while working one day a week for the Agency. (A Exh. 10; Testimony of Grievant). Once employed full time by the Agency, Grievant was required to obtain permission to engage in outside employment. (Testimony of Grievant; A Exh. 15; G Exh. 3).
2. Consequently, to continue his private practice after becoming a fulltime employee of the Agency, Grievant annually submitted a completed form titled "Request to Engage in Outside Employment." Grievant received permission each year to maintain a private dental practice for about 2 hours per day. Grievant reported to his private practice after the end of his work shift at the Agency. (A Exh. 15; G Exh. 3; Testimony of Grievant).
3. In pertinent part, the outside employment form contained the following language:

I request approval to engage in paid employment outside my position with the Department as detailed below. I hereby certify by

⁴ The Agency is a facility of the Department.

my initials that the outside employment will not:

_____ Take place during any hours I am expected to work for the Department.

_____ Interfere with my ability to devote the expected time and attention to my work or duties with the Department or compromise my ability to perform my official duties effectively and impartially or give any appearance of impropriety that would reflect on the Department, facility or my position.

_____ Involve the use of property belonging to or under contract with the department.

(G Exh. 3; A Exh. 15).

4. At the bottom of the form's first page appears a statement typed in bold. This statement informs the applicant/Grievant that the request for outside employment will not be considered unless the employee initials each of the blanks. Grievant initialed the blanks. He therefore certified that he would not engage in the activities set forth in the statements next to each blank. (G Exh. 3; A Exh. 15).

5. On the next page of the outside employment request form, Grievant certified that the outside employment would involve dental practice for about 10 to 15 hours a week. Grievant signed the statement, further indicating that his employment with the Agency would take precedent over any outside work. Based on Grievant's certifications and signature, management approved his request for outside employment. (A Exh. 15; G Exh. 3).

6. Sometime prior to June 18, 2014, Dental Assistant reported to the Agency's Director that Grievant was performing work for his private patients at the Agency location and/or Grievant was using state equipment for his private patients. (Testimonies of Dental Assistant and Agency Director).

7. Upon receiving this report, the Agency Director instructed Dental Assistant to inform him the next time the alleged offense occurred.⁵ (Testimony of Agency Director).

8. Next, on June 18, 2014, Dental Assistant telephoned the Agency Director and informed him that Grievant had been performing work for his private patients at the Agency and there was evidence of such in the lab. Agency's Director then arrived at the dental lab and caused the Agency's security officers to take four (4) pictures of what was alleged to be evidence of Grievant working for his private patient in the Agency's dental lab. Agency Exhibit 13 contains the photos. (Testimonies of Dental Assistant and Agency Director; A Exh. 13).

⁵ The evidence is insufficient to determine the exact date this report was made to Agency's Director.

9. Thereafter, Grievant's immediate supervisor (Immediate Supervisor/Supervisor), the Agency's Director, the Human Resource Director, and the Agency's Director of Human Resource met to discuss the allegations that the Dental Assistant had presented to the Agency's Director. In addition, as discussed in more detail below, the group deliberated about allegations that Grievant was rude and disrespectful to staff and others affiliated with the Agency. (Testimonies of Agency Director and Supervisor).

During this initial meeting the group reviewed the 4 photos that were taken at the dental lab on June 18, 2014, purportedly illustrating that Grievant was using the Agency's property/making dentures for his private patients. The meeting concluded with the group deciding that Grievant's supervisor would investigate the matters. (Testimonies of Agency Director and Supervisor).

10. Concerning the use of state equipment, Supervisor's investigation consisted of his (i) reviewing at least one of the referenced photos taken on June 18, 2014, and (ii) meeting with Grievant. During that meeting, Grievant admitted he brought in materials/molds from his private practice and worked on a dental matter involving one of his private patients. He also informed Supervisor that he believed this activity was acceptable to perform during his "down time." To that statement, Supervisor informed Grievant that his action on June 18, was inappropriate. Upon further questioning, Grievant informed Supervisor that he had engaged in such practice eight to nine times previously. (Testimonies of Supervisor, Agency Director, and Grievant; A Exh. 12, p. 13).

11. After this investigation, another meeting then took place with Supervisor, Agency Director, Human Resource Director, and the Agency's Medical Director. At this second meeting the group recommended Grievant receive a Group I for violating the mutual respect policy and Group III with removal for unauthorized use of state property and abuse of state time. (Testimony of Agency Director; A Exhs. 2 and 11).

12. On June 19, 2014, a meeting was held with Grievant, Supervisor, Director of the Agency, Medical Director of the Agency, and the Human Resource Director. At that time Grievant was informed of the recommended disciplinary action - a Group I for disrespectful behavior and a Group III with removal for using the Agency's equipment for his private patients. (Testimony of Supervisor and Director of Agency).

13. The Agency then provided Grievant with an opportunity to respond to the accusations and proposed discipline. Accordingly, on June 23, 2014, Grievant submitted his written reply. (A Exh. 3, pp. 9 – 10).⁶

14. In his written response Grievant denied being rude. Also, in pertinent part regarding the Group III Written Notice, Grievant stated:

⁶Grievant contends the time allotted for him to respond was inadequate due to multiple allegations of misconduct lodged against him. No evidence was presented that Grievant requested additional time to respond. (A Exh. 12, p. 2).

