

Issue: Group III Written Notice with Termination (failure to follow policy, falsifying records, unsatisfactory performance); Hearing Date: 10/30/14; Decision Issued: 11/19/14; Agency: DSS; AHO: Ternon Galloway Lee, Esq.; Case No. 10474; Outcome: No Relief – Agency Upheld.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10474

Hearing Date: October 30, 2014

Decision Issued: November 19, 2014

SUMMARY OF DECISION

The Agency had found Grievant failed to follow instructions and/or policy, falsified records, and unsatisfactorily performed her work. It then issued Grievant a Group III Written Notice with termination. The Hearing Officer found Grievant engaged in the behavior alleged and it was misconduct. Next, finding the Agency's discipline was consistent with policy and reasonable, the Hearing Officer upheld the discipline.

HISTORY

On August 28, 2014, the Agency issued Grievant a Group III Written Notice with termination for unsatisfactory job performance, failing to follow instructions/policy, and falsifying records. On September 10, 2014, Grievant timely filed her grievance challenging the Agency's discipline. Moreover, the Office of Employment Dispute Resolution (EDR) assigned the undersigned as the hearing officer to this grievance effective October 7, 2014.

The Hearing Officer held a telephonic prehearing conference (PHC) on October 9, 2014.¹ Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was October 30, 2014. Accordingly, by agreement of the parties, the hearing was set for that date. On October 10, 2014, the Hearing Officer issued a scheduling order addressing those matters discussed and ruled on during the PHC. The Hearing Officer held a second PHC on October 15, 2014, to address outstanding requests by Grievant for the production of certain documents by the Agency. Thereafter, the Hearing Officer issued an Order for the Production of Documents, to which the Agency complied.²

On October 27, 2014, the Hearing Officer held a third PHC to address conflicts regarding the scheduled time for two of Grievant's witnesses to testify. The matter was resolved during that PHC when the parties agreed that these witnesses would be permitted to testify first during the hearing.

On the date of the hearing, the parties were given an opportunity to present matters of concern to the Hearing Office. The Grievant asserted that she had not received all the documents ordered to be produced by the Agency or they were not produced in the format ordered. After hearing the parties' arguments, the Hearing Officer found the Agency had complied with the

¹ This was the parties' first date available for the PHC.

² By motion dated October 26, 2014, received on October 27, 2014, Grievant moved to suppress certain proposed exhibits of the Agency. The Hearing Officer provided the Agency's Advocate an opportunity to respond to this motion. After considering the arguments of the parties regarding this motion, on October 30, 2014, the Hearing Officer overruled the motion.

applicable order. Moreover, a motion to suppress the Agency's proposed exhibits 4, 5, 6, and 7 was argued and denied.³

Also, during the hearing, the Hearing Officer admitted Agency Exhibits 1 through 10 and Grievant's Exhibits "A through "AB" and policy exhibits 1 through 9.

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.

During the proceeding, the Agency was represented by its advocate. Grievant elected to represent herself with the assistance of an advocate.

APPEARANCES

Advocate for Agency
Agency Representative
Witnesses for the Agency (2 witnesses)
Grievant
Grievant's Advocate
Witnesses for Grievant (5)

ISSUE

Was the written notice 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 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. September 10, 2013, Grievant was employed as a Senior Support Enforcement Specialist

³ This motion was received by the Agency's Advocate and the Hearing Officer on October 27, 2014. The Hearing Officer made no decision on the motion at that time to provide the Agency's Advocate an opportunity to review the motion and consider her response. The parties were provided an opportunity to argue their respective positions on the day of the hearing.

in the child support enforcement division of the Agency. (A Exh. 1, p. 1; A Exh.3).

2. Among other responsibilities, under her Employee Work Profile (EWP), Grievant is required to respond to incoming correspondence within five (5) work days. Also, she is required to empty her mailbox daily. Filings, to include Show Cause Petitions, were required to be completed within one calendar month of receipt of documents to file. Among other things, her responsibilities require Grievant to review her work-list, take action and delete matters from the work-list within 10 working days. What is more, the EWP indicated that a Senior Specialist carries a case load of approximately 850 cases. Because Grievant was a senior specialist, she was also expected to be a leader and trainer in the unit, aware of its functioning, and keep her supervisor informed of the unit's operation. (A Exh. 3, p. 6; Testimony of Supervisor; G Exh. N, pp. 1-3).