I have never used [Agency] property or supplies to manufacture dentures for patients other than [Agency] patients.

[Dental Assistant's] email concerning my use of stone purchased by [ESH], as well as her statement that I left a mess for her to clean up are both untrue.

In the past 10 years I have used the vibrator or the model trimmer maybe 9 or 10 time [sic] to make models for my own use. I brought in and used my own stone and never left a mess. I only poured and trimmed the models either during my 15 minute breaks or during lunch. I only used the vibrator and the trimmer because I thought that as long as I was not removing any [Agency] property from the hospital it was alright.

(A Exh. 12, p. 13).

15. A reasonable interpretation of “In the past 10 years” is events happening within and inclusive of the last 10 years. As applied to this case, the Hearing Officer finds that “in the past 10 years” means occurring between and inclusive of 2004 and 2014. (HO’s finding determined from Grievant’s June 23, 2014 statement and normal inferences of the phrase).

16. Accordingly, The evidence establishes Grievant performed work involving his private patients at the Agency about 10 times between 2004 and 2014. That work was performed during Grievant’s lunch and break times. The evidence is insufficient to establish the work was performed during other times at the Agency. (A Exh. 12, p. 13; Testimony of Supervisor).

17. Grievant’s statement on his Grievance Form A, Attachment 2a states in pertinent part that “[T]he offense entails using less than a ½ cup of water and powdered stone, a vibrator and model trimmer for less than 2 minutes total.” (A Exh. 12, p. 7). Moreover, Grievant brought his mold/tray from his private practice to the Agency’s dental lab on or about June 18, 2014. (Testimony of Grievant).

18. Grievant used state property for a private patient while at the Agency on or about June 18, 2014. The evidence is not sufficient to determine the exact time Grievant used the state property for his private patient during that time. (Testimony of Supervisor; Testimony of Grievant).

19. Grievant’s lunch time is considered non-paid time. His break times are considered paid time. Both lunch time and break times are a reprieve from work. (Testimony of Agency Director).

Both lunch time and break time provide an employee a rest or break from his/her job tasks at the Agency. (Reasonable description of these periods).

20. On June 27, 2014, the Agency issued Grievant a Group III Written Notice with removal. The notice describes the nature of the offense and evidence as follows:

You were found to have used [Agency] and state property/supplies to manufacture dentures for patients other than [Agency] patients as evidenced by dentures in the Dental Office and the machine showing signs of use (not being cleaned). This is a violation of DHRM Policy 1.60 Standards of Conduct: Abuse of State Time and Use of State Property. (A Exh. 10).

21. Unauthorized use or misuse of state property is normally a Group II offense. (Standards of Conduct Policy 1.60 (Policy 1.60), Attachment A, Group II Offenses).

22. Abuse of state time is normally a Group I offense. (Standards of Conduct Policy 1.60 (Policy 1.60), Attachment A, Group I Offenses).

23. The Agency elevated Grievant's offenses to a Group III. (A Exh. 10).

24. Grievant challenged the Agency's elevation of the offenses to Group III offense. (A Exh. 12, p. 7).

25. Under Policy 1.60, if management's elevated discipline is challenged through the grievance process, management must establish its "legitimate, material business reason(s) for elevating the discipline..." (Policy 1.60, Attachment A, Note).

26. The evidence is insufficient to establish that Grievant neglected Agency patients or stole from the Agency. (Testimony of Dentist 2; Testimony and documentation of Dental Assistant not persuasive; Testimony of Grievant).

27. Dental Assistant worked in the dental clinic from 1996 to 2002, with Dentist 2 who was her immediate supervisor. (Testimonies of Dentist 2 and Dental Assistant). In 2002, Dental Assistant 2 caused Dental Assistant to be removed from the dental clinic because problems arose between Dentist 2 and Dental Assistant. Dental Assistant described the problem in part as Dentist 2 refusing to talk to her. (Testimony of Dentist 2; Testimony of Dental Assistant). However, Dentist 2 described Dental Assistant as one who

- Fabricated things;
- Falsified her credentials;
- Intimidated employees;
- Destroyed consultations;
- Maintained unofficial records and is of questionable integrity

(Testimony of Dentist 2).

28. Dentist 2 testified credibly. During his testimony, he stated that he was a Vietnam veteran and would rather be in Vietnam than deal with a personality like Dental Assistant. (Testimony of Dentist 2).

29. Dentist 2 testified that Dental Assistant caused stress in the dental clinic. As an example he stated that Dental Assistant would claim he was hollering at her and documenting untruths

about him. He stated that it got to the point that he would call security on her. (Testimony of Dentist 2).

30. Dental Assistant contends she began documenting Grievant in 2009. Dental Assistant admits at least some of her documentations are based on her assumptions. (Testimony of Dental Assistant)

31. The total accuracy of Dental Assistant's documentation pertaining to Grievant from 2009 to June, 2014, cannot be established as determined by the assessment of Dental Assistant's demeanor and credible testimony of other witnesses. (Testimonies of Dental Assistant, Grievant, and Dentist 2; A Exh. 14; G Exh. 1).

Group I Written Offense

June 3, 2013 Alleged Offense

32. Purchasing Director was responsible for the overall operation of goods, supplies, and services provided to the Agency. Moreover, he was responsible for assuring that the Agency operated consistent with applicable law. His tasks, among others, included purchasing goods and services for the Agency. (Testimony of Purchasing Director).