Moreover, a senior specialist was expected to perform the following tasks:

- Respond to complex questions and case situations from staff;
- Responsible for walk-in and telephone customer complaints;
- Provide training on new policy and Clearinghouses for Team;
- Prepare training material and conduct hearings;
- Complete case reviews for case compliance and identify worker training needs;

(A Exh. 3, p. 7).

Grievant was aware of her EWP and the expectations of her as a senior specialist. (Testimony of Supervisor, A Exh. 3, pp. 1 – 7).

3. Sometime before August 19, 2014, Grievant's supervisor had handed each specialist what she identifies as the Driver's License Checklist (Checklist). The Checklist indicated suspensions of driver licenses for those parents/individuals (responsible for paying child support) who had their driving licenses suspended for failure to pay child support. Supervisor had requested Grievant return the Checklist by August 19, 2014. Because Grievant failed to return the Checklist by the due date, on August 20, 2014, Supervisor approached Grievant's desk to look for it. At the time, Grievant was not at her desk. While at Grievant's desk, Supervisor noticed a pile of various documents on Grievant's desk. The documents included, but were not limited to, (i) "Show Cause Petitions"⁴ (Petitions) that had not been processed for court, (ii) unprocessed mail, and (iii) training materials. (Testimony of Supervisor).

4. On at least a weekly basis, Supervisor would ask her staff if they needed help with their work load or processing documents/mail. In fact, the day before discovering the pile of documents on Grievant's desk, Supervisor had asked the specialists, including Grievant, if any of them needed help in processing their mail. (Testimonies of Supervisor and Grievant Witness 3). At that time, Grievant gave her supervisor a small stack of documents consisting of 20 pieces to

⁴ A Show Cause Petition is filed with the court when the Agency has exhausted means of collecting child support from an individual responsible for paying child support (responsible party). This petition directs the responsible party to appear in court and explain why he/she has not paid child support. When such a pleading arrives at the Agency, the specialist is expected to process it immediately and forward it to the appropriate court. (Testimony of Supervisor).

handle for Grievant. Thus, Supervisor was alarmed at the pile of documents found on Grievant's desk. She then informed her superior, District Manager. And per the District Manager's instruction to Supervisor, the documents were then retrieved from Grievant's desk and reviewed by Supervisor and District Manager to determine what they were and to process them. (Testimonies of Supervisor and District Manager).

5. Among other documents, the papers/mail reviewed included Petitions from February 2014, to July, 2014, that had not been handled. (Testimonies of Supervisor and District Manager).

Grievant had apparently performed some work on the Petitions, but she had not completed them. Thus, the Petitions had not been forwarded and filed with the appropriate court(s). In addition, Grievant entered data or caused data to be entered on the Agency's APECS system⁵ that noted the Petitions had been completed. Particularly, APECS indicated Grievant had printed Show Cause Petitions prior to August 2014. Printing them signifies they have been completed and filed with the court. As such, if a client called the Agency's customer service division to check on the status of his/her case, based on Grievant's entries which generated notations in APECS that the Petitions were printed, customer service would report that the matters had been referred to court on a Show Cause Petition. Yet they had not. The Agency thus considered Grievant's entries in APECS as falsification of records. Further it found Grievant's actions had caused the Agency, through customer service, to report false information to clients; namely that Show Cause Petitions had been filed with the court when in fact they had not. (Testimony of Supervisor).

After finding the stack of documents on Grievant's desk, an audit of those records was conducted including matching Grievant's monthly logs with court dockets/logs to determine if Grievant had filed the number of Petitions she claimed to have filed on her monthly logs. In addition, in some cases the audit entailed contacting another local office involved in the case to determine if the Show Cause request had been sent there as indicated by Grievant's documentation. The audit revealed that Grievant had not accurately reported Show Cause filings. For example, Grievant's November 2013 monthly log indicated that she had filed three (3) show causes with the court, but she had filed none. On Grievant's December 2013 monthly statement, she reported processing 10 Show Cause Petitions when she only processed nine (9). Further, through its audit, management determined that Grievant had not processed any of the Petitions she reported on her monthly statements from January 2014, to July 2014. Thus, of the 54 Petitions Grievant claimed to have processed and filed with the court, numerous ones were not filed. (Testimony of Supervisor; A Exh. 5, p. 2,4, and 6; Testimonies of District Manager and Supervisor). Moreover the audit revealed that the work regarding an intrastate request for a Show Cause Petition that Grievant documented as completing on her February 28, 2014, and June 30, 2014 monthly logs was not completed. Entries appeared on the APECS system indicating this Petition had been completed and filed. (A Exh. 4, p. 7).

6. In addition, the documents found in the stack on Grievant's desk included unprocessed mail. Also, management found about 500 pieces of mail in Grievant's locked cabinet. Of that

⁵ APECS is the Agency's database system used to input information about the child support cases handled by the Agency. (Testimony of Supervisor).

number, 234 pieces had not been processed. A desk audit conducted by management confirmed that the unprocessed mail was from Grievant's desk/cabinet. (Testimonies of Supervisor and District Manager).

Most of the mail was critical. For example, it included interstate petitions, a pleading from another state sent to the Agency for the purpose of acquiring assistance in receiving payments on a child support order from another state. Once the Agency receives these petitions, it is expected to process them immediately. In addition, the unprocessed mail consisted of modified court orders that changed the amount of the child support due. The Agency was asked to enter these orders in their system to reflect the amended child support payment amount. Moreover, some of the mailing included emancipation notices which could affect whether a responsible party continued to be required to pay child support. The unprocessed mail was also not documented on APECS. (Testimonies of Supervisor and District Manager).

While some of the mail items referenced were not on Grievant's case load, they were her responsibility. This is because they had been dispersed to her from a vacant work/case load per established protocol by the District Manager and Supervisor.⁶

There are no written instructions or policies on how vacant case loads and the mail associated with those case loads are to be handled. However, per Agency policy, the District Manager and Supervisor determine how these tasks are to be completed. To that end, District Manager and Supervisor established the protocol that mail from vacant workloads is dispersed to various staff in the office to be processed. Staff included Grievant. Some of the 234 pieces of mail found during the audit of Grievant's desk/cabinet was from a vacant work load that had been given to Grievant to process, and she had failed to do so. (Testimony of District Manager; G Exh. K).

7. The Agency had no tolerance for the conduct it found Grievant had committed. Consistent with this no tolerance policy, the Agency had recently terminated another employee for the same conduct. Management considered Grievant's case more egregious because it had gone on since almost the beginning of her employment as senior enforcement specialist until the time of her termination. (Testimonies of Supervisor and District Manager).

8. The effect on the Agency for not timely processing the mail and Show Cause Petitions include (i) not being able to meet deadlines pursuant to Agency policy; (ii) Clients of the Agency being reported misinformation and thus possibly leading to mistrust of the Agency; and (iii) unreliable data on APECS. (Testimony of Supervisor).

9. Supervisor was a Senior Enforcement Specialist for about 3.5 years before becoming a supervisor and she was very familiar with the responsibilities of the Senior Specialists. As mentioned above, weekly, Supervisor would ask her staff if they needed help. She also sent emails informing staff that if help was needed they could ask for it. (Testimonies of Supervisor

⁶ A vacant case load consists of unprocessed documents/mail from the work load of an employee of the Agency who is on leave or no longer working for the Agency. If such is the case, that work is dispersed amongst the remaining staff at work the Agency. Grievant had been dispersed some of the mail from vacant caseloads as well as other employees. (Testimony of Supervisor).

and Grievant Witness 3).