33. The Agency purchased a service whereby Vendor would supply dental labs/jackets for the Agency to be used in the dental clinic. Grievant, the Agency's dentist, and his dental assistant wore the jackets. Legitimate concerns arose concerning the quality, appearance, and possible sanitation of the lab coats provided by Vendor. To address these problems a meeting was held on June 3, 2013. Those in attendance at the meeting included Grievant, Purchasing Director, Vendor's manager, and Vendor's driver. (Testimonies of Purchasing Director, Agency Witness 1, and Grievant; A Exh. 4).

34. During this meeting, the participants went to the dental lab. Grievant then presented samples of the lab coats to the Vendor's representatives to show the problems with them. Purchasing Director described the discussion as becoming tense. Purchasing Director described Grievant as becoming visibly angry as evidenced by Grievant speaking in "a loud and boisterous manner." Purchasing Director could not remember the exact language used by Grievant. He stated Grievant probably used colorful adjectives and, in his opinion, the level of Grievant's anger was inappropriate to address the issues with the lab coats. Purchasing Director does not assert Grievant used profanity. (Testimony of Purchasing Director).

35. Purchasing Director has known Grievant as an employee at the Agency for at least 10 years. In Purchasing Director's opinion, June 3, 2013, was the first time Grievant had displayed unprofessional behavior. Purchasing Director retired from the Agency at the end of 2013. In his view, there were no other incidents of Grievant displaying unprofessional behavior while Purchasing Director remained employed by the Agency. (Testimony of Purchasing Director).

36. Subsequent to the June 3, 2014 meeting, Purchasing Director and Vendor's manager at the time engaged in telephone conversations about the dental jackets. Then, on June 4, 2013,

Purchasing Director sent an email to Vendor as a follow up to the June 3, 2013 meeting. Neither the telephone conversations nor email mentioned any allegation of rudeness or unprofessionalism by Grievant during the June 3, 2013 meeting. (Testimony of Purchasing Director; A Exh. 4).

37. At the time, Purchasing Director did not report to his supervisor or Human Resources that Grievant had failed to show mutual respect during the June 3, 2013 meeting. (Testimony of Purchasing Director).

38. The evidence is insufficient to establish Purchasing Director expressed strong disapproval of any comments made by Grievant during the June 3, 2013 meeting. (Testimony of Purchasing Director).

39. Grievant's annual performance evaluation was issued by his supervisor on September 30, 2013. This evaluation does not indicate Grievant had displayed any unprofessional behavior during the annual period that his performance was judged. (G Exh. 6).

Pre-2014 Alleged Offense Involving Administrative Office Assistant

40. Agency Witness 1, the Administrative Office Assistant of Purchasing Director engaged in a telephone conversation with Grievant sometime before 2014.⁷ The conversation was about the Agency acquiring a Vendor to supply dental jackets for the dental lab. Grievant had requested a certain jacket from a particular vendor. (Testimony of Agency Witness 1; A Exh. 8).

41. In her version of what occurred during the telephone conversation, Agency Witness 1 states that when she informed Grievant that the Agency was not able to obtain the dental jackets he desired, Grievant would not listen to her and became loud and rude. Agency Witness 1 stated that Grievant did not use profanity, but she became "uncomfortable" because he was screaming. (Testimony of Agency Witness 1; A Exh. 8).

42. Agency Witness 1 wrote a statement June 26, 2014, describing the alleged incident. This was at least six months after the alleged incident occurred. (A Exh. 8). This statement was written at the request of her current supervisor. (Testimony of Agency Witness 1; A Exh. 8).

43. The evidence fails to show that this pre-2014 incident was immediately reported by Agency Witness 1 or her supervisor, Purchasing Director. (A Exh. 8).

June 3, 2014 Incident

44. On June 3, 2014, Vendor's driver delivered dental jackets to the dental lab. Vendor's driver (driver) and Grievant engaged in a conversation whereby Grievant informed driver that the coats were not acceptable because they smelled like gas. The driver sniffed the jackets and stated that they did not smell like gas. Grievant continued to refuse the jackets and instructed the driver to return them to the Vendor. The Driver then stated words to the effect of "you don't

⁷ The evidence was insufficient to establish the exact date. However, the evidence did show this incident occurred before the Purchasing Director's January 1, 2014 retirement. (Testimony of Agency Witness 1).

have to talk to me like that, I'm trying to work with you." Grievant then replied with words to the effect of "You don't tell me how to talk and you are not attempting to work with me." (A Exh. 8; Testimony of Vendor's Representative).

45. Agency Witness 2 observed the conversation between the driver and Grievant. Two days later she wrote a statement as requested by her supervisor regarding her perception of what occurred. That statement in pertinent part reads as follows:

"[Grievant] smelled them told him in a rude way to take them back, they smelled like chemicals..."

(A Exh. 6).

46. Agency Witness 2 described Grievant as being upset and frustrated during the incident because the Vendor had brought stained jackets with offensive odors on at least two other occasions. Grievant did not use profanity on those occasions. (Agency Witness 2).

Agency Witness 2 provided no objective definition of "rude." (Testimony of Witness 2).