10. Grievant never asked Supervisor for help. (Testimony of Supervisor).

11. On August 22, 2014, management issued Grievant a notice of intent based on the unprocessed documents found at her desk. Among other things, the notice informed Grievant that she had failed to process Show Cause Petitions. As a sample, the notice specifically (i) identified the date that 10 of those Petitions were printed and (ii) mentioned that none had been referred to court.

In addition, the notice of intent informed Grievant that her supervisor had discovered a stack of incoming mail that had not been processed. It mentioned that mail dated between March 2014 through June 2014, had not been addressed. The notice also provided a sampling of the unprocessed mail, to include the following:

- transmittals involving child support arrears;
- a request for a certified copy of an administrative order;
- request for a lien.

Management considered much of the mail significant correspondence. (A Exh. 1, pp. 6 – 7; G Exh. B, pp. 1-2).

12. On August 23, 2014, Grievant submitted her response to the notice of intent. In her response, Grievant details personal problems that she asserts greatly affected her work performance at the Agency. In addition, she denied any intent or desire to falsify records. (A Exh. 1, p. 9 - 13; G Exh. C, pp. 1 – 3).

13. Prior to being issued the Notice of Intent on August 22, 2014, Grievant was counseled by her supervisor and District Manager for failing to timely process eight (8) items of critical mail on her work list. This action by management took place on August 8, 2014. The counseling had come about because District Manager and Supervisor had determined that Grievant had not completed 8 items on her APECs generated work lists. These items were tasks that had appeared on Grievant's worklists months before and their completion was overdue. Grievant's supervisor had discovered that Grievant had either deleted the these items from the APECs listing or advanced their due dates; that is, noted a future due date for the tasks to be completed so that it appeared that Grievant had not missed the deadline for completing the tasks. (A Exh. 1, p. 7; G Exh. A; Testimony of District Manager).

14. Following the counseling, on August 11, 2014, Grievant was issued a Notice of Improvement Needed/Substandard Performance. Under this notice, Grievant was required to complete the 8 items on the worklist within 10 days. (A Exh. 1, p. 7; G Exh. A; Testimony of District Manager).

15. Also, in that August 11, 2014 Notice of Improvement, Grievant's supervisor acknowledged that the completion of other worklists of Grievant was of concern but they had not been reviewed to determine if Grievant had actually completed the work noted them. Grievant

was therefore on notice that she needed to complete any items on other worklists that she had previously failed to complete. (G Exh. A).

16. On August 26, 2014, Management issued Grievant a Group III Written Notice with termination. The written notice described the nature of the offense as follows:

On August 20, 2014, your supervisor found a stack of assorted documents that included show cause petitions that had been printed from February 2014 through July 2014 which were not processed. Your failure to process these documents and/or follow-up in a timely manner, and the fact that you reported the processing as complete on your monthly statistical log reflected false information. Also, there was incoming mail that needed to be worked for the same period. Additionally, you failed to follow your supervisor's instructions and your Employee Work Profile (EWP) by not following-up with your mail timely. This adversely impacted the credibility of the agency and is a disservice to our Clients, Non-Custodial Parents, and their children. (See NOI for details)

(A Exh. 1, p. G Exh. D).

17. Also, in "Section IV" of the written notice regarding circumstances considered by management, it notes the following:

[Grievant], began her position as a Support Enforcement Specialist on November 5, 2001. She was promoted to a Specialist Sr. on September 10, 2013. A careful review of the records revealed that [Grievant] continued to print and not process show cause petitions month after month. APECS reflects that an action has been taken leading staff or call center personnel checking the status of the case to believe it was processed when in fact, the document was never sent to court or forwarded for additional processing by another office. Because you reported filing these Show Cause motions on your monthly statistical log prior to completing the process, this is a falsification of records. This failure to complete the process is harmful to the clients, Noncustodial Parents, their children, and the reputation of our office, DCSE and VDSS.

[Grievant] was given a notice of intent and did offer mitigating circumstances to be considered. The evidence however, predates the circumstances detailed in her response to the notice of intent. [Grievant] could have asked her supervisor for assistance but failed to do so. Additionally, her supervisor asked [Grievant] on many occasions if she needed help/assistance and [Grievant] declined the offer.

(A Exh. 1, p. 1).

18. Before issuing the Group III Written Notice with termination, Management considered Grievant's August 23, 2014 response to the Notice of Intent. (Testimony of District Manager).

19. Also, the Assistant Regional Director for Child Support Enforcement and Human

Resource personnel (HR) were consulted about the offenses the Agency had found. Management then determined that Grievant's matter was similarly situated to another matter involving hundreds of documents. The employee was terminated in that case. As previously referenced, management found Grievant's actions were even more egregious than those in the other case where the employee was terminated. Thus, it concluded that termination was appropriate.

20. Grievant had more than 850 cases to manage. Also she had other responsibilities such as training employees in subordinate positions and processing mail from vacant workloads. (Testimony of District Manager; G Exh. Z).

Grievant acknowledges in her response to the notice of intent that she failed to take prompt action regarding Show Cause Petitions and incoming mail. Grievant also indicated in her response that she could have met all her responsibilities (to include, but not limited to her case load work, training, work assigned from the vacant work load, etc.) had she not been experiencing the personal problems outlined in her response. In addition, Grievant denied intentionally falsifying records. (G Exh. C, pp. 1 - 3; A Exh. 1, p.p. 9 - 13).

21. Grievant was very skilled in customer service and handling difficult and sensitive cases. (Testimony of District Manager).

Supervisor issued Grievant an interim evaluation on March 26, 2014. The evaluation indicated that an area of strength for Grievant was her excellent communication skills and ability to handle telephone and walk-in complaints. Areas noted for improvement were case management skills, increasing the number of work actions taken per month, contacting non-custodial parents by telephone, and taking court actions against non-custodial parents who fail to pay child support or appear for appointments. Moreover in that evaluation, Grievant was instructed to take the initiative to ask questions and trust her leadership skills. (G Exh. F, p. 12).

22. Grievant was experiencing marital problems from March 2014, to August 2014. And July 2014, and August 2014, Grievant informed her supervisor that she was having difficulty focusing. Supervisor suggested counseling, but Grievant informed Supervisor she was already in counseling. (Testimony of Supervisor).

23. Staff expects the Senior Specialist to follow the Agency's procedures. (Testimony of Supervisor).

24. District Manager has been employed by the Agency for 38 years. During her employment with the Agency she has held mostly managerial jobs and has issued termination notices less than 5 times throughout her tenure. (Testimony of District Manager).

25. Under no circumstances is it appropriate to report work has been completed when it has not. (Testimony of District Manager).

26. Grievant received an evaluation on October 4, 2013, that gave her an overall rating of "Contributor." (G Exh. M, p. 4).

27. In the office, specialists and senior specialists such as Grievant are required to submit monthly enforcement logs where the specialist reports on the form, among other things, the number of Show Cause Petitions they had completed and filed with the court. (Testimony of Supervisor; A Exh. 5).

28. Grievant provided some training to her subordinates, the non-senior specialist. (Testimonies of Grievant's Witnesses 1 and 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 repeat offenses. 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 August 28, 2014, management issued Grievant a Group III Written Notice with

removal for the reason 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?

The Agency contends that Grievant failed to follow policy/instructions, falsified records, and performed work in an unsatisfactory manner. The evidence shows that under Agency policy, Grievant was required to process incoming mail within 5 work days. In addition, a Show Cause Petition was expected to be processed by staff immediately and forwarded to the court. Moreover, the evidence demonstrates that when an employee entered data in the APECS system or cause such to be entered, it was expected to accurately reflect the status of a tasks or case. Reporting work as being complete when it was not was unacceptable.