47. Vendor's Representative was not present during the June 3, 2014 incident. He wrote a statement about it 27 days later however. On the day Vendor's Representative drafted the statement, the driver was present and provided input for the statement. The written statement was not signed by the driver. (Testimony of Vendor's Representative; A Exh. 8).

48. Vendor's Representative testified that Vendor has the desire to continue to work with the Agency. (Testimony of Vendor's Representative).

49. A letter dated June 3, 2014, was sent to the State Waste, Fraud and Abuse Hotline. It reports, among other things, overhearing Grievant yelling at the Vendor's driver on June 3, 2014. The letter is unsigned and the author is not known. (A Exh. 5). The Grievant, through counsel objected to this anonymous letter.

Group I Written Notice

50. As mentioned above, Management also issued Grievant a Group I Written Notice on June 27, 2014. The nature of the offense was described as follows:

You were found to have a disrespectful demeanor towards a hospital vendor as evidenced by [Agency] staff and vendor complaints. This constitutes a violation of [Agency] Policy 053-62, Mutual Respect Through Adherence to Vision, Mission, and Values of [Agency]. (A Exh. 1).

51. The group notice noted Grievant committed the offense on June 3, 2014 as well as on various other unspecified dates. (A Exh. 1.)

52. Policy 053-62 mandates that all employees, among others, “treat each other with dignity and respect, as well as promote an environment which is free of disruptive behaviors.” (A Exh. 9, p. 1). In pertinent part, the policy notes that the following list of behaviors (not all inclusive) will subject those involved to corrective progressive disciplinary action under the Standards of Conduct:

- Workplace harassment as defined in DHRM Policy No.
- Intimidating and disruptive behaviors include overt actions such as verbal outbursts and physical threats, as well as passive activities such as refusing to perform assigned tasks or interfering with someone being able to complete his/her assigned duties;
- Sexual Harassment;
- Profane/derogatory language of any kind in jokes, written material or electronically transmitted material;
- Racial slurs or any kind, e.g. in jokes, written material or electronic transmitted material;
- Disrespectful language (name calling, racial/ethnic jokes, etc.);
- Remarks about a person's health, stature, physical appearance which may be perceived as derogatory;
- failure to comply with confidentiality regulations;
- retaliation, overt or covert acts of reprisal, interference, discrimination, intimidation, or harassment against an individual or group, for reporting any of the above behaviors/actions or helping with an investigation into disruptive behavior.

(A Exh. 9, pp. 2-3).

53. Moreover, in pertinent part, the policy mandates the following:

Individuals must report incidents that they believe violate this policy to their supervisors **as soon as possible after the incident occurs. Supervisors should notify Human Resources immediately upon receipt of an allegation of a violation of this policy.** (Emphasis added).

(A Exh. 9, p.3).

54. In addition, the policy, in relevant part, requires managers to take the actions noted below:

Stop any harassing, disruptive or unacceptable behavior of which they are aware,

whether or not a complaint has been made;

Expressed strong disapproval of all forms of unprofessional, rude, discourteous, disruptive behavior contrary to help values;

Ensure that employees have knowledge of this policy and that it is readily accessible to those without convenient computer access.

(A Exh. 9, p. 3).

55. On June 3, 2013, the evidence does not establish that Purchasing Director expressed strong disapproval of any alleged unprofessional conduct of Grievant. In addition, Purchasing Director conversed with Vendor after the June 3, 2013 meeting. Purchasing Director also sent the Vendor's manager a follow up email the next day. During these modes of communication, there was no mention or apology concerning Grievant conducting himself in an unprofessional manner at the June 3, 2013 meeting. (A Exh. 4, Testimony of Purchasing Director).

56. None of Grievant's performance evaluations by his supervisor or his peers indicated that Grievant lacked a professional demeanor. In fact all of his evaluations, to include his final annual evaluation dated September 30, 2013, rated him a contributor or more. (G Exhs. 4 through 7).

Grievant's fall 2013 annual evaluation was issued three months after the alleged June 3, 2013 incident. Nothing is reflected in that evaluation about Grievant displaying unprofessional behavior.

57. Grievant had no disciplinary record. Further, the evidence establishes Grievant had not been accused of violating Policy 053-62 in the past. Although the Agency contends Grievant violated this policy, no progressive discipline was utilized. (Testimony of Director and Supervisor; G Exhs. 4 through 7).

58. Other Agency staff had concerns about the quality of Vendor's product. For example, the Agency had observed grease smudges on the dental jackets, wrinkles, etc. Complaints about the product had been provided to the Agency's district manager. The District Manager had indicated he would resolve the matter. (Testimony of Agency Witness 1).

59. Regarding Vendor's product, Agency Witness 1 emailed Grievant and informed him the problem with the jackets was taken care of. But Vendor returned with jackets that smelled of gas to Grievant. (Testimony of Agency Witness 1 and 2).

60. Agency Witness 1 is not familiar with Agency Policy 053-62 regarding mutual respect. (Testimony of Agency Witness 1).

61. Grievant's Witness 2 came to Grievant on short notice in early June 2014 as a private

dental patient and requested that Grievant repair her dentures as she was about to leave for a trip to Alaska. Grievant agreed to undertake the repair. (Testimonies of Grievant and Grievant Witness 2).

DETERMINATIONS 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. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent 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 resolution of employment 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 Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 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 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.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or of a repeat nature that require more formal discipline. The Standards of Conduct notes that it is appropriate to categorize an offense as a "Group II" when it significantly impacts business operations and/or constitute neglect of duty ... the abuse of state resources, violations of policies, procedures or laws. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

On June 27, 2014, management issued Grievant a Group I Written Notice and a Group III Written Notice with removal for the reasons stated in the above section. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue(s) before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the alleged conduct? Further, if so did that behavior constitute misconduct?

1. Group III Written Notice

The Agency contends that Grievant (i) used Agency property for patients other than the Agency's and (ii) abused state time.

a. Unauthorized Use of State Property

The Hearing Officer now addresses the allegation regarding property abuse. Under the relevant Agency policy regarding outside employment, an employee granted leave to engage in such employment is precluded from using the Agency's property for that outside employment. The evidence demonstrates that even though Grievant annually certified by his initials and signatures that he would adhere to this policy, he failed to do so.

On this issue, Grievant twice acknowledged using Agency property for his private use in writing. First, in responding to the Agency's notice that it intended to issue Grievant a Group III Written Notice with removal for violating the referenced policy, Grievant wrote in pertinent part the following:

In the past 10 years I have used the vibrator or the model trimmer maybe 9 or 10 time [sic] to make models for my own use. I brought in and used my own stone and never left a mess. I only poured and trimmed the models either during my 15 minute breaks or during lunch. I only used the vibrator and the trimmer because I thought that as long as I was not removing any [Agency] property from the hospital it was alright.

Second, when completing his grievance "Form A" to challenge the "unauthorized use of property charge," Grievant acknowledged engaging in certain actions. Specifically, he wrote (referring to the unauthorized use of state property on June 18, 2014) "the offense entails using less than a ½ cup of water and powdered stone, a vibrator and model trimmer for less than 2 minutes total."

Moreover, during the hearing Grievant admitted that he brought one of his own dental trays/mold into the office on or about June 18, 2014. Grievant's testimony lacked clarity on what he did with the mold/tray once he brought it to work at the Agency. Even with this ambiguity, other evidence implicates Grievant with using state property for his private patients, to include doing so on or about June 18, 2014. This evidence includes the following:

- prior written statements referenced above;
- Grievant agreeing on June 9, 2014 to repair the dentures of a private patient who needed them soon prior to leaving for a vacation;
- Grievant's admission to his supervisor that he brought a tray/mold to work on June 18, 2014;
- Grievant informing his supervisor that he performed work for his private pay patients during his down time at the Agency;
- June 18, 2014 Picture of Grievant's mold/tray used for his private patients.

In the above listing, the Hearing Officer has referenced the testimonies of Grievant and his supervisor. She had the opportunity to observe the demeanor of these witnesses and give their testimony the weight deemed appropriate.

In addition, the Hearing Officer has carefully considered all the evidence. The Hearing Officer finds that whether Grievant used the Agency's dental equipment to simply trim his models for his private dental practice (as alleged at one point by Grievant) or actually manufactured dentures for his private patients (as asserted by the Agency), the evidence clearly establishes that Grievant used the Agency's equipment for private use. Further, this activity occurred from 2004 to 2014. In making this determination, the Hearing Officer is cognizant of the assertion that Grievant only used the Agency's property prior to his September 2004 orientation to becoming a fulltime employee. This argument is not persuasive considering Grievant has admitted he used the Agency's property for his private patients about 9 or 10 times "in the past 10 years." The reasonable interpretation of "within the last 10 years" is between 2004 and 2014, inclusive of those years.

Moreover, the Hearing Officer has considered Grievant's alternative argument that he thought his activities involving his private practice at work was acceptable. This argument is also unconvincing. Of note, Grievant testified that once he attended the September 2004 orientation for fulltime staff he knew it would be a mistake to bring in work from his private practice. In addition, each year he initialed and signed the request to engage in outside employment. The certification clearly acknowledged in writing that use of state property for outside employment was prohibited. Thus, the Hearing Officer finds that Grievant knew or reasonably should have known that his use of the Agency's property for his private patients was prohibited. Therefore, the Hearing Officer finds that Agency has clearly shown Grievant violated this policy.

b. Abuse of State Time

The Hearing Officer now focuses on the contention that Grievant abused state time. The Hearing Officer finds that the evidence is insufficient to show that Grievant performed work for

his private patients during times other than his lunch or break times. The Hearing Officer identifies the real issue as whether lunch or break time is considered state time and whether Grievant abused state time if work for private patients was performed during those times. Agency Director testified that lunch time is non-paid time and break time is paid time. The Hearing Officer finds that it is reasonable to expect that employees are not expected to perform Agency work during their break times, to include lunch time. During a break, employees do not perform work for the Agency. Accordingly, the Hearing Officer does not find Grievant doing work for private patients during his breaks was an abuse of state time. Otherwise, simple activities such as an employee making personal telephone calls on his/her mobile telephone during a break or checking personal emails on same would constitute abuse of state time. Thus, the Agency has failed to meet its burden and show Grievant abused state time.

Having made this finding, the Hearing Officer notes that she has considered the testimony and documentation of Dental Assistant but she is not persuaded by it considering this witness' past history with Dentist 2, her reputation as expressed by Dentist 2, and the testimony of Grievant. Moreover, the Hearing Officer had an opportunity to observe the demeanor of Dental Assistant as she testified and found much of her testimony unconvincing and lacking credibility.

2. Group I Written Notice

The Agency also contends that Grievant violated its Policy No. 053-62 that requires employees to show mutual respect to others.

a. Incident Involving the June 3, 2013 meeting.

The Agency contends that Grievant displayed rudeness at a meeting held on June 3, 2013. The evidence establishes that those in attendance were Purchasing Director, Grievant, Vendor's manager, and Vendor's driver. The purpose of the meeting was to discuss concerns about dental jackets being supplied and delivered by Vendor. The evidence establishes that the jackets did not meet the Agency's standards and Grievant had a legitimate concern to express his dissatisfaction. For example, when presented to the Agency, they had been observed to have wrinkles and there were quality issues with the jackets, such as grease smudges on the jackets. The Agency had taken pictures of what it deemed as "substandard jackets." According to Purchasing Director's testimony the participants had walked to the area where the jackets were delivered and Grievant commenced to show the vendor representatives the problems with the dental jackets. Discussions ensued between the parties regarding the issues. He testified that the meeting became tense and Grievant became visibly angry, loud, and boisterous. He stated Grievant possibly used colorful adjectives to describe the quality of the jackets. In his view those words were not appropriate for a professional setting. Purchasing Director testified that at some point, he made sure the meeting got back on point.

The Hearing Officer is not persuaded Grievant violated the policy on June 3, 2013. As authority, the Agency's policy mandates the following:

Individuals must report incidents that they believe violate this

policy to their supervisors as soon as possible after the incident occurs. Supervisors should notify Human Resources immediately upon receipt of an allegation of a violation of this policy.

An examination of the evidence fails to illustrate the Agency reported any such incident. In fact the first reporting of this incident to management occurred a year after it occurred. Such suggests that no offense occurred. Moreover, under the policy managers are required to

Stop any harassing, disruptive or unacceptable behavior of which they are aware, whether or not a complaint has been made;

Expressed strong disapproval of all forms of unprofessional, rude, discourteous, disruptive behavior contrary to help values;

Ensure that employees have knowledge of this policy and that it is readily accessible to those without convenient computer access.

Of note, Purchasing Director did testify that he made a point of redirecting the meeting. However, the evidence does not establish that Purchasing Director expressed strong disapproval of any alleged unprofessional conduct of Grievant. In fact, even though Purchasing Director may have redirected the meeting, no evidence exists to establish Grievant understood or reasonably should have that Purchasing Director's redirection to be a rebuke of Grievant's conduct or language. This fact suggests there was no expressed strong disapproval. Further, telephone conversations with the Vendor after the meeting did not address any concerns with the behavior. Neither did an email to Vendor the next day. Without a doubt, the above referenced factors illustrate the Agency failed to meet its burden and show Grievant's conduct on June 3, 2014 violated the policy.

Of note also, Grievant's fall 2013 annual evaluation was issued three months after the alleged June 3, 2013 incident. Nothing is reflected in the evaluation about Grievant displaying unprofessional behavior. These omissions and significant delays on reporting the allegations of inappropriate behavior negate the allegation of unprofessional behavior.

b. Incident involving Agency Witness 1

In another incident, the Agency contends that Grievant also violated Policy 053-62. The evidence establishes that the incident occurred prior to 2014 at some unspecified time.⁸ This is so because according to the testimony of Agency Witness 1, the incident occurred prior to the retirement of her former supervisor, Purchasing Director. The evidence shows Purchasing Director retired, effective January 1, 2014.

According to Agency Witness 1, this pre-2014 incident occurred when she and Grievant engaged in a telephone conversation regarding dental jackets for the lab. Agency Witness 1

⁸ The exact date of the alleged offense was not provided.

testified that Grievant became loud and rude to her during the conversation. She stated at one point she felt uncomfortable. According to the witness, Grievant did not use profanity. But when she informed him he could not get the dental jackets he desired, Grievant would not listen to her and commenced screaming.

The evidence fails to show that this pre-2014 incident was immediately reported. In fact Agency Witness 1's written statement about the matter was dated June 26, 2014 (and presumably composed on this date) at least six months after the incident allegedly occurred. Moreover, the evidence illustrates that this writing was only precipitated at the urging of Agency Witness 1's current supervisor.

The Hearing Officer had an opportunity to observe the demeanor of the witness and consider her testimony and related evidence of record. Having done so, she is not persuaded that the Agency has met its burden and shown that Grievant violated policy 053-062 on the pre-2014 date. First, the incident occurred at least six months before Grievant was disciplined. Thus, the accuracy of a statement supposedly memorializing an event that took place at least six months before is questionable. Second, if Grievant actually screamed at Agency Witness 1 and caused her to feel uncomfortable as the witness stated during her testimony, the Hearing Officer finds a reasonable response would have been to immediately report the matter to her supervisor. The evidence fails to show that Agency Witness 1 made an immediate report. Moreover, swift reporting is mandated by the very policy the Agency contends Grievant violated. In addition, this policy requires supervisors to notify Human Resources immediately upon receipt of an allegation that the "mutual respect" policy was violated. The evidence fails to show Agency Witness 1's supervisor – Purchasing Director – reported to Human Resources that he had received a report that Grievant violated the policy when this incident supposedly occurred. Hence, the foregoing indicates to this Hearing Officer that Grievant's conduct during this pre-2014 incident did not rise to the level of a policy violation.

In addition, the Hearing Officer is cognizant of Agency Witness 1's testimony that she was not aware of policy 063-052 regarding mutual respect. Even so, the Hearing Officer finds if Grievant had conducted himself as described in Agency Witness 1's testimony and caused this witness to feel as described, a reasonable response would have been to immediately inform her supervisor. Evidence does not exist to illustrate this was the case. For this reason and others previously discussed, the Hearing Officer finds this witness' statements unconvincing.

c. June 3, 2014 Incident

Also, the Agency contends that on June 3, 2014, Grievant violated the "mutual respect" policy. According to the Agency this misconduct occurred when a driver of the vendor delivered dental lab coats to Grievant at the dental lab. A conversation ensued between the two of them where Grievant refused to accept them because Grievant perceived they smelled of gas. Driver sniffed them and contended the coats did not have such an order. Still, Grievant continued to refuse the coats and instructed Driver to return them. To this, Driver stated words to the effect of "you don't have to talk to me like that I'm trying to work with you." Grievant then replied that Driver does not tell him how to talk and that Vendor/Driver was not attempting to work with Grievant.

The Agency offered in support of this claim the testimony of Agency Witness 2 and her statement regarding the conversation between Grievant and Driver. The evidence shows that this witness was present when the driver and Grievant engaged in the conversation. The Hearing Officer had an opportunity to observe the demeanor of this witness and after careful consideration of her written statements/testimony find they are non-persuasive, subjective, circular, and fail to sufficiently clarify why Agency Witness 2 described Grievant's actions as rude. Thus, this evidence is unconvincing.

Regarding this same incident, the Agency also offered the testimony and statement of Vendor's Representative to support its claim. Of note, Vendor's Representative testified that he composed a statement in writing about what occurred on June 3, 2014. This was written in the presence of the Vendor's driver who was the driver engaged in the conversation with Grievant when the alleged rudeness occurred. In fact, Vendor's Representative testified that the driver provided input as to what should be provided in the written statement. Of note however, the driver did not sign the written statement indicating his endorsement of what was written. Also, the Hearing Officer has observed that Vendor's Representative, who testified on behalf of the Agency, testified that Vendor has a desire to continue to work with the Agency. After careful deliberation of this evidence, the Hearing Officer finds the evidence is insufficient to demonstrate Grievant violated the policy regarding mutual respect.

The Agency also presented an anonymous letter dated June 3, 2014, to support its allegation. Grievant objected to the reliability of this letter. Of note, it is unsigned. Moreover, its author is unknown and could not be subjected to direct/cross examination. The Hearing Officer finds this letter untrustworthy and therefore affords it negligible weight.

Considering the above and after careful deliberation, the Hearing Officer cannot find that the Agency has met its burden and shown a violation of the policy on June 3, 2014. Moreover, the Hearing Officer does note that Grievant is a health care provider. Thus, she finds it reasonable that, as such, Grievant would be concerned about the health and welfare of his patients at the Agency, himself, and the dental assistant. Further, she finds that lab coats reeking of gas presents, at a minimum, the perception of an unhealthy product.

In sum, the Hearing Officer finds the Agency has not shown Grievant violated Policy No. 063-052 on June 3, 2014, June 3, 2013, and some unspecified date that preceded 2014.

B. Was the discipline consistent with policy and law?

Group I

The Hearing Officer finds that the Agency failed to meet its burden and show Grievant violated the policy regarding showing mutual respect. Accordingly the issuance of a disciplinary notice, in this case a Group I, was not warranted.

Group III With Removal

Regarding the Group III Written Notice with removal, the Agency has met its burden and shown that Grievant engaged in the unauthorized use of state property. However, under the standards of conduct, Grievant's behavior is a Group II offense. The Agency elevated the group offense to a Group III offense with removal. While the standards of conduct permits such. *See* Attachment A to Policy 1.60, Note on page 2 of the attachment), if the enhanced discipline is objected to, as is the case here, the Agency must establish a legitimate, material business reason for the enhanced discipline. Here the Agency did not argue and/or present why there was a legitimate business reason for the enhancement and the Hearing Officer finds none. Alternatively, for the sake of argument, even if such an argument can be inferred from the evidence, the Agency has failed to meet its burden to show an enhanced punishment was warranted. Thus, the Group III with removal is not consistent with policy and law.

Moreover, the enhanced Group III was based on the allegation that Grievant abused state time and engaged in the unauthorized use of state property. As discussed above, the Agency failed to demonstrate that Grievant engaged in the abuse of state time. Accordingly, for this reason also, the enhanced punishment (based on abuse of state time coupled with the unauthorized use of state property) is unwarranted and against state policy.

II. Mitigation.

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁹ EDR’s *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”¹⁰ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.¹¹

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

⁹ Va. Code § 2.2-3005 and (c)(6)

¹⁰ *Rules for Conducting Grievance Hearings* VI(A)

¹¹ *Rules for Conducting Grievance Hearings* VI(B)

The Hearing Officer has found that Grievant engaged in the unauthorized use of state property and that it constitutes a group II offense. The Hearing Officer has considered Grievant's work history with the Agency, his performance evaluations, allegations of deficient investigation, and all other evidence whether specifically mentioned or not to determine what mitigation, if any, is appropriate. Having done, so the Hearing does not find mitigation of the founded Group II offense is appropriate.

Having carefully considered all evidence and arguments, the Hearing Officer sets forth her determination in the decision and order below.

III. Attorney Fees

Under Virginia Code § 2.2 – 3005.1 (A), “[i]n grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorney’s fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated as set forth below in the decision section. There are no special circumstances making an award of attorney’s fees unjust. Accordingly Grievant's attorney is advised to submit an attorney's fee petition to the Hearing Officer within 15 days of this decision. The petition should be in accordance with the *Grievance Procedural Manual* §7.2(e).

DECISION AND ORDER

1. Group I Written Notice - Rescinded

For the reasons stated here, with respect to the Agency’s Group I Written Notice, based on the evidence of record the Hearing Officer finds the Agency has not met its burden. Therefore, the Group I Written Notice is rescinded. The Agency is therefore ordered to remove the Group I Written Notice.

2. Group III Written Notice with Removal - Amended

With respect to the Agency’s Group III Written Notice with removal, based on the evidence of record the Hearing Officer finds the Agency has not met its burden to show a Group III offense occurred. The evidence established that the offense is a group II, specifically the unauthorized use of state property. The Agency failed to meet its burden and establish its legitimate, material business reason(s) for elevating the discipline. Therefore, the Agency is ordered to take the following action:

1. amend the Group III Written Notice with removal to a Group II Written Notice for the unauthorized use of state property with 10 days suspension without pay. The Agency is ordered to remove Language regarding abuse of state time from the amended Group Notice;
2. pay full back pay for the period Grievant has been separated from his job

excluding the 10 days of suspension without pay (back pay is to be offset by interim earnings);

3. appropriately restore other benefits and seniority;
4. reinstate Grievant to his former position or, if occupied, to an equivalent position.

APPEAL RIGHTS

You may file an **administrative review** request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Departmental of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219
or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N. 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 may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.¹²

Entered this 23rd day of December, 2014.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate/Agency Representative
Grievant's Advocate/Grievant
EDR's Director

¹² Agencies must request and receive prior approval from EDR before filing a notice of appeal.

DECISION OF HEARING OFFICER

In the matter of

Case Numbers: 10437 and 10475

Hearing Dates: November 3 and 18, 2014

Decision Issued December 23, 2014

Addendum to Decision Issued: January 13, 2015

In her decision issued on December 23, 2014, the Hearing Officer found the Agency failed to meet its burden and show Grievant violated Agency Policy 053-62, Mutual Respect Through Adherence to Vision, Mission, and Values. The Hearing Officer then rescinded the Agency's Group I Written Notice that alleged such a violation.

In addition, the Hearing Officer found the Agency met its burden and demonstrated that Grievant engaged in the unauthorized use of state property. And Further, Grievant's conduct constituted a Group II Offense. The Hearing Officer also found that the Agency failed to show Grievant abused state time. Moreover, the Agency failed to establish a legitimate, material business reason for enhancing Grievant's Group II Offense to a Group III Offense with termination. Hence, the Hearing Officer determined that the Agency's issuance of a Group III Written Notice with removal was inconsistent with policy 1.60. The Agency was then ordered to amend the Group III Written Notice with removal to a Group II Written Notice for the unauthorized use of state property. In addition, the Hearing Officer ordered 10 days suspension without pay, reinstatement with back pay, and restoration of appropriate benefits and seniority.

The Hearing Officer also noted that the grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorney fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.¹ The Hearing Officer determined that Grievant substantially prevailed and an award of attorney fees would not be unjust.

Grievant's attorney timely submitted a petition for attorney fees to which the Agency did not object.² The Hearing Officer has considered the time and effort expended by the attorney(s), the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate. Having done so, the Hearing Officer finds Grievant's attorney(s) expended 95 hours in representing his client. Further, she finds that an hourly rate of \$131.00 is reasonable.³ Counsel for Grievant has petitioned for an attorney fee in the amount of \$12,435.00 -- an amount that equates to substantially less than the reasonable hourly rate of \$250.00 Grievant's attorney normally charges for services performed. Accordingly, the Hearing Officer awards Grievant attorney fees

¹ Va. Code § 2.2-3005.1A.

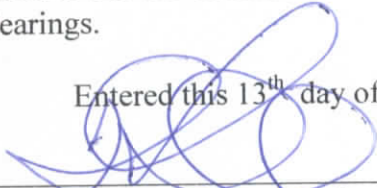
² The Petition with its attachments and the Agency's response indicating it does not object to the proposed fee are appended here as Attachment 1.

³ This is the maximum hourly amount permitted under the Rules for Conducting Grievance Hearings, Section VI (E) and pursuant to EDR website regarding the allowance of Attorney fees.

in the amount of \$12,435.

Within 10 calendar days either party may petition EDR for a decision solely addressing whether the fee addendum complies with the Manual and the Rules for Conducting Grievance Hearings.

Entered this 13th day of January 2015.



Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate/Agency Representative
Grievant's Advocate/Grievant
EDR