A close examination of the evidence shows that Grievant's supervisor discovered on August 20, 2014, that Grievant had not processed over 200 pieces of incoming mail dated between March 2014 to June 2014. Much of this mail was critical. Grievant's failure to process the mail was confirmed by a desk audit. In addition, the evidence shows that from the period November 2013, to July 2014, Grievant had failed to process Show Cause Petitions in over 40 cases. None of the Show Cause Petitions Grievant claimed to have completed and filed from February 2014, to July 2014, had been filed with the court. Yet, Grievant had taken action in APECS and submitted to her Supervisor monthly logs that indicated she had completed the Petitions and filed them. Grievant's failure to process the petitions was confirmed by a desk audit of items found on Grievant's desk. This failure to perform was also critical. This is so because the stalling adversely affected or had the ability to hamper the collection of past due child support. Moreover, Grievant's documentation reflecting that she had filed Show Cause Petitions had the effect of inaccurately reporting in APECS the status of the child support cases for which the Agency is responsible for enforcing.

The evidence clearly shows Grievant did not process mail within the 5 days required by policy. Likewise, she did not timely process Petitions. Thus, the Hearing Officer finds Grievant's conduct constitutes unsatisfactory job performance and failure to follow policy or instructions.

In addition, the evidence shows Grievant reported that she had completed 53 Show Cause Petitions when she had only done 43. Petitions she reported as completing from February 2014, to July 2014, were not done. In her defense, Grievant contends she did not know how to complete the monthly logs and had no intention of falsifying a report. Grievant's assertion is not persuasive. To that point, the Hearing Officer notes that Grievant was a Senior Enforcement Specialist. The evidence shows that a Senior Enforcement Specialist becomes such by excelling in the position subordinate to it; that is the specialist position. In addition, Supervisor weekly

asked staff if they needed help. Grievant had also been instructed as early as October 4, 2013, to take the initiative to ask questions. The evidence shows Grievant never informed her supervisor that she needed assistance in completing the monthly logs. Neither did she ask questions about how to complete them. The Hearing Officer finds that it is reasonable to infer from these factors that Grievant was aware of how to complete the forms and that any inaccuracies were not simply a matter of misunderstanding regarding how to complete the reporting forms.

Accordingly, the Hearing Officer finds Grievant also falsified records. This conduct, as well as, Grievant's unsatisfactory job performance and failure to follow instructions are all misconduct.

B. Was the discipline consistent with policy and law?

Next the Hearing Officer considers whether the Agency's discipline was consistent with policy and law. Standing alone the Standards of Conduct Policy 1.60 classifies "failure to follow policy or instructions" as a Group II offense. Moreover, Policy 1.60 identifies "falsifying records" as a Group III offense. Accordingly, the Hearing Officer finds the Agency's consideration of all three acts of misconduct collectively and imposing a Group III Written Notice consistent with policy and law. In addition, a Group III offense normally warrants termination. Hence, the Agency also terminating Grievant for her misconduct is consistent with policy and law. Thus, the Hearing Officer finds nothing inappropriate regarding the Agency's discipline.

Moreover, because the evidence shows a similarly situated employee received the same discipline as Grievant, the Hearing Officer cannot find inconsistent application of policy.

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"]."⁷ 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."⁸ 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,

⁷ Va. Code § 2.2-3005 and (c)(6)

⁸ *Rules for Conducting Grievance Hearings* VI(A)

the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁹

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.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice and that the behavior was misconduct. Further, the Hearing Officer has found, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable.

In her plea for mitigation Grievant claims she was overwhelmed with personal problems. The hearing officer finds Grievant's personal situation does not excuse her behavior. Further she argues instructions were not provided on completing the monthly logs and there was no intent to deceive. The Hearing Officer addressed this argument earlier. She finds no merit in it. Neither is Grievant's claim of not being adequately notified of the charges against her.

The Hearing Officer has considered all of Grievant's arguments and all evidence whether specifically mentioned or not. Having undergone this thorough deliberation, the Hearing Officer finds the Agency's discipline is reasonable.

DECISION

Hence for the reasons stated here, the Hearing Officer upholds the Agency's discipline.

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.

⁹ *Rules for Conducting Grievance Hearings VI(B)*

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.¹⁰

Entered this 19th day of November, 2014.

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

¹⁰ Agencies must request and receive prior approval from EDR before filing a notice of appeal